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REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

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DECIDED BY

All the Superior Courts

RELATING TO THE

LAW ADMINISTERED BY MAGISTRATES

AND TO

PAROCHIAL AND MUNICIPAL LAW.

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VESTRY OF ST. MARYLEBONE v. SHERIFF OF LONDON.

[CT. OF APP.]

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, July 16, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

VESTRY OF ST. MARYLEBONE v. SHERIFF OF LONDON. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Sheriff—Seizure of goods of person liable to pay rates—Goods "taken in execution"—Privilege of overseers—Duty of sheriff to pay rate collector—35 Geo. 3, c. 73, s. 195—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 161.

By a local Act affecting the parish of St. Marylebone it was provided that when the goods of any person liable to pay any rate by virtue of that Act should be "taken in execution" by the sheriff before such rate should have been paid, then the sheriff, upon demand made by the rate collector, was "directed and required in the first place to pay to such collector" such rate which shall not then have been paid.

By sect. 161 of the Metropolis Management Act 1855 the overseers of every parish are to collect the rates mentioned in the section, and for the purpose of levying such rates, shall proceed in the same manner, and have the same powers, remedies, and privileges as for levying poor rate.

The goods of a judgment debtor, who was liable to pay to the vestry of St. Marylebone a poor rate made by them under their local Act, and also other rates made by them under the Metropolis Management Act 1855, were seized by the sheriff under a writ of fi. fa. The rate collector demanded

payment from the sheriff of all the rates due. The judgment debtor subsequently paid to the sheriff the amount due in respect of the judgment debt, and the sheriff thereupon withdrew from possession of the goods, paying the judgment debtor his claim, but not paying to the rate collector the amount of the rates due to the vestry.

In an action by the vestry against the sheriff to recover the amount of the rates for which the judgment debtor had been liable:

Held, that the goods had been "taken in execution" within the meaning of the local Act, and that the privileges given to the overseers by sect. 161 of the Metropolis Management Act 1855 included the privilege given by the local Act with regard to a rate made under that Act.

Held, therefore (affirming the decision of Bigham, J.), that the sheriff was liable to the vestry for the amount of all the rates which the rate collector had demanded of him.

THIS was an appeal by the defendant from the judgment of Bigham, J. at the trial of the action without a jury.

The action was brought to recover a sum of 18l. 19s. 3d. which sum the plaintiffs alleged was payable to them by the defendant under sect. 195 of the 35 Geo. 3, c. 73, under the following circumstances:

On the 17th Nov. 1898 the defendant seized under a writ of fieri facias the goods of one T. M. Bush, at 50, Crawford-street, in the parish of St. Marylebone.

On the 24th Nov. the plaintiffs' rate collector served on the defendant a written demand for the payment of 18l. 19s. 3d., which was the amount due to the plaintiffs from Bush in respect of eleven months' rates.

This amount was less than the value of the goods seized.

The rates in respect of which Bush was liable to the plaintiffs were a poor rate made under a

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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local Act of 35 Geo. 3, c. 73, and other rates made under the Metropolis Management Act 1855.

On the 25th Nov., the defendant being still in possession of the goods, Bush paid to him the amount of the judgment debt, which was more than the amount demanded by the rate collector from the defendant in respect of Bush's liability for rates.

On the same day the defendant handed over to the judgment creditor the amount of the judgment debt and then withdrew from possession of the goods without having satisfied the demand made by the rate collector.

At the trial of the action without a jury, Bigham, J. gave judgment for the plaintiffs.

The defendant appealed.

By 35 Geo. 3, c. 73, which is entitled "An Act for repealing several Acts . . . and for paving, repairing, cleansing, and lighting the parish of St. Marylebone in the county of Middlesex and for the better relief and maintenance of the poor thereof and for divers other purposes . . ." it is provided as follows:

Sect. 195. When and as often as the goods, chattels, and effects of any person or persons liable to pay any rate or assessment by virtue of this Act shall be taken in execution, within the limits aforesaid, by any sheriff or other officer, before such rate or rates, assessment or assessments, shall have been paid, then the said sheriff or other officer, upon demand made by the collector or collectors for the time being to the said vestrymen shall, and he is hereby directed and required, in the first place, to pay to such collector or collectors such rate or rates, assessment or assessments, so made as aforesaid, and which shall not have been paid by such person or persons, and all arrears due thereon; provided always that nothing herein contained shall extend, or be construed to extend, so as to charge such sheriff or other officer with the payment of more than one year's rate or of a larger sum of money than the value of the goods, chattels, and effects so taken in execution.

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) it is provided as follows:

Sect. 161. The overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein, and shall for that purpose make separate equal pound rates upon their parish, or the part thereof upon which any sum specified in such order is required to be levied, in respect of each sum thereby ordered to be levied; that is to say . . . a sewers rate, . . . a lighting rate, and . . . a general rate . . . and the said overseers shall, for the purpose of levying such rates, proceed in the same manner, and have the same powers, remedies, and privileges, as for levying money for the relief of the poor.

A. T. Lawrence, Q.C. and P. Rose-Innes for the defendant.—The debtor's goods were not "taken in execution" within the meaning of those words in sect. 195 of the local Act. "Taken" does not mean "taken into the possession of the sheriff"; it means "taken away from the place where they were seized and sold." The expression "taken in execution" is exactly equivalent to the expression "taken by virtue of an execution" which occurs in the Act 8 Anne, c. 14, s. 1. The words used in that Act imply the removal and sale of the goods:

Riseley v. Ryle, 11 M. & W. 16;

Re McCarthy, 7 L. Rep. Ir. 473.

Secondly, it was not "by virtue of" the local Act of 1795, that the judgment debtor was liable

to pay the amount of the rates demanded by the late collector from the sheriff, and therefore the plaintiffs cannot rely upon the privilege granted by sect. 195 of that Act. That Act has been superseded by the Metropolis Management Act 1855, and it is under the latter Act that the rates were payable:

Reg. on the Prosecution of Paddington Vestry v. Great Western Railway Company, 28 L. J. 59, M. C.

The Act of 1855 does not incorporate sect. 195 of the local Act. Sect. 161 of the Act of 1855 does not say that the overseers are to have the same powers as the collector of the vestry had under the local Act.

English Harrison, Q.C. (Manisty with him) for the plaintiffs.—There is no reason why the words, "taken in execution" should in this Act of 1795 be construed in any other than their ordinary meaning—i.e., "seized in execution." The Act of 8 Anne, c. 14, s. 1, had reference to the payment of rent "before the removal of the goods" and that explains the interpretation given to the expression "by virtue of an execution" in that Act. Secondly, though part of the sum due from the judgment debtor to the plaintiffs was in respect of rates made under the Act of 1855, yet the greater part was due in respect of a poor rate made under the local Act, and sect. 161 of the Act of 1855 gives the overseers the same privileges in respect of the rates there named as they have for levying poor rate. By sect. 250 of the Act "overseers of the poor" is to include collectors of poor rate. By sect. 8 all the powers held by the old vestries were transferred to the new vestries.

A. T. Lawrence, Q.C. in reply.

SMITH, L.J.—Two questions have been raised upon this appeal, one of which is a matter of considerable complication, though the other one is plain enough. I will take the simple one first. The sole question there raised is as to the meaning of the words "goods taken in execution" in sect. 195 of the Act of 35 Geo. 3, c. 73. The sheriff in this case seized certain goods under a writ of *feri facias*. Bigham, J. held that those goods were "taken in execution" within the meaning of those words in sect. 195. I think that in so holding the learned judge was perfectly right. The other question raised in this case is more difficult to decide. The sheriff seized the goods under the *feri facias* on the 17th Nov. On the 24th Nov., while he was still in possession of the goods, a written notice was served on him by the collector to the vestry of Marylebone, to the effect that the judgment debtor owed the vestry 18l. 19s. 3d. for eleven months' rates, and the collector demanded payment of that sum by the sheriff. The next day, the 25th Nov., the judgment debtor paid the sheriff enough money to satisfy the judgment, and the sheriff accordingly paid over to the judgment creditor, the amount due to him, and withdrew from possession of the goods without having paid to the rate collector the 18l. 19s. 3d. which had been demanded. Under these circumstances the vestry are now suing the sheriff on the ground that under sect. 195 of 35 Geo. 3, c. 73, he ought to have paid them the amount of rates due from the judgment debtor before he handed over to the judgment creditor

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the amount which he had received from the judgment debtor. Sect. 195 provides that whenever the goods of any person "liable to pay any rate or assessment by virtue of this Act" shall be taken in execution within certain limits by any sheriff before such rate or assessment shall have been paid, the sheriff upon receiving notice shall in the first place pay to the rate collector the amount of the rate or assessment which shall not have been paid by such person. On behalf of the defendant it is contended that the rates which were due from the judgment debtor to the vestry were not rates which the debtor was liable to pay "by virtue of" the Act of 35 Geo. 3, c. 73. The rates for which the collector demanded payment from the sheriff included a poor rate, a general rate, a sewers rate, and two other rates. Now the poor rate, in my opinion was due by virtue of the Act of 35 Geo. 3, c. 73. It purports to have been made under that Act, and that Act has never been repealed. The Metropolis Management Act 1855 (18 & 19 Vict. c. 120) does not deal at all with poor rate, though it does give power to make certain other rates. I come to the conclusion, therefore, that the judgment debtor was liable to pay poor rate by virtue of 35 Geo. 3, c. 73, and therefore with regard to that rate the vestry were entitled under sect. 195 to be paid by the sheriff. With regard to the rates other than poor rate, I think that they were made by virtue of the Metropolis Management Act 1855, and not by virtue of 35 Geo. 3 c. 73; but then we must take into consideration the clause at the end of sect. 161 of that Act. After giving power to the overseers to levy certain rates, sect. 161 continues thus: "And the said overseers shall, for the purpose of levying such rates, proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor." Now one of the powers, remedies, and privileges which are given by the Act of 35 Geo. 3 c. 73, with regard to poor rate is that given by sect. 195 under which, after giving notice to the sheriff when he has taken in execution the goods of any person liable to pay poor rate under the Act, the vestry is entitled to require the sheriff to hand over to them, in the first place, the amount of poor rate due from such person before the judgment creditor is paid. In my opinion, therefore, this privilege extended to the other rates, besides the poor rate, payment of which was demanded by the vestry. Bigham, J. was right in so holding, and I think that the appeal must be dismissed.

WILLIAMS, L.J.—I entirely agree. Now that the matter has been threshed out, it is clear that it resolves itself into two points only, and I have very little to add to what Smith, L.J. has said upon them. In so far as the payment demanded by the collector from the sheriff was in respect of rates other than poor rate, it seems to me that the clause in sect. 161 of the Metropolis Management Act 1855, giving to the overseers the same privileges as they have in respect of poor rate is absolutely fatal to the argument that was put forward on behalf of the sheriff, unless the meaning of the clause can be limited by construing them as referring only to powers exercised generally by overseers, not including special powers given by local Acts. With regard to the other point, it was contended that the words "taken in execution" in sect. 195 of 35 Geo. 3, c. 73, ought to be

construed in the same way as the words "taken by virtue of any execution" in 8 Anne, c. 14, s. 1, were construed in *Biseley v. Ryle* (*ubi sup.*). There seems to me to be no ground for that contention. The construction which has been put upon the words "taken by virtue of any execution" in the statute of Anne, depends upon the presence in the earlier part of the section of the words "before the removal of such goods from off the said premises"; and it was held that what was intended to be forbidden by the statute was the removal of the goods from the premises unless the rent is first paid. The Act is very different from the Act which we have now to construe. By sect. 195 of the Act of 35 Geo. 3, c. 73, where demand has been made by the collector of payment of the rates due, the sheriff is directed and required in the first place to pay to such collector the rates due and unpaid provided that the sheriff is not liable to pay more than one year's rates, nor more than the value of the goods taken in execution.

ROMER, L.J.—I agree. I only wish to add a few words as to the effect of these two Acts of 1795 and 1855. Until the matter was fully threshed out, the point involved seemed a little difficult; but it now seems clear enough, and I cannot help thinking that the case is really concluded by the decision in *Vaughan v. Imray* (28 L. J. 78, M. C.). In that case the facts were that by an Act of George II. the hamlet of Spitalfields was made a distinct parish, and persons possessing certain qualifications were constituted vestrymen. By a subsequent local Act in the same reign power was given to this vestry to make poor rates. Then under the Metropolis Management Act 1855 a new vestry was constituted to supersede the old one and to exercise the powers and privileges held by the then existing vestry. The court held that under these provisions the new vestry had the power of making poor rates which had been possessed by the old vestry. In the present case the vestry of Marylebone, after the passing of the Metropolis Management Act 1855, still possessed the power given by the Act of 35 Geo. 3, c. 73, of making a poor rate, and the poor rate made by it was made by virtue of their old Act, and they still had the privilege given them by sect. 195 of the old Act to assist them in getting in the rates due to them, in cases where the goods of persons who had not paid the rates due from them had been taken in execution by the sheriff. Then by sect. 161 of the Act of 1855 the privileges possessed by the overseers for the purpose of levying poor rates were extended to apply to the cases of other rates which the overseers were empowered to levy under the Act of 1855. The plaintiffs are, therefore, right in their contention, and I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Clarkson, Greenwells, and Co.*

Solicitors for the defendant, *W. and T. Burchell.*

[OT. OF APP.]

BOSTOCK v. RAMSEY URBAN DISTRICT COUNCIL.

[OT. OF APP.]

Friday, July 20, 1900.

(Before SMITH, WILLIAMS, and ROMER, L.JJ.)

BOSTOCK v. RAMSEY URBAN DISTRICT COUNCIL. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Costs—Action against public authority—Jurisdiction of judge to deprive successful defendant of costs—Discretion—"Good cause"—Order LXV., r. 1—Public Authorities Protection Act 1893 (56 & 57 Vict. 61), s. 1 (b).

Sect. 1 (b) of the Public Authorities Protection Act 1893 provides that where an action is brought against a public authority for any act done in execution of any Act of Parliament, and judgment is given for the defendant, the judgment shall carry costs to be taxed as between solicitor and client.

Held, affirming the decision of Lord Russell, C.J., that this enactment does not take away from the judge at the trial of the action with a jury the jurisdiction given him by Order LXV., r. 1 of depriving a successful defendant of costs for "good cause."

In an action for malicious prosecution, evidence of conduct of the defendant previous to and conducing to the plaintiff's action may be taken into consideration by the judge for the purpose of deciding whether or not there is "good cause" for depriving the defendant of costs.

THIS was an appeal from an order of Lord Russell, C.J. at the trial of the action with a jury depriving the successful defendants of costs.

The action was for malicious prosecution and was brought under the following circumstances:

The plaintiff was proprietor of a travelling menagerie.

On its arrival at Ramsey in Huntingdonshire on the 15th Dec. 1897 the manager put it up on a piece of open ground where it had been put up on previous occasions when visiting the town.

This piece of ground was alleged by the defendants to be a public highway but they did not take any steps to compel the removal of the vans, and after remaining there for one night the menagerie left the town.

The plaintiff was in Scotland at the time and had no knowledge of what was being done.

The defendants, by their solicitors, then wrote to the plaintiff giving him formal notice that if he persisted in putting up his menagerie in the streets of Ramsey, they would without further notice, commence an action against him for damages, and apply to the court for an injunction.

In May 1898, the defendants preferred an indictment against the plaintiff at Huntingdon Assizes for having unlawfully obstructed the highway, they having been advised by counsel that this was an available remedy against the plaintiff.

The indictment was tried before Wills J., and on his direction the jury acquitted the plaintiff.

The plaintiff then brought the present action for malicious prosecution.

The action was tried before Lord Russell, C.J. with a jury. He ruled that there was reasonable and probable cause for the prosecution, and that

there was no evidence of malice, and directed judgment to be entered for the defendants without costs.

On further consideration the Lord Chief Justice held that there was nothing in sect. 1, sub-sect. (b), of the Public Authorities Protection Act 1893 which prevented him from depriving the defendants of costs under Order LXV., r. 1, and, taking the circumstances of the case into consideration, he held that there was "good cause" within Order LXV., r. 1, for depriving the defendants of costs, and he made an order accordingly.

This decision of the Lord Chief Justice is reported in 81 L. T. Rep. 756; (1900) 1 Q. B. 357.

The defendants appealed.

By Order LXV., r. 1, it is provided as follows:

Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge . . . provided also that where any action, cause, matter, or issue, is tried with a jury the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue, is tried, or the court, shall for good cause, otherwise order.

The Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61) provides as follows:

Sect. 1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom, against any person for any Act done in pursuance, or execution, or intended execution, of any Act of Parliament, or of any public duty or authority . . . the following provisions shall have effect: . . . (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

Lawson Walton, Q.C. and J. W. Cooper for the defendants.—First, there were no facts before the Lord Chief Justice which could constitute "good cause" within Order LXV., r. 1. The question whether there were any such facts before a judge who has deprived a successful party of costs is one on which an appeal lies to this court:

Jones v. Ourling, 50 L. T. Rep. 349; 13 Q. B. Div. 262;

Husley v. West London Extension Railway Company, 60 L. T. Rep. 642; 14 App. Cas. 26.

The mere fact of the failure of the prosecution which was instituted by the defendants cannot be "good cause." Nor was there any such conduct of the defendants before litigation as in the case of *Harnett v. Vise* (43 L. T. Rep. 645; 5 Ex. Div. 307) was held sufficient to constitute "good cause." Secondly, it is immaterial whether or not there was "good cause" within the meaning of Order LXV., r. 1. The Public Authorities Protection Act 1893 gives the defendants in the present case an absolute right to costs, and the Lord Chief Justice had no power to exercise any discretion in the matter. The Act is a consolidation Act by which it was never intended to put public authorities in a worse position than they were in before. It is clear that many of the Acts which it repeals gave such an absolute right as the defendants now contend for:

Ores v. St. Pancras Vestry, 80 L. T. Rep. 388; (1899) 1 Q. B. 693;

Harrop v. Mayor, &c., of Ossett, 78 L. T. Rep. 387; (1898) 1 Ch. 525;

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Harker v. Wood, 54 L. J. 419, Q. B.;*Fielden v. Morley Corporation*, 82 L. T. Rep. 29; (1900) A. C. 133;*Reeve v. Gibson*, 64 L. T. Rep. 141; (1891) 1 Q. B. 652.

Blake Odgers, Q.C. and *P. Rose-Innes* for the plaintiff.—First, apart from the question of the construction of the Public Authorities Protection Act 1893, it is clear from the decision of the Court of Appeal in *Harnett v. Vise* (*ubi sup.*) that for the purposes of deciding whether or not there was “good cause” within Order LXV., r. 1, the Lord Chief Justice was entitled to take into consideration the conduct of the defendants which induced the plaintiff to bring the action of malicious prosecution. With regard to the construction of the Public Authorities Protection Act 1893, the object of sect. 1, sub-sect. (b) was to overrule *Avery v. Wood* (65 L. T. Rep. 122; (1891) 3 Ch. 115), and to declare that where a public authority was a successful defendant in any such action as is mentioned in sect. 1, it should, if entitled to costs, have those costs taxed as between solicitor and client. It would not be reasonable to construe the Act so as to give a public authority its costs in every case where it defended an action successfully, regardless of how oppressive or vexatious its conduct may have been. They referred to

Holford v. Acton Urban District Council, 78 L. T. Rep. 829; (1898) 2 Ch. 240;*Southampton and Itchin Bridge Company v. Southampton Local Board of Health*, 8 E. & B. 801.*Lawson Walton*, Q.C. replied.

SMITH, L.J.—This is an appeal from an order of the Lord Chief Justice depriving the successful defendants of costs in an action for malicious prosecution. The plaintiff was the proprietor of a travelling menagerie, and for many years when visiting the town of Ramsey it had been usual for the menagerie to occupy a particular piece of open ground in the town. In Dec. 1897 the menagerie arrived at Ramsey and remained there for one night. The plaintiff's manager set it up in the usual spot, as he thought he was entitled to do. The defendants took no steps to put a stop to what the manager was doing, and, after remaining one night the menagerie was taken off to some other town. Some months after an indictment for obstructing the highway was preferred by the defendants against the plaintiff at Huntingdon Assizes. The judge who presided at the trial held that there was no case, and directed an acquittal. Thereupon the plaintiff, having been acquitted, brought this action against the defendants for malicious prosecution. The action was tried before Lord Russell, C.J., with a jury, and he came to the conclusion that there was no evidence of malice on the part of the defendants or of absence of reasonable and probable cause, and he directed a verdict for the defendants. It is obvious that he took a very decided view of the conduct of the defendants in instituting the prosecution against the plaintiff, and therefore, acting under Order LXV., r. 1, he deprived the defendants of the costs which as successful defendants they would otherwise have been entitled to. The Lord Chief Justice thought that the conduct of the defendants in presenting an indictment against the plaintiff, in-

stead of taking the simple steps to which he adverted, was conduct which naturally induced the plaintiff to think that they were acting maliciously and without reasonable and probable cause, that is to say, that the defendants' unreasonable conduct had induced the plaintiff to bring his action for malicious prosecution. On that ground he held that there was “good cause” for depriving the defendants of costs. Two questions now arise. The first is, was there any evidence of “good cause” within the meaning of Order LXV., r. 1? It has been held, and it is clear law, that if there is any evidence at all of good cause, the question whether the defendants shall be deprived of costs is one for the discretion of the judge at the trial, and no appeal lies against the way in which he has exercised his discretion. That was laid down in the cases of *Jones v. Curling* (50 L. T. Rep. 349; 13 Q. B. Div. 262) and *Husley v. West London Extension Railway Company* (60 L. T. Rep. 642; 14 App. Cas. 26). The point for us to consider now is, therefore, whether there was any evidence before the Lord Chief Justice that the conduct of the defendants in instituting this prosecution was such as might give rise to a reasonable belief in the plaintiff's mind that he would succeed in any action which he might bring against the defendants for malicious prosecution. It is clear that the conduct which is relied upon as constituting “good cause” must be connected with the subject-matter of the action. I think that the Lord Chief Justice was quite right in holding that the judge is not confined to the consideration of the defendants' conduct in the actual litigation itself, but may also take into consideration matters which led up to and were the occasion of that litigation. That was what was held by the Court of Appeal, in *Harnett v. Vise* (43 L. T. Rep. 645; 5 Ex. Div. 307). That was an action for libel in which the jury found a verdict for the plaintiff. It was tried before Huddleston, B., and upon the application of the defendant's counsel the learned judge deprived the plaintiff of his costs on the ground that he had brought the libel upon himself by his incautious conduct. On the matter coming before the Court of Appeal, James, L.J. said he was of opinion that the jurisdiction as to costs given to the judge was not confined to the conduct of the parties in the litigation itself and that it is the duty of the judge to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may show that the action was not properly brought in respect of the libel complained of. In the present case I think that there was evidence of conduct on the part of the defendants such as to lead the plaintiff to think that he had a good cause of action against them, and the Lord Chief Justice rightly took that evidence into consideration in deciding whether or not there was good cause for depriving them of costs. On that ground, therefore, the appeal fails. I now come to the second point as to the true construction of sect. 1 (b) of the Public Authorities Protection Act 1893. It seems to me unnecessary to go back to the earlier Acts which that Act repealed. The words of the existing Act are, in my opinion, perfectly clear. The sub-section provides that where any action is commenced against any person for any act done in pursuance, or execu-

tion, or intended execution, of any Act of Parliament, or of any public duty or authority, and wherever in any such action a judgment is obtained by the defendant, such judgment shall "carry costs to be taxed as between solicitor and client." That enactment means that the judgment is to carry those costs, in a case where the defendant is entitled to costs. It does not mean that the defendant is to have costs in a case in which he is not entitled to costs. It would not be reasonable to construe the sub-section as meaning that, in all cases, however vexatious and unreasonable the defendant's conduct may have been, he is to have costs as between solicitor and client. The only adverse opinion that I am aware of is that which was expressed by Bruce, J. in *Cree v. St. Pancras Vestry* (*ubi sup.*), but I feel unable to agree in the view then taken by the learned judge. On the other hand, there is the opinion on the construction of this Act which was expressed by my brother Romer in the case of *North Metropolitan Tramways Company v. London County Council* (78 L. T. Rep. 711; (1898) 2 Ch. 145). As to *Harker v. Wood* (*ubi sup.*), I think that, when once the true construction of the Act has been arrived at, the case has no application to the present. I think that the appeal must be dismissed.

WILLIAMS, L.J.—I agree. The arguments in this case have made perfectly plain what are the points really in issue. The question is as to the application of the provision of Order LXV., r. 1, that where an action is tried with a jury the judge may, for good cause, order that the costs shall not follow the event. Two points have been raised. First, it was said that that provision has no application at all to the present action, because under the Public Authorities Protection Act 1893 the defendants are absolutely entitled to costs as between solicitor and client, and their rights under the Act cannot be affected by the judgment of the judge at the trial. Of course it is not contested by the plaintiff that, if an Act of Parliament provides that in a given event a litigant shall be entitled to costs, the judge at the trial would have no jurisdiction to deprive the litigant of his right; but the plaintiff says that the Public Authorities Protection Act 1893 does not contain any such provision as is alleged. I do not think it does. Sect. 1 (b) cannot be reasonably construed as giving a successful defendant an absolute right to costs to be taxed as between solicitor and client to the exclusion of the exercise of the discretion of the judge which is given by Order LXV., r. 1. I will not repeat what was said by the Lord Chief Justice with reference to the case of *Southampton and Itchin Bridge Company v. Southampton Local Board of Health* (*ubi sup.*). But, apart from those considerations, I think that the words of the sub-section, when considered in connection with the provisions of the Act as a whole, do not import any intention to give the defendant costs to the exclusion of the discretion of the judge under Order LXV., r. 1. I think that the Legislature only meant to fix the measure of costs in a case where the defendant is to have costs. It was not meant that every judgment for the defendant must carry costs. The later provisions of the section seem to me to tend to show that this is so. By sub-sect. (c) where an action for damages is commenced after tender of amends or is proceeded

with after payment into court in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, "and the defendant shall be entitled to costs to be taxed as between solicitor and client, as from the time of the tender or payment." The case there contemplated seems to be one in which the plaintiff has vexatiously carried on the litigation after sufficient amends have been offered, and therefore in that case it is provided that the defendant "shall be entitled to costs" to be taxed as between solicitor and client as from the time of the tender or payment. I think that the words used in sub-sect (b): "shall carry costs to be taxed as between solicitor and client," cannot have been intended by the Legislature to have the same meaning as the words used in sub-sect (c): "the defendant shall be entitled to costs to be taxed as between solicitor and client." So much for the first point. The other point is this: Assuming that the Lord Chief Justice had jurisdiction to exercise a discretion as to depriving the defendants of costs for "good cause," were there any facts before him on which he was entitled to hold that the defendants had so conducted the litigation that they ought not to have their costs? It is not disputed by the plaintiff that there must be some facts before the judge to form a basis for the exercise of his discretion. Both sides accept the law as laid down in *Harnett v. Vise* (*ubi sup.*); and, therefore, the only real question is whether there was conduct on the part of the defendants which can be considered as having led to the action being brought, and but for which it probably would never have been brought. I think that there were facts which the Lord Chief Justice was entitled to treat as constituting "good cause" within Order LXV., r. 1, and in that case this court has no jurisdiction to review his decision in the matter. No one can deny that it is possible that the defendants might so act as to give the plaintiff reasonable ground for supposing that they were actuated by malice when they prosecuted him and that they prosecuted him without reasonable and probable cause. The circumstances of the present action are such as to afford some ground for supposing that such was in fact the case. With regard to the question of malice, the matter has not been very strongly contested; and as to the absence of reasonable and probable cause, it appears that the defendants themselves at the outset of the affair took the view that their proper remedy was in a civil court, and expressed that view to the plaintiff. It seems that they changed their mind because they were advised that an indictment would be a cheaper remedy. They did not, however, communicate with the plaintiff the reasons for their change of view, but left him to suppose that they knew that their proper remedy was a civil one. The result of the trial of the plaintiff at the assizes would be to confirm the impression made in the mind of Wills, J. who tried the case, that the defendants had behaved unreasonably in instituting a prosecution. It seems to me impossible to say that there were not some facts before the Lord Chief Justice on which he might come to the conclusion that the defendants by their conduct had conducted to the plaintiff's bringing the action and had induced in his mind the belief that they had acted maliciously and without reasonable and probable

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cause. The Lord Chief Justice had, therefore, a discretion to deprive the defendants of costs, and we have no jurisdiction to review his exercise of that discretion.

ROMER, L.J.—With regard to the construction of the Public Authorities Protection Act 1893, I adhere to what I said in *North Metropolitan Tramways Company v. London County Council* (*ubi sup.*). In my opinion that Act was not intended to take away from the judge the power to deprive a successful defendant of costs in any case in which it would otherwise be proper to do so. In my view, if the action fails, but the defendant is deprived of costs by the judge under Order LXV., r. 1, the defendant cannot be said to have obtained a judgment within the meaning of sect. 1, sub-sect. (b) of the Public Authorities Protection Act 1893. Of course, if judgment be simply given for the defendant, it must be a judgment obtained by the defendant such as under sub-sect. (b) will carry costs as between solicitor and client. But if the Act is not intended to take away the discretion of the judge to deprive the defendant of costs, the judge if he exercises that discretion ought to see that the judgment is drawn up in such a way as to carry out his intention. I think it would not matter in what particular form the judgment is drawn up, so long as the intention is made clear. The word "judgment" in sub-sect. (b) is not used with reference to the form in which the judgment or order of the court is drawn up, but merely indicates the substance of the judgment, as was pointed out in *Shaw v. Hertfordshire County Council* (81 L. T. Rep. 208; (1899) 2 Q. B. 282). In that case it was held that a consent order in chambers dismissing the action with costs was a judgment obtained by the defendants within the meaning of the Act. That point seems to me to be reasonably clear. As to the second point that has been made, namely, whether there were any facts on which the Lord Chief Justice was entitled to hold that there was "good cause" within Order LXV., r. 1, for depriving the defendants of costs, it is clear that this "good cause" does not have reference only to the conduct of the successful party in the course of the litigation. It might for example, in the case of a successful defendant, be founded on his conduct outside the action if his conduct were such as to have led the plaintiff reasonably to suppose that he had a good cause of action, and thus induced him to bring the action. But I do not consider that such conduct on the part of the defendant could constitute "good cause" if it had no reference to the action, and did not lead the plaintiff reasonably to believe that he had a good cause of action. Misconduct in nowise connected with the action could not be any ground for depriving a successful defendant of costs. Nor could conduct of the defendant outside the action, unless it were such as to lead the plaintiff reasonably to suppose that he had a good cause of action, and so conduced to the action. Suppose X. takes criminal proceedings against Y. which fail, but X. had reasonable and probable cause for taking the proceedings, and was not actuated by malice, and then suppose that Y. brings an action against X. for malicious prosecution, and it fails. Then I should say that the mere fact that X. had taken criminal proceedings against Y. unsuccessfully would not be

good cause for depriving X. of costs. If I were wrong in that, then in all actions for malicious prosecution a successful defendant could be deprived of costs. But if X. by his conduct had induced a reasonable belief in the mind of Y. that X. had acted maliciously and without reasonable and probable cause, then I think there might be good cause for depriving X. of costs. That I think is the view which the Lord Chief Justice took in the present case. I have felt some doubt as to whether there was sufficient evidence before Lord Russell, C.J. of such conduct on the part of the defendants, but as my brethren are clearly of opinion that there was such evidence, I do not think that I should be justified in differing from the view taken by them and the Lord Chief Justice. With the discretion exercised by the Lord Chief Justice upon those facts, we have no jurisdiction to interfere.

Appeal dismissed.

Solicitors for the plaintiff, *Lewis and Newton*.
Solicitors for the defendants, *Stevens, Sons, and Parkes*, for *Serjeant and Son*, Ramsey.

Tuesday, July 24, 1900.

(Before the LORD CHANCELLOR (Halsbury),
SMITH and WILLIAMS, L.JJ.)

BARON AND ANOTHER v. PORTSLADE URBAN DISTRICT COUNCIL (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Local government — Sewers — Neglect of local authority to cleanse — Nuisance to adjoining landowner — Cause of action for damages — Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 19, 299.

Sect. 19 of the Public Health Act 1875 provides that every local authority shall cause the sewers belonging to them to be kept so as not to be a nuisance, and to be properly cleansed and emptied.

Sect. 299 of the same Act provides a remedy by means of an application to the Local Government Board in cases where default has been made by a local authority in maintaining existing sewers.

Held (affirming the decision of Mathew, J.), that a person who has sustained damage through the breach by a local authority of the duty imposed on them by sect. 19 has a right of action in respect thereof.

THIS was an appeal by the defendants from the judgment of Mathew, J. on further consideration after the trial of the action with a jury.

The plaintiffs were occupiers of a dwelling-house and agricultural land at Portslade, and the defendants were the local authority for the district.

The action was brought to recover damages in respect of a nuisance on the plaintiffs' land alleged to have been caused by the negligence of the defendants in not properly cleansing an open sewer belonging to and vested in the defendants, whereby large quantities of sewage and filth were brought on to the plaintiffs' land.

Several years previous to the bringing of the action, a sewer had been constructed by a private

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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person for the drainage of a brewery and some cottages. This sewer drained into an open ditch, which emptied itself into a pond on the plaintiffs' land.

Under the Public Health Act 1875 this drain became vested in the local sanitary authority, and when the defendant council was formed in 1898, the sewer became vested in them.

Before the year 1898 the local sanitary authority had paid the expenses of cleansing the sewer and pond; but in that year, in consequence of a dispute between the plaintiffs and the defendants, the arrangement which had previously been made with regard to the cleansing was put an end to.

After this the sewer and pond were not cleaned out at all, with the result that the sewage overflowed on the plaintiffs' land, and caused a nuisance. The plaintiffs thereupon commenced the present action. The defendants admitted at the trial that they were guilty of a breach of their statutory duty in not properly cleansing the sewer as required by sect. 19 of the Public Health Act 1875.

The jury returned a verdict for the plaintiffs for 75*l.* damages.

On further consideration Mathew, J. held that sect. 299 of the Public Health Act 1875 has no application to the case of a breach of the duty created by sect. 19, and that there was therefore nothing to deprive the plaintiffs of their right of action against the defendants, and he accordingly gave judgment for the plaintiffs.

The case is reported in 81 L. T. Rep. 225.

The defendants appealed.

By the Public Health Act 1875 (38 & 39 Vict. c. 55) it is provided as follows:

Sect. 19. Every local authority shall cause the sewers belonging to them to be constructed, covered, ventilated, and kept so as not to be a nuisance or injurious to health, and to be properly cleansed and emptied.

Sect. 299. Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers, or in the maintenance of existing sewers, . . . or that a local authority has made default in enforcing any provisions of this Act which it is their duty to enforce, the Local Government Board if satisfied after due inquiry, that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of *mandamus*, or the Local Government Board may appoint some person to perform such duty.

Macmorran, Q.C. and Thorn Drury for the defendants.—The plaintiffs have no right of action against the defendants for what the defendants have neglected to do. The plaintiffs' only remedy is that provided by sect. 299 of the same Act which imposes the duty on the defendants—namely, by means of a complaint to the Local Government Board. The defendants have simply been guilty of non-feasance of duty. They did not make the sewer. It was vested in them by Act of Parliament. No alteration has been made by the defendants in the amount of sewage which is poured into the sewer:

Attorney-General v. Guardians of Dorking Union, 46 L. T. Rep. 573; 20 Ch. Div. 595;

Brown v. Mayor, &c., of Dunstable, 80 L. T. Rep. 650; (1899) 2 Ch. 378.

They cited also:

Robinson v. Mayor, &c., of Workington, 75 L. T. Rep. 674; (1897) 1 Q. B. 619;

Peebles v. Oswaldtwistle Urban District Council, 76 L. T. Rep. 315; (1897) 1 Q. B. 625;

Pasmore v. Oswaldtwistle Urban District Council, 78 L. T. Rep. 569; (1898) A. C. 387;

Dent v. Bournemouth Corporation, 66 L. J. 395, Q. B.

Witt, Q.C. and Sinclair Cox for the plaintiffs were not called upon.

The LORD CHANCELLOR (Halsbury).—In this case I think we have simply to apply the law which has been already laid down in previous cases. The sewer in question was vested in a local authority, and, according to what had been their practice for some time, the local authority had the sewer cleansed at certain intervals. After some time they discontinued that practice with the result that a nuisance was caused upon the plaintiffs' land. Now, there is all the difference in the world between the right to call on a local authority to make a new system of drainage and the right to compel them to use in a reasonable manner the sewers that are vested in them. No complaint has been made that the defendants ought to provide a new sewer, but only that they have neglected to clear out an existing sewer, and so have caused a nuisance to the plaintiffs. I cannot see why the defendants should not be subject to an action to compel them to use their sewer in a reasonable manner. The first part of sect. 299 of the Public Health Act 1875 refers to the construction of new sewage works, and the only difficulty here can arise from the subsequent words of the section as to maintaining existing sewers. I agree with the learned judge that the maintenance of a sewer is not the same thing as that which it is the duty of the local authority to do by virtue of sect. 19, that is, to keep the sewer so that it shall not be a nuisance or injurious to health, and to see that it is properly cleansed. Sect. 299 does not, in my opinion, touch the duty of the local authority to use proper diligence in the ordinary course of the management of their sewers, and I cannot see anything in the section to show that a private person who has suffered damage by the neglect of such a duty by the local authority may not have a right of action in consequence. The appeal must be dismissed.

SMITH, L.J.—I am of the same opinion.

WILLIAMS, L.J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the plaintiffs, *Rodgers and Gilbert*.
Solicitors for the defendants, *Biggs - Roche, Sawyer, and Co., for J. C. Buckwell and Berkeley*, Brighton.

Aug. 2 and 4, 1900.

(Before SMITH and WILLIAMS, L.J.J.)

REG. on the Prosecution of *WRIGHT v. EASTBOURNE CORPORATION*. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.
Local government—Local authority—Refusal to approve—Plans of proposed building—Grounds of refusal—Mandamus.

A prerogative writ of mandamus will not be granted to compel a local authority to approve plans of a

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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proposed building which the local authority has in good faith refused to approve upon the ground that the building would contravene the provisions of the Public Health (Buildings in Streets) Act 1888 by being brought forward beyond the front main wall of the building on one side thereof in the same street.

THIS was an appeal by the prosecutor from an order of the Divisional Court (Ridley and Darling, JJ.) discharging a rule *nisi* for a *mandamus*.

One Wright deposited with the Eastbourne Corporation plans for a block of buildings which he proposed to erect in Eastbourne.

After properly considering the plans, the corporation resolved that the plans should be approved as complying with their bye-laws; but they resolved that the plans should be disapproved as regards the building line shown upon the plans upon the ground that the proposed building was shown upon the plans to be intended to be brought forward beyond the front main wall of the building on one side thereof in the same street, contrary to the provisions of sect. 3 of the Public Health (Buildings in Streets) Act 1888.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 157. Every urban authority may make bye-laws with respect to the following matters—that is to say: (1) With respect to the level, width, and construction of new streets, and the provisions for the sewage thereof; (2) with respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires, and for purposes of health; (3) with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; (4) with respect to the drainage of buildings, to water-closets, earth-closets, privies, ashpits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation. And they may farther provide for the observance of such bye-laws by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the urban authority, and as to the power of such authority (subject to the provisions of this Act) to remove, alter, or pull down any work begun or done in contravention of such bye-laws. Provided that no bye-law made under this section shall affect any building erected in any place (which at the time of the passing of this Act is included in an urban sanitary district) before the Local Government Acts came into force in such place, or any building erected in any place (which at the time of the passing of this Act is not included in an urban sanitary district) before such place becomes constituted or included in an urban district, or by virtue of any order of the Local Government Board subject to this enactment.

Sect. 158. Where a notice, plan, or description of any work is required by any bye-law made by an urban authority to be laid before that authority, the urban authority shall, within one month after the same has been delivered or sent to their surveyor or clerk, signify in writing their approval or disapproval of the intended work to the person proposing to execute the same; and if the work is commenced after such notice of disapproval, or before the expiration of such month without such approval, and is in any respect not in conformity with any bye-law of the urban authority, the urban authority may cause so much of the work as has been executed to be pulled down or removed.

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The Public Health (Buildings in Streets) Act 1888 (51 & 52 Vict. c. 52) provides:

Sect. 3. Section one hundred and fifty-six of the Public Health Act 1875 is, save as hereinafter mentioned, hereby repealed, and in lieu thereof it is hereby enacted that it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same. Any person offending against this enactment shall be liable to a penalty not exceeding forty shillings for every day during which the offence is continued after written notice in this behalf from the urban authority.

The corporation, in disapproving the plans upon the above ground, acted in good faith, and in the belief that the proposed building would contravene the provisions of sect. 3 of the Act of 1888.

Wright thereupon obtained a rule *nisi* for a *mandamus* commanding the Eastbourne Corporation to approve and signify in writing their approval of the plans.

The Divisional Court (Ridley and Darling, JJ.) discharged the rule *nisi* for a *mandamus* upon the ground that the case of *Smith v. Chorley Rural District Council* (76 L. T. Rep. 637; (1897) 1 Q. B. 678) showed that the court would not grant a *mandamus* to a local authority to approve plans which, in the *bond fide* exercise of their discretion, they had refused to approve.

The prosecutor appealed.

Macmorran, Q.C. and *B. A. Hall* for the appellant.—A local authority has power, under sect. 157 of the Public Health Act 1875, to make bye-laws and to require the deposit of plans, and, under sect. 158, has power to approve or disapprove of plans. The local authority has, however, power to disapprove of plans only if the plans contravene any of the provisions of the bye-laws. They cannot disapprove of plans upon the ground that they contravene the provisions of a statute although they comply with the bye-laws. If the building, in respect of which the plans are deposited, does infringe the statute, the remedy of the local authority is to take proceedings under the statute:

Robinson v. Barton-Eccles Local Board, 50 L. T.

Rep. 57; 8 App. Cas. 798;

Reg. v. Tynemouth Rural District Council, 75 L. T.

Rep. 86; (1896) 2 Q. B. 451.

If the local authority has power to consider the question whether the plans do show that the provisions of the statute will be infringed, yet the High Court will consider the question whether the local authority were right in saying that there would be an infringement, and will grant a prerogative writ of *mandamus* if the local authority appears to have come to a wrong conclusion. The decision in *Smith v. Chorley Rural Council* (76 L. T. Rep. 637; (1897) 1 Q. B. 678) was only that an action for a *mandamus* would not lie against a corporation for refusing to approve plans upon the ground that they showed an infringement of the bye-laws. In the present case the statute does not in fact apply, and the local authority has no jurisdiction to disapprove of the plans upon the ground that they do infringe the statute. This remedy by the way of

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mandamus is the only remedy in a case of this kind.

C. A. Russell, Q.C. and Bowall, for the respondents, were not called upon to argue.

SMITH, L.J.—This is an appeal by the prosecutor against the judgment of my brothers Ridley and Darling, who refused to make absolute a rule *nisi* for a *mandamus*. The rule *nisi* is to show cause why a writ of *mandamus* should not issue directed to them—that is, to the local authority of Eastbourne—commanding them to approve and signify in writing their approval of the building line as shown on the plans sent in by Wright. What happened was this: Wright wanted to build some flats at Eastbourne, and the question has arisen—a very serious question—as to whether or not what he is proposing to do with regard to these flats is not prohibited by sect. 3 of the Public Health (Building in Streets) Act 1888 (51 & 52 Vict. c. 52). It is admitted that the Eastbourne local authority have no bye-law that fits the case; and when Wright sent in his plans a question arose whether he was entitled to build, as he was about to build, in contravention of this Act of Parliament, and the rule *nisi* was moved for and obtained. That rule *nisi*, as I have already said, was discharged by my brothers Ridley and Darling. What is complained of is this: that Wright is proposing to build these flats and to bring forward the building “beyond the front main wall of Mixbury House being a house on one side of and in the same street as the proposed flats”—that is practically copying the words out of the 3rd section of the Act of 1888—in other words, that what he is proposing to do is to contravene that Act. What is it that the local authority has done? They have returned to us this: “That the amended plans now submitted by Mr. Wright for the erection of flats in Hartington-place and Compton-street, Eastbourne, be approved as complying with the bye-laws.” They have approved of them; but they go on and add this, and I see very good reason for adding it myself, so that it might never be said that the local authority had consented to this building, as a consent within sect. 3, by the approval of the plans: “But disapproved as regards the building line shown on the said plans on the grounds that the said plans are” in contravention of sect. 3 of the Act of 1888. Now, with regard to the prerogative writ of *mandamus*, what is wrong about that return? First of all, for myself, it seems to me perfectly plain that a rule *nisi* for a *mandamus* should not be made absolute when it appears, and clearly, to the court that obedience to that *mandamus* would be the approval of plans which would be in contravention of the law of the land, which is if anything more cogent than a bye-law. If it is in contravention of a public Act of Parliament, it seems to me obvious that the Queen's Bench Division ought not to grant a *mandamus*. A *mandamus* ought not to go when it would be futile and could not be obeyed. That is another very good ground why a *mandamus* should not go, because, if this be against the Act of Parliament, of course it cannot be obeyed; although they might approve plans, they could not approve plans which would authorise buildings to be carried out in the teeth of the Act of Parliament. It seems to me, on

that ground this *mandamus* ought not to be made absolute. Then it is said that the local authority have held facts to bring this case within the ambit of sect. 3 of this Act of 1888 which are not facts at all. I should like to know where is the evidence of that before us. I have no evidence of that. What is more, as the case stands before us, it comes precisely within what the late Chitty, L.J. said, with great accuracy, and I think with rather greater accuracy than Lopes, L.J. in *Smith v. Chorley Rural Council* (76 L. T. Rep. 637; (1897) 1 Q. B. 678). One of them used the word “discretion,” and the other used the word “jurisdiction.” I think Chitty, L.J.'s word “jurisdiction” was the right word when he said: “They had jurisdiction in the matter, which they honestly exercised, and it was part of the question before them whether the building of the new houses amounted to laying out a new street.” He said that it was for them to decide, not for this court to decide. I am clearly of opinion that, in a case like this, unless it is shown that there was no evidence at all and the local authority had usurped jurisdiction by finding something which was not competent to them to find, we cannot interfere, particularly on a rule *nisi* for a *mandamus*. For these reasons I think my brethren were quite right, and that this appeal ought to be dismissed.

WILLIAMS, L.J.—I agree. I do not think that the application which has been made in the Divisional Court, and before us on appeal, is an application which we ought to grant, because I do not think that the applicant really wishes for that which he is asking, for what he does wish for is to get something under our *mandamus* from the local authority which he can use for a purpose for which it is not intended. Now, what was asked for originally was a *mandamus* to the local authority commanding them to approve and signify in writing their approval of the building line as shown on the plans sent by John Wright, &c. Now, what he wants to do is this: Having got that approval of the building line in that way, he then thinks he will be in a better position hereafter in case any prosecution is instituted under sect. 3 of the Act of 1888, to which our attention was called, for building beyond the building line in contravention of that Act. To my mind the duty which the local authority has to perform has nothing to do with that Act at all. Under sect. 158 they are bound within a limited time to signify in writing their approval or disapproval of the intended work. As I read that section of the statute it has no relation to anything else at all but the bye-laws. The statute begins with enabling the local authority to pass bye-laws, and then it says that the plans of intended buildings are to be submitted and then the approval or disapproval of the local authority is to be expressed. That does not mean general approval or general disapproval. It means under the statute that they approve this as not being in contravention of their bye-laws, or they disapprove this as being in contravention of their bye-laws. I agree with Mr. Macmorran when he says that Wright here is entitled to have the local authority comply with that statute and signify in writing their approval or disapproval, and, if the local authority had refused to do this, I should have thought, speaking for myself, that a *mandamus* might have gone to them to approve or disapprove.

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But that is not what is asked for. It is not said here that this resolution, or whatever it may be that has been passed by the local authority, is neither an approval nor a disapproval and therefore the statute has not been complied with. What is said is that it is not sufficient that they should have expressed their approval of the plans, as they have done, as complying with the bye-laws, but that they ought not to have added these words, "but disapproved as regards the building line shown on the said plans on the ground that the said flats are shown on such plans as intended to be erected or brought forward beyond the front main wall of Mixbury House being a house," &c.—in other words, disapprove in so far as they are a breach, not of the bye-laws, but of the statute. We have not got to decide any question here to-day as to what is the effect of this document which has been issued by the local authority. If, so far as the statutory duty is concerned, it is an approval, I do not see myself what more Mr. Wright can require; and, in so far as it contains something outside the statutory duty imposed upon the local authority, it does not seem to me that the proper mode of testing that, or correcting that, is by this application for a *mandamus*.

Appeal dismissed.

Solicitors for the appellant, *H. Reeves and Co.*
Solicitors for the respondents, *Sharpe, Parker, and Co., for A. W. Fovargue, Eastbourne.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

July 31, Aug. 1 and 10, 1900.

(Before KENNEDY and DARLING, JJ.)

LONDON AND INDIA DOCKS (apps.) v. POPLAR UNION (resps.). (a)

Rating—Machinery—Cranes in docks—Warehouses in different parish—Docks in different parishes in same union—Deductions.

The L. and I. Docks used cranes worked by hydraulic power communicated to them by means of mains laid under the surface of the docks in which they were used alongside the rails upon which the cranes travelled. The cranes could be made to travel along the rails upon which they rest by means of hand gearing attached to them, or by means of hydraulic capstans, or by means of levers. When in use such cranes were firmly and securely attached, by means of a flexible tube capable of resisting a pressure of 700lb. to the square inch, to the hydraulic main by the side of the rails. While so attached the cranes could be moved along the rails 6ft. in either direction, but in order to move them from one quay to another new lines of rails would have to be laid, or they would have to be moved by floating derricks.

Held, that these cranes must be treated as enhancing the rateable value of the dock undertaking, as they were on the premises for the purpose of making them fit as premises for the purpose for which they were used.

The L. and I. Docks also used certain warehouses, situate outside the parishes in the P. Union, in

connection with and for the purposes of their undertaking. These warehouses were separately assessed in the parishes in which they were situate, and they did not adjoin the dock warehouses or docks.

Held, that the net receipts derived from these warehouses should be deducted from the net receipts derived by the L. and I. Docks from their whole undertaking, inclusive of such warehouses, when ascertaining the rateable value of the premises of the L. and I. Docks within the parishes in the P. Union.

*Where one system of docks is situated in different parishes in the same union, the rateable value ought to be ascertained upon the parochial principle as laid down in *Sculcoates Union v. Hull Dock Company* (71 L. T. Rep. 642).*

Expenses of one company, such as superannuation allowances or rents of premises made payable by such company, upon an amalgamation of several companies to form one undertaking, ought not to be deducted from receipts in order to arrive at the net revenue of the undertaking.

CASE stated by the Court of Quarter Sessions for the County of London in an appeal against the decision of the assessment committee upon an objection by the appellants to the valuation list made for the parish of Bromley St. Leonard, in the Poplar Union, pursuant to the Valuation (Metropolis) Act 1869.

1. The appellants are a body incorporated under and by virtue of the London and St. Katharine and East and West India Docks Act 1888 for the purpose of working, maintaining, and managing the undertakings of the London and St. Katharine Docks Company and the East and West India Dock Company hereinafter referred to as the "undertakings."

2. The "undertakings" mean and include the docks, wharves, quays, bridges, railway stations, and other works and conveniences, and the lands, buildings, and property of every description and of whatever tenure, with any improvements, alterations, and additions which may from time to time be made therein or thereto.

3. The appellants were assessed in a valuation list made by the overseers of the poor of the parish pursuant to the provisions of the Valuation (Metropolis) Act 1869, in respect of so much of the undertakings of the East and West India Docks Company as are situate within the parish at a gross value of 8271l. and a rateable value of 5514l., and upon objection made to the assessment committee by the appellants, pursuant to sect. 11 of the Act, the respondents' assessment committee finally determined the gross value of the portion of the undertakings at 7622l. and the rateable value thereof at 4372l.

4. Among the buildings comprised in the undertakings are certain warehouses known as and hereinafter referred to as the "town warehouses," situate at Crutched Friars and Outler-street, in the city of London, and at Commercial-road and West Smithfield outside the parish, which warehouses are separately assessed in the parishes in which they are situated. Such warehouses are in the occupation of the appellants, and are used by them in connection with and for the purposes of their undertakings in the same way as other town warehouses are used belonging

(a) Reported by W. DE B. HEMBERT, Esq., Barrister-at-Law.

to wharfingers or warehouse keepers. A portion of the goods stored in the town warehouses do not come from or go to the docks at all, but are delivered by rail from Liverpool, Southampton, and elsewhere, or are lightered from ships discharged in the river or places other than the appellants' docks. Some portion of the goods, however, are stored in the town warehouses after discharge from vessels in the docks, and as regards some of these last-mentioned goods payments are made not only in respect of the storage of the goods, but also in respect of the cost of dealing at the dock of discharge with the goods so stored, and the transfer of such goods to the warehouses. Each of these payments when received is divided into two parts which are separately dealt with in the appellants' accounts, one part being included in the receipts attributable to the warehouses. There are also dock warehouses situate within the parish forming part of the dock, and which belong to and are occupied by the appellants in connection with their undertakings. The town warehouses do not adjoin the dock warehouses or docks, but in the case of the Commercial-road warehouse there are lines of railway between the warehouse and the docks, belonging to and worked by the London, Tilbury, and Southend Railway Company and the Great Eastern Railway Company, by means of which goods are conveyed from the docks for delivery either in the Commercial-road warehouse, or to warehousemen and other persons other than the appellants.

5. In the case of dutiable goods it is necessary that warehouses duly licensed for the reception of goods upon which duty is payable but has not been paid should be provided, and certain portions of the dock warehouses are duly licensed for the reception of such goods. Some portion of the town warehouses are also duly licensed, and the appellants use them for the storage (*inter alia*) of dutiable goods received by rail or road, or discharged from vessels in the river, or in the docks or elsewhere.

6. The accounts of the town warehouses are kept quite distinct by the appellants, and are included in their published accounts of the receipts and expenses of the undertakings. All moneys received and expended in respect of all the town warehouses and other separately assessed property have always been treated by the appellants in the published accounts of the undertakings and in their dealings with the companies as forming, and they do form, part of the appellants' undertakings.

7. For facilitating the lading and unloading of vessels in the appellants' docks there are hydraulic cranes placed upon the sides of the docks, which cranes travel upon iron rails about 10ft. to 13ft. apart, specially constructed for the purpose, upon and along the quays which form the sides of the docks, and used only for the purposes of such cranes. Such rails do not extend further than the quay upon which they are constructed, and are firmly affixed to and embedded in and form part of such quay, but the cranes can be and are moved from one quay to another as the business and occasion requires; but in order to move them it would be necessary to lay down new lines of railway where no sufficiently hard pavement exists, or they could be transported by water by means of floating derricks.

8. Upon the undertakings there are 191 hydraulic cranes, which vary in weight from thirteen to sixteen tons. Such cranes are worked by hydraulic power communicated to them by means of mains laid under the surface of the quays in and through the appellants' said lands between their hydraulic pumping station thereon and the rails upon which the cranes travel, close by the side of which and parallel thereto such mains are laid.

9. The larger of the cranes can be made to travel along the rails upon which they rest by means of hand gearing attached to them, and the smaller of the cranes by means of hydraulic capstans and by means of levers. When in use such cranes are firmly and securely attached by means of a flexible tube, capable of resisting a pressure of 700lb. to the square inch, to the hydraulic main by the side of the rails. While so attached the cranes can be moved along the rails to a distance of 6ft. either way from the point of attachment.

10. The appellants contended that, in arriving at the net receipts of their undertakings for the purpose of ascertaining the gross and rateable value of so much of the undertakings as is situate in the parish, all moneys received and expenses incurred in respect of the town warehouses separately assessed in the parishes in which they are situate ought to be deducted from the total receipts and expenses of the appellants in respect of the undertakings; and that, in estimating such rateable value, the hydraulic cranes were to be treated as tenants' fixtures, and the value thereof included in ascertaining the amount of the tenants' capital necessary to carry on the undertakings.

11. The appellants also contended that the entire net revenue should be apportioned in the various parishes according to gross receipts of each dock. That the amount of tenants' capital, maintenance, renewals, and taxes should be calculated in each dock and deducted where they arise. That the profits and rents outside the Custom House fence ought not to be included in the receipts, and that the expenses of the separate dock companies and the rent of the Commercial-road warehouses should be deducted from the total receipts in order to arrive at the net revenue.

12. The respondents contended that the receipts and expenses of the appellants in respect of all warehouses wherever situate and although separately assessed were to be included in the total receipts and expenses of the appellants in respect of their undertakings in order to arrive at the net receipts of the appellants for the purpose of estimating the rateable value of so much of the appellants' undertakings as is situate in the parish, and that the rateable value of such of the warehouses as were separately assessed was to be deducted from the rateable value of the whole of the undertakings in arriving at the rateable value of the portion in the parish, and that in any event, if the receipts in respect of certain of the warehouses were to be deducted, all expenses incurred by the appellants in respect of those warehouses should also be deducted from the total expenses of the appellants in respect of their undertakings. The respondents further contended that no dock premises are complete as such unless cranes are placed so as to travel upon rails along the sides of the docks comprised in

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such premises, and that the value of the appellants' undertaking was enhanced by reason of the cranes thereon inasmuch as no one would be likely to become tenant of dock premises which were not provided with cranes such as those hereinbefore described; that the hydraulic cranes were to be taken into consideration in valuing the appellants' undertakings, and that the value thereof was to be included in ascertaining the rateable value of the undertakings.

13. The Court of Quarter Sessions were of opinion that the aforesaid contentions of the appellants were correct except those mentioned in par. 11, and arrived at the rateable value of the appellants' premises in accordance therewith, and accordingly ordered the appeal to be allowed, but without costs, and the gross value of the portion of the appellants' undertakings in the parish to be assessed at 5949l. and the rateable value thereof at 4085l.

14. The questions for the opinion of the court are: (1) Whether in ascertaining the rateable value of so much of the appellants' premises as is the subject-matter of the above appeal the net receipts derived from the town warehouses occupied by the appellants in connection with their whole undertaking, but rated or capable of being rated separately from the remainder of their premises, should be deducted from the net receipts derived by the appellants from their whole undertaking inclusive of such warehouses? (2) Whether the hydraulic cranes upon the quays of the appellants' docks are to be treated as landlords' or tenants' fixtures? (3) Whether the entire net revenue is to be apportioned according to the gross receipts of each dock? (4) If not, then whether the amount of tenants' capital, maintenance, renewals, and taxes are to be calculated in each dock and deducted when they arise? (5) Whether the profits earned and rents received outside the Customs House fence are to be included in the receipts? (6) Whether the expenses of the separate dock companies and the rent of the Commercial-road warehouses are to be deducted from the receipts in order to arrive at the net revenue?

Cripps, Q.C. and *B. Cunningham Glen* for the union.—In *Reg. v. Southampton Dock Company* (14 Q. B. 587; 15 Jur. 268) it was held that cranes, steam engines, shears, and other heavy machinery attached to the freehold, and essential to the business, but capable of being detached as easily and with as little injury to the freehold as other fixtures put up for the purpose of the tenants' trade, and usually valued as between incoming and outgoing tenants, were not allowable deductions. Again, in *Tyne Boiler Works Company v. Overseers of Longbenton* (55 L. T. Rep. 825; 18 Q. B. Div. 81) it was laid down that in estimating the rateable value of premises used as a factory, the machinery and plant thereon, placed there for the purpose of making the premises fit as a factory, were to be taken into account as enhancing the value, although the machinery and plant were not physically attached and remained personal property. Retorts, purifiers, engines, boilers, &c., at gasworks, although capable of being removed, were held rateable in *Reg. v. Lee* (13 L. T. Rep. 704; L. Rep. 1 Q. B. 241) as they were attached to the hereditament for its permanent improvement.

The rule appears in *Laing v. Overseers of Bishopwearmouth* (38 L. T. Rep. 781; 3 Q. B. Div. 299) that machinery, although capable of being removed, is to be taken into consideration in ascertaining the rateable value of premises, if it is essential to the business to which the premises are devoted, and is intended to remain attached to them so long as they are applied to that purpose. These cranes enhance the rateable value of the hereditament, and are not like loose plant or loose machines. They should be valued as part of the premises. The last case on the point was *Gifford v. Chard Union* (63 L. T. Rep. 249), where these former decisions were discussed and followed.

Balfour Browne, Q.C. (*Freeman, Q.C., Boyle, Q.C., and Ryde* with him) for the docks.—These warehouses are separate undertakings, and are so assessed. They have nothing to do with the receipts, and should not be included. [KENNEDY, J.—The union wishes to increase the value of the docks by the excess of the profit of the warehouses over the rent.] That is so, and must be wrong. As to the cranes, the description in the case shows them to be on the same footing as locomotives or rolling stock of a railway. [DARLING, J.—Is not the analogy a bad one? Rolling stock earns when moving, but these cranes only earn when not moving and attached.] The cranes here are very different to those in *Laing v. Overseers of Bishopwearmouth* (*sup.*), as appears from the description given on p. 302. [KENNEDY, J.—In *Mersey Docks and Harbour Board v. Overseers of Birkenhead* (29 L. T. Rep. 454; L. Rep. 8 Q. B. 445) cranes were held rateable.] That would depend upon what kind of cranes they were in that case. These cranes do not make the place a dock. In *Tyne Boiler Works Company v. Overseers of Longbenton* (55 L. T. Rep. 825; 18 Q. B. Div. 81) the machinery made the place what it was, and the same must be said of *Gifford v. Chard Union* (63 L. T. Rep. 249). [KENNEDY, J.—Do you dispute the analysis of Cockburn, C.J. in *Reg. v. North Staffordshire Railway Company* (3 L. T. Rep. 554; 3 El. & El. 392) where he says at p. 556: "The second question is whether the company are entitled to a deduction in respect of the capital invested in the various articles therein specified, being things necessary for the carrying on the business of the company. The articles to which such a question may have reference may be divided into three classes—first, things movable, such as office and station furniture; secondly, things so attached to the freehold as to become part of it; and, thirdly, things which, though capable of being removed, are yet so far attached that it is intended that they shall remain permanently connected with the railway, or the purposes connected with it, as certain permanent appendages to it and essential to its working. It is clear, in respect of the first class of articles, a deduction should be allowed; it is equally clear that no deduction should be allowed as to the second; as to the third, the question is finally settled by the decision of the court in the case of *Reg. v. Southampton Docks* (14 Q. B. 587).] No. That lays down the law as it exists.

Aug. 10.—KENNEDY, J. delivered the following judgment of the court:—In this case two distinct parishes in the east of London are appealing

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against the decision of the quarter sessions for the county of London on two points decided adversely to them upon the hearing of the appeal to quarter sessions against the decision of the assessment committee in regard to the assessment for rating purposes of property of the London and India Docks Joint Committee. The London and India Docks Joint Committee raise several points by way of cross-appeal. The cases stated for our decision in regard to the two parishes are identical. One of the points raised by the parishes is the question of the assessment of the joint committee on 191 hydraulic cranes which are the property of the joint committee, and are upon the docks which form part of the undertaking of the joint committee within the rating area of the parishes. The parishes contend that these cranes enhance the value of the joint committee's undertaking and ought to be taken into consideration in valuing that undertaking, and that the value is to be included in ascertaining its rateable value. On the other hand, the joint committee contend that these cranes are to be treated as tenants' fixtures, and the value of them to be included in ascertaining the amount of tenants' capital necessary to carry on the undertaking. The quarter sessions have decided, as we understand, against the parishes on this point. The second point raised by this appeal is as to the correctness of the decision of the quarter sessions in adjudging that, for rating purposes, in the parishes, the net receipts derived by the joint committee from certain warehouses described in the case as town warehouses and situated outside the rateable area, should be deducted from the net receipts derived by the joint committee from the whole undertaking, inclusive of such warehouses. It is convenient, I think, to deal with these two points on appeal first before stating the points of the cross-appeal. The cranes in question are described in pars. 8 and 9 of the case before us. [His Lordship read those paragraphs, and continued:] The law, as it seems to us, governing the case of machinery of this description appears to be laid down by the Court of Appeal in *Tyne Boiler Works Company v. Overseers of Longbenton* (55 L. T. Rep. 625; 18 Q. B. Div. 81). The effect of the judgment in that case, as appears from the report, is that in estimating the rateable value of premises used as a manufactory, machinery and plant placed thereon for the purpose of making them fit as premises for such a manufactory are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remain personal property, and are not physically attached to the premises. Lord Esher, in his judgment, at p. 92, lays down the rule in these terms: "I believe the real rule to be that things which are on the premises to be rated, and which are there for the purpose of making and which make the premises fit as premises for the particular purpose for which they are used are to be taken into account in ascertaining the rateable value of such premises. Of course, it is not all things on the premises, or that are used on the premises, which are to be taken into account; but things which are there for the purpose of making and which do make them fit as premises for the particular purpose for which they are used." On page 95 Lopes, L.J. states the principle thus: "I adopt the con-

cluding words of the judgment of Mathew, J. in the court below, where he says that the machinery ought to be taken into account as essentially necessary to the business to which the premises are devoted, and manifestly intended to remain connected with the premises so long as they are used for the same purposes." That which is said by the late Master of the Rolls and by Lopes, L.J. with regard to machinery in a manufactory appears to me to be equally applicable to machinery or plant in such docks as these, which form part of the undertaking of the joint committee. It is, of course, possible to have a dock in which ships are separately received, but these docks are intended to be used, and are used, not merely for the reception but for the unloading of ships, for the effective and profitable performance of which some mechanical appliances, such as these cranes are, are, in the case at least of some cargoes, necessary. It appears to us from the description which is given in pars. 8 and 9 of the case which I have read that these cranes are manifestly intended to remain connected with the docks so long as the premises are used as docks. Indeed, it is clear from those paragraphs, in my judgment, that whilst in use the cranes are actually attached to the premises with only a very limited range of movement. They are moved upon lines of rails only for the purpose of being brought to the places convenient for the using of them, where they are fixed when in actual use. I do not think it can be argued, as the joint committee suggest by their counsel, that these cranes are identical in character for rating purposes with the locomotives of a railway company, which are in no sense connected with any particular rateable area on the line of railway. We feel ourselves unable satisfactorily to distinguish the character of these cranes, in regard to the subject of rating, from the character of the portable engine and boiler mounted on cast iron wheels so that it can be moved from place to place, in *Laing v. Overseers of Bishopswearmouth* (37 L. T. Rep. 781; 3 Q. B. Div. 299), or from the character of "the traversing crane weighing thirty tons carried on a pair of wrought iron girders bolted to the iron columns supporting the roof" mentioned in p. 302 of the same case, and apparently held by the court to be properly included as part of that which enhances the value of the hereditament. The question which is marked 2, and is set forth for our judgment in the two cases in regard to these cranes, is not, we may add, correctly put, because, as is stated by the court in the case I have just cited, referring to the earlier case of *Reg. v. Guest* (5 A. & E. 951), the treatment of machinery for rating purposes does not depend upon the consideration whether on the expiration of the lease the machinery will belong to the landlord or to the tenant; but understanding as we do that question to mean, Are these cranes to be included as enhancing the rateable value of the joint committee's undertaking or as tenants' fixtures, the value of which should be included as part of the tenants' capital in fitting up and working this place? we are of opinion, in answer to that question, that they must be treated as landlords' and not as tenants' fixtures. With regard to the second point raised by the appellant parishes—namely, the treatment of the receipts derived from the town warehouses, the circumstances of

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which are set forth in pars. 4, 5, and 6 of the case—we have come to the conclusion that the view of the quarter sessions as expressed in par. 13 of each case was right, and that question No. 1 ought to be answered in the affirmative. The town warehouses are wholly outside the rating areas of these parishes. They are separately assessable and, in fact, are separately assessed in the parishes in which they are respectively situated. They do not locally adjoin the property of the joint committee in the parishes. They are used in part for goods which have never passed through the docks. The only case in which there is any sort of connection, as we understand the facts, between the docks and any of the town warehouses is in the case of the Commercial-road warehouse, to which it appears some goods from the docks are brought, not by the joint committee, but by the London, Tilbury, and Southend Railway Company over a line of railway which belongs to and is worked by the railway company. It appears to us that the decision of the quarter sessions is right, and ought to be upheld. We now come to the consideration of Nos. 3, 4, 5, and 6, all of which are intended to raise points of cross-appeal. We cannot but wish that the facts deemed relevant to the issues which the answers to those questions are intended to settle had been stated in the case in a fuller and more instructive manner. The meagreness of the information relating to them has involved some obscurity as to the exact point and bearing of the questions which the court is asked to decide, and some difference in the opinion of the learned counsel who argued the case, and whose assistance we had, in regard to the two questions Nos. 3 and 4, and as to the contentions which those two questions are intended to represent. With regard to questions Nos. 3 and 4 we are asked to say “whether the entire net revenue is to be apportioned according to the gross receipts of each dock”; and, “if not, then whether the amount of tenants’ capital, maintenance, renewal, and taxes are to be calculated in each dock, and deducted when they arise.” It was agreed, as we understood, by counsel on both sides, that by the expression “each dock” was meant in both questions the dock property in each parish; but some discussion arose as to the meaning of the words “net revenue” in question No. 3. In the result, as we understood it, upon the learned counsel for the joint committee saying that his clients were quite willing that “net revenue” should be understood and taken for the purposes of this case to mean the net revenue as apportioned by the governing Act of Parliament, which is the London and St. Katharine’s and the East and West India Docks Act, s. 42, it was agreed between the parties that the third question should be answered in the affirmative. This being so, it is apparently by the alternative form of the question intended that the court should not be asked to answer No. 4, and it becomes unnecessary to do so. I will therefore only point out that in my view, if it were practical in the present case to apply it, the principle stated in No. 4—that is, the parochial principle—appears on the authority of the *Sculcoates Union v. Hull Dock Company* at Kingston-upon-Hull (71 L. T. Rep. 642; (1895) A. C. 136) to be the proper principle. It may be that in the present case, which is no doubt in some respects

very peculiar, as in the case of the docks system which the Court of Queen’s Bench had to consider in *Reg. v. Hull Dock Company* (18 Q. B. 325), there would be so much practical difficulty in applying this at all, or in applying it at any rate without working injustice, as Mr. Glen seemed to suggest might be worked here, that it cannot rightly be adhered to. Upon the face of these questions I do not see why an affirmative answer to question No. 4 might not have stood with the affirmative answer to No. 3; but, as the case is stated, we are not, I think, at liberty so to treat the relation of each alternative question. Question No. 5 asks us “whether the profits earned and rents received outside the Customs House fence are to be included in the receipts of the undertaking.” We may possibly, though I do not think so, have overlooked it, but I cannot find in the statement of facts in the case any information as to the position of the Customs House fence, and the court is not, I think, placed in a position to answer this question except in a hypothetical manner. If by the expression “outside the Customs House fence” is meant profits earned and rents received in respect of property situated outside the rating area with which these parishes are concerned distant from the docks and separately rateable and rated in other rating districts, we ought, in my view, to answer the question in accordance with the principle of our decision with regard to the town warehouses on the earlier question, and say that such profits and rents are not to be included. If, on the other hand, the property from which these rents and profits arise, though lying outside the Customs House fence, is within the real area or ambit of these two parishes, or, although lying outside that ambit, if it forms part of the dock undertaking and is so closely connected therewith that the docks and property from which these rents and profits arise form, as it were, part of one entire undertaking, which is a question of fact, this question, in my judgment, should be answered in the affirmative. The property described by Mr. Balfour Browne as intended to be referred to in this question and described by him as a bit of railway miles away, which the joint committee let to the Tilbury and Southend Railway, seems rather to bring the case within the first branch of the hypothesis. The last question is No. 6, and this, in my judgment, should be answered in the negative. It refers to the rent of the Commercial-road warehouses, which, under sect. 47 of the Act of Parliament, is to be paid by the East and West India Docks Company alone, and as we understand from counsel in the case, for there is no information that we can find in the case itself, applies to superannuation allowances paid separately by the dock companies who were amalgamated by the Act to old servants under agreements made prior to the amalgamation. With regard to the question of the Commercial-road warehouses, which form one of the town warehouses which have been already dealt with in the earlier part of this case on another point, I see no reason for including an allowance for those in respect of the burden which the paying of the rent lays upon one of the amalgamated companies. I have already held that the town warehouses in respect of net receipts ought not to be included in getting at the rateable value of the joint committee’s property

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within those parishes, and I see no reason to allow the rent as a deduction from the receipts as an expense in one of the companies which were amalgamated in order to form the joint committee. With regard to the superannuation allowances, I think that Mr. Glen rightly argued that superannuation allowances which were agreed upon before the passing of the Act for the constitution of the joint committee ought not to be taken into consideration when the thing to be calculated is the amount of the expenses of carrying on the undertaking at the present time. The learned counsel for the joint committee upon this sixth question, and in reference to his clients' claim for a deduction in respect of the rent of the Commercial-road warehouses, referred to *Altrincham Union v. Cheshire Lines Committee* (15 Q. B. Div. 597; 50 J. P. 85). I do not think that that decision has a real bearing upon the present case. There, by reason of an agreement between the two railway companies which received statutory sanction by embodiment in a private Act of Parliament, the hereditament to be rated was, to quote the language of Lord Esher (p. 602), "struck with sterility by the Act beyond the value of 2500L," and the question was whether that hereditament could be rated for more than the amount of 2500L. Here there is a peculiar burden, no doubt, upon the separate dock company contained in the enactment, but it is not a burden upon the joint committee whose property is in question. The case must therefore be remitted to the quarter sessions. I have been desired to say by my brother Darling that he concurs in this judgment.

Judgment accordingly.

Solicitors: *E. J. Marsh; Turner, Son, and Foley.*

Monday, Oct. 29, 1900.

(Before LAWRENCE and KENNEDY, JJ.)

CALLOW (app.) v. TILLSTONE (resp.). (a)

Public health—Unsound meat—Exposure of for sale—Aiding and abetting exposure—Negligence—Sufficiency for conviction—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 5—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 117.

Negligence on the part of a veterinary surgeon in making an examination and giving a certificate that meat which is in fact unsound is sound and healthy is not of itself sufficient to justify a conviction against the veterinary surgeon for aiding and abetting the exposing of the unsound meat for sale although such negligence in fact causes the exposure of the meat.

CASE stated by justices of the peace for the borough of Brighton.

At a petty sessions, held in Brighton on the 12th Feb. 1900, an information was preferred by F. Tillstone (the respondent), town clerk of Brighton, against one Lintott, a farmer in Sussex, and Callow (the appellant), a veterinary surgeon, for having on the 24th Oct. 1899 at Brighton unlawfully abetted the exposing for sale for food of man by one Grey, a butcher in Brighton, on the 27th Oct. 1899, of certain meat which was unsound and unfit for the food of man,

such meat being part of a carcase of beef sold on the 24th Oct. to Grey by Lintott. This information was heard and determined by the justices who convicted the defendants, Grey having been previously convicted of having exposed the meat for sale.

On the 27th Oct. the sanitary and food inspector for Brighton visited Grey's shop, and he found in the shop the meat in question exposed for sale. The whole, which formed part of the carcase of a heifer, was unsound and unfit for the food of man. The meat was seized, and on the following morning was brought before the justices, who condemned it and ordered it to be destroyed.

The facts were as follows:

On the morning of the 23rd Oct. this heifer, together with a steer, a black cow, a spot cow, and another animal, had been feeding in a field belonging to Lintott, and the animals belonged to him. The steer was found dead in a field by a servant of Lintott very early on that morning, and the black cow died shortly afterwards.

The appellant Callow, who was a veterinary surgeon, was called in to examine the carcasses. He opened them and found the stomach full of yew leaves, inflammation in the intestines, and other clear indications of yew poisoning.

Lintott asked if they had been bled and dressed would they have been fit for food, and Callow replied "No." Callow refused to certify them as fit for food and they were buried. The animals had died of poisoning by eating yew leaves.

At the time of Callow's visit to the farm the heifer (in respect of which these proceedings were taken) was apparently quite well and so lively that he was not able to examine her. He examined another cow and prescribed drinks for the heifer and this cow.

At four o'clock of the same day the heifer became very ill. She fell over on her side and was in a moribund condition, and ten minutes later Lintott killed her. She could not have lived more than a very short time, probably but a few minutes. The carcase was dressed and hung in the barn and the internal parts were buried. The spot cow was then visited in a stall and was found either dead or on the point of death, and Lintott stuck this cow also.

Late in the afternoon of the 24th, between four and five o'clock, Grey, who was, as Callow knew, a butcher, came to the farm, and Callow was then sent for to inspect the carcasses of the heifer and the spot cow.

When Callow arrived he asked Lintott what he had killed them for, and he replied, "because they might go like the others." He then asked if there was anything the matter with them, and Lintott replied "No."

Lintott, Grey, and Callow went into the barn and examined the carcasses hanging there. They then went and examined the intestines of the two animals which had been stuck—the heifer and the spot cow.

While Callow examined the heifer in the barn there was no light, but afterwards a stable lantern was brought. The carcase was hanging about 10ft. from the barn doors, but there was no window. He did not observe the patch of inflammation which existed where the spleen had been removed. He examined the stomach and found a little yew in it, but not so much as in the

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other animals. He made no inquiry of anyone as to the time at which the animals had been stuck, and thereupon promised to give Grey a certificate, and Grey bought the carcase from Lintott.

After the seizure of the meat Callow did in fact give Grey the following certificate:

24th Oct. 1899.—At the request of Mr. John Grey I have this day examined the carcase of a heifer belonging to Mr. Lintott, and found the animal in good condition, and the flesh and organs sound and healthy.—CHARLES CALLOW, M.R.C.V.S.

Callow admitted that he knew that yew acted as a strong narcotic poison and was very rapid in its action, and that he knew that the animal in question had eaten some yew. He admitted also that it was not possible to ascertain by examination of the carcase whether the animal had died of narcotic poison or whether narcotic poison was present in the carcase.

The investigation and examination by the defendant Callow was negligently performed. It was conducted partly when almost dark and partly with the dim light of a candle, and was perfunctory in character. He had not made a careful inspection, but relied on Lintott's statement. He had not cut into the carcase, and took no notice of the extravasation of blood and patch of inflammatory lymph which—in the judgment of the justices—must have existed prior to death, and might have been discovered by him had he exercised due care.

The justices therefore found that Callow had been guilty of negligence, and that such negligence had in fact caused the exposure of the unsound meat for sale, and that he thereby abetted Grey, and they convicted him (and Lintott), and imposed on him a penalty of 40s. and costs or fourteen days' imprisonment.

Various questions of law were raised by counsel on behalf of Callow on the hearing: First, that even admitting negligence that is not sufficient to justify the conviction; that there must be on the defendant's part carelessness amounting to wilfully shutting his eyes to facts within his knowledge; secondly, that the summons charged aiding and abetting on the 24th an offence alleged to have been committed on the 27th, and that this constitutes no offence in law.

The questions for the opinion of the court were (amongst others): (1) Was the negligence of which the justices found Callow had been guilty sufficient to support the conviction for aiding and abetting in the offence of exposing for sale meat unsound and unfit for food of man? (2) Could the defendant Callow be properly convicted of aiding and abetting on the 24th Oct. an offence stated in the summons to have been committed on the 27th Oct.? and (3) could the defendant Callow on the findings and facts as above stated be properly convicted of the offence with which he was charged?

If any of the questions should be answered in the negative the conviction was to be quashed; otherwise it was to stand.

Sect. 5 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) provides:

Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be

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liable to be proceeded against and convicted for the same, either together with the principal offender, or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender is or shall be by law liable, &c.

Sect. 117 of the Public Health Act 1875 (38 & 39 Vict. c. 55) deals with the offence of exposing unsound meat for sale.

Corrie Grant for the appellant.—The justices were wrong in convicting the appellant Callow. Under sect. 5 of the Summary Jurisdiction Act 1848 a person who aids and abets the commission of an offence may be punished as the principal offender; but a person cannot be convicted of a criminal offence merely because he is unskilful. The justices have merely found that Callow was negligent, but negligence is not of itself sufficient to justify a conviction under a criminal statute. There must be something more than negligence; there must be a criminal intent or knowingly counselling the commission of the offence. At the utmost the appellant was merely guilty of an error in judgment in giving the certificate, and even if that is to be taken as negligence it is not enough:

Benfield v. Simms, 78 L. T. Rep. 718; (1898) 2 Q. B. 641.

Bowall for the respondent.—The finding by the justices was not a finding that the appellant had been unskilful, or that he had given a wrong opinion in point of judgment or committed an error in judgment. It is a finding of negligence that it is more than a mere want of care. That there was gross carelessness on the part of the appellant cannot be doubted. There was something more than mere carelessness or unskilfulness; there was a wilful shutting of his eyes to the whole suspicious circumstances of the case. No *mens rea* or criminal intent is necessary to convict a person of an offence under sect. 117 of the Public Health Act 1875:

Blaker v. Tillstone, 70 L. T. Rep. 31; (1894) 1 Q. B. 345.

LAWRENCE, J.—In this case we have no doubt that the justices came to a wrong conclusion in finding that the appellant Callow was guilty of the offence charged against him. What they had found him guilty of was only negligence, and the question now arises upon that finding whether Callow, who was the veterinary surgeon called in in the case, can be found guilty of aiding and abetting the exposing for sale of this unsound meat, when all that the justices find against him is negligence. The justices found that Callow had been guilty of negligence and thereby abetted Grey, and upon that they convicted him. We think that is not sufficient, and the case of *Benfield v. Simms* (*ubi sup.*) is very strong to show that it is not sufficient. In that case, where there was a conviction, the defendant, a veterinary surgeon, had—according to the finding of the justices—knowingly counselled the owner of a horse to cause the act of cruelty in question and Channell, J. says at the end of his judgment that the decision of the court in that case “afforded no ground whatever for supposing that a veterinary surgeon who gives a wrong opinion and commits an error in judgment is liable to be convicted of cruelty if the effect of his opinion being followed is that the act of cruelty does in

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fact result." I think, therefore, the appeal must be allowed.

KENNEDY, J.—I am entirely of the same opinion. It seems to me that all that is found by the justices against the appellant is negligence, and to my mind a person cannot be convicted of aiding and abetting the commission of this offence upon such a finding. In this case the appellant gave his certificate, one is bound to assume, quite honestly, and therefore it seems to me he ought not to be convicted under sect. 5 of aiding and abetting the exposing of the meat for sale.

Appeal allowed. Conviction quashed.

Solicitors for the appellant, *Crowders, Visard, and Oldham*, for *Stevens, Son, and Maynard*, Brighton.

Solicitors for the respondent, *Bozall and Bozall*, for *H. Talbot*, Brighton.

Tuesday, Oct. 30, 1900.

(Before LAWANCE and KENNEDY, JJ.)

MAYOR, &C., OF SOUTHEND-ON-SEA (apps.) v. WHITE (resp.). (a)

Bating—General district rate—Shop closed during winter months—Stock removed—Fixtures and articles left in shop—Occupation—Liability to rate—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 2.

The respondent held certain premises under a lease or licence for a term of years, and had entered into possession and used the premises as a shop. As the business was remunerative only during the summer, the respondent at the end of the summer locked up and left the shop with the intention of not reopening the same for business until the beginning of the following summer, and during this interval he had not in fact returned to the shop and no one lived therein. Before he left he removed all his stock, but left in the premises certain fixtures and other articles. He was entitled under his lease to occupy the premises and carry on his business continuously throughout the year except for certain hours during the night. A general district rate was made for the half-year during the whole of which the shop was so closed in the winter. The respondent having objected to pay the rate made in respect of the shop on the ground that in law the premises were unoccupied by him during the time the shop was closed:

Held, that the respondent was in occupation of the premises during the time they were so closed, and was liable to pay the half-year's rate accordingly.

CASE stated by justices of the peace for the borough of Southend-on-Sea.

The respondent appeared before a court of summary jurisdiction on the 27th March 1900 on the complaint of the appellants that he (the respondent), being a person duly rated and assessed by the general district rate made for the borough on the 9th Nov. 1899 for the half-year ending the 31st March 1900, at the rate of 1s. 6d. in the pound, in respect of certain premises in the borough, had failed to pay the rate.

The following were the facts as proved or admitted:

The rate was duly made, and the respondent was rated thereby in respect of premises which were shops, known as Nos. 2 and 3, Pier Hill-buildings.

The rate was made on the 9th Nov. 1899 for the half-year ending the 31st March 1900, at 1s. 6d. in the pound on an annual value of 136l., amounting to 10l. 4s., and the respondent had not paid the rate.

The respondent held the premises by virtue of a lease or licence granted to him by the appellants as owners thereof, dated the 8th March 1899, and by this lease or licence the corporation (the appellants) gave leave and licence to the licensee to use the premises in question between the hours of 8 a.m. and 11.20 p.m. on every day from the 25th March 1899 to the 25th March 1913, the premises being described as two shops forming part of certain buildings belonging to the corporation.

The licence was to be subject to the terms and conditions of the agreement, and the licensee was to pay to the corporation by way of rent on the 30th June and 15th Aug. in each year the sum of 100l.

The licensee was to use the premises for the carrying on of the business of a fancy bazaar, and none of the rooms or premises were to be used for any other purpose whatsoever except with the previous consent in writing of the corporation.

The premises were not to be used for the purpose of a dwelling-house, and no person was to occupy the same between 11.30 p.m. and 6 a.m. the next morning, and no person was to be allowed to sleep on the premises at night.

The licensee was not to assign or underlet without the consent of the corporation, and was to keep the premises in good and substantial repair and condition, and on the determination of his tenancy deliver them up to the corporation in the same good repair, and was to have the liberty of keeping his premises open during the aforesaid hours for business all the year round except Sundays, but if the premises should be closed during the summer season for a longer consecutive period than one month then the corporation should be at liberty to determine the lease.

After the respondent had entered into possession he had with the consent of the appellants turned the two shops into one shop. There was no living accommodation, lavatory, or water supply on the premises.

The respondent had carried on business there under the name of the "Universal Bazaar Company," and had used the premises as a shop for the sale of goods at prices not exceeding 6½d. up to the 25th Sept. 1899, when he locked them up and left them.

For the purposes of such business the respondent had caused to be indicated on a signboard securely attached to the premises the words "Any article 6½d.," and had also affixed to the windows and exterior parts of the premises the words "The Universal Bazaar Company. Nothing over 6½d.," all of which remained attached and affixed for the period during which the rate was current.

The respondent's business could not be carried on lucratively on the premises except in the

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summer months, and the respondent on the 25th Sept. 1899, and before the rate in question was made, locked up and left the premises with the *bona fide* intention of not reopening the same for business until the month of May 1900 and after the expiration of the half-year for which the rate was made. Up to the date of the hearing of the summons neither the respondent nor any person on his behalf had in fact returned to the premises, and no one ever lived on the premises.

Before the respondent left the premises in Sept. 1899 he had removed all his stock therefrom, but had left on the premises some mirrors and mirrored shelves which he had on the premises for the purpose of displaying his stock, and some other articles, such as three movable tables, three tiers of mirrored shelves, a sweeping brush, pail, a small trolley, and a shop ladder.

By the lease or licence the respondent was entitled to occupy the premises continuously throughout the whole term mentioned therein if so disposed and to carry on business there, nor was there anything in the state or condition in which the premises were left to prevent him so doing. He would require all the tables, mirrored shelves, and other articles left by him for carrying on his business, but he could not utilise the premises for his business until he had moved in and unpacked his stock.

The respondent contended that under the above circumstances the premises had in law ceased to be occupied by him after the 25th Sept. 1899 and throughout the period during which the rate was current and until he again brought stock on to the premises and again carried on business thereon, and that therefore he was not liable to pay the rate.

The appellants contended that the respondent was in occupation of the premises during the period for which the rate was made and was therefore liable to be rated, and was not within the exemption contained in sect. 211, subsect. 2, of the Public Health Act 1875 and was liable to pay the rate.

The justices, having found the above facts, held that in law the respondent was not in occupation of the premises during the period, and that he was not liable to pay the rate or any part thereof, and they dismissed the complaint.

The question for the court was, whether upon the facts above set out the justices were right in law in holding that the respondent did not occupy the premises or any part thereof during the currency of the rate of the 9th Nov. 1899.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 211. With respect to the assessment and levying of general district rates under this Act the following provisions shall have effect; namely, (1) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property, &c. (2) If at the time of making any general district rate any premises in respect of which the rate may be made are unoccupied, such premises shall be included in the rate, but the rate shall not be charged on any person in respect of the same while they continue to be unoccupied, &c.

Picksford, Q.C. (Herbert Smith with him) for the appellants.—The question raised is as to the rating of this lock-up shop during the time when the business is not going on in the shop. The

justices have held as a matter of law that during the winter months when the respondent is not selling goods in this shop there is no occupation, and that he is therefore not liable to pay this rate. The justices were wrong in so holding. Though the respondent took away his stock, he left behind the fittings in the shop, his advertisements, and various other articles, but the justices held that the premises were unoccupied, and were therefore exempt under sect. 211, subsect. 2, of the public Health Act 1875. In *Willing v. St. Pancras Assessment Committee* (37 L. T. Rep. 126; 2 Q. B. Div. 581) it was held that a person who affixes advertisements to hoardings was not an occupier. That case differs from the present, as there the person sought to be rated merely got a licence to place advertisements on hoardings generally belonging to someone else. What is given to the respondent in this case is an exclusive occupation of these premises for the whole year, and, although in the agreement it is called a licence, it is one which gives him the exclusive occupation for the whole year, and if he is in occupation during the summer months when he is carrying on his business—which is admitted—he is equally in occupation during the time the shop was shut up. He can use the premises at all times, even after eleven o'clock at night, except that no one can sleep there, and at any moment he could come back and resume his business and open his shop. The case is analogous to a person going away for a few months and closing up his house.

Macmorran, Q.C. (J. A. Hawke with him) for the respondent.—The justices were right. The question is not one of law at all; it is a question of fact and of degree, and as such the justices have dealt with it, and they have found that the respondent was not in occupation of the premises. A distinction has been made between an actual and a beneficial occupation, and the question of actual occupation is to be decided by the justices by whom the rate is to be enforced. The case is not at all analogous to the case of a person going away from his house for a short time. Such a person leaves his house in a position in which he can resume occupation at any time. Applying the principle applicable in such cases and looking at the facts in this case substantially there was no actual occupation by the respondent. He had left the shop and had removed the whole of his stock, and had left behind merely a few small things which make no difference. The shop was an empty shop, and, being an empty shop, was not rateable. It was in the contemplation of the parties that the shop should be used only in the summer months. The case of *Willing v. St. Pancras Assessment Committee* (*ubi sup.*) is in favour of the respondent. Lush, J. there says: "Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, . . . but as long as he leaves it vacant he is not rateable for it as an occupier." The same principle appears in *Reg. v. Overseers of Malden* (L. Rep. 4 Q. B. 326) and in *Smith v. Assessment Committee of New Forest Union* (61 L. T. Rep. 870). The rights of the tenant in this case were distinctly limited so that he could not use the place at certain times, and the distinction in cases where the rights of the tenant are limited is well stated by Oake, J. in *Mayor of Southport v. Ormskirk Union Assess-*

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ment Committee (1893) 2 Q. B. 468; affirmed 69 L. T. Rep. 852; (1894) 1 Q. B. 196).

Pickford, Q.C., in reply, was stopped.

LAWRENCE, J.—In this case I think the magistrates came to a wrong conclusion. The point has been taken in the first instance that there was no tenancy at all under this agreement, but merely a licence. On looking at the agreement, a lease or licence was granted for fourteen years at the yearly rent of 200*l.*, and on the terms of that agreement these premises were handed over to the respondent. He has to pay 100*l.* in June and in August, and he has a full right to carry on his business there, but he is not to carry it on after eleven o'clock at night. As to that point, I think there was a tenancy. The question, then, is whether there was an occupation during the period in question—namely, the winter months when the shop was closed. When the summer ended, the goods were removed from this shop, which was only a lock-up shop, but certain things were left behind. All that was necessary to carry on the business—with the exception of the stock itself—was kept on the premises, and by the terms of the agreement he was bound to keep the place in good repair and hand it over in good repair. I think, therefore, that the respondent was in occupation for the six months in question, and that this appeal must be allowed.

KENNEDY, J.—I am of the same opinion. It seems to me that the justices have held as a matter of law that the respondent did not occupy the premises during the time when the shop was locked up. When we look at the facts stated in the case we find that the respondent left on the premises what was necessary for the fitting up of the place, and also some other things; but he removed his stock, and because he did so the magistrates have held really as a matter of law that the premises ought to be treated as unoccupied premises unless they are stocked, as they say that the respondent "could not utilise the premises for his business purposes until he had moved in and unpacked his stock." I think they were clearly wrong, and that there is no authority for that proposition. Putting it as a question of law, I think they were wrong. With regard to the other point, although in many cases it is not easy to say whether a thing is a licence or a tenancy, I think in this case there was a tenancy, and that the justices were clearly wrong in holding that the respondent was not liable to this rate.

Appeal allowed. Case remitted to the justices.

Solicitors for the appellants, J. E. and H. Scott, for W. H. Snow, Southend.

Solicitors for the respondent, Todd, Dennes, and Lamb.

Oct. 30 and 31, 1900.

(Before LAWRENCE and KENNEDY, JJ.)

JONES (app.) v. DAVIES (resp.). (a)

Bastardy—Wife living with husband—"Single woman"—Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65), s. 3.

A married woman living with her husband cannot lay an information and obtain an order against

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

the putative father of her bastard child under sect. 3 of the Bastardy Laws Amendment Act 1872.

CASE stated by justices upon the hearing of an information preferred by the appellant against the respondent under sect. 3 of the Bastardy Laws Amendment Act 1872.

Upon hearing it was proved that the appellant at the time of the birth of the child mentioned in the information and for some years previously was a married woman, the wife of Benjamin Jones (hereinafter called the husband), who is still alive.

The appellant deposed that the respondent was the father of the child, which was born on the 3rd Dec. 1899.

Some evidence (other than the appellant's or her husband's evidence) was called to show that the husband, who was a seafaring man, was from home from the 23rd Feb. 1899 to the 6th July 1899.

It was proved that the husband became aware of the appellant's pregnancy about four months after conception, and, notwithstanding that fact, he returned to his wife, who had throughout remained at his home, in July 1899, and he stayed thereat for about three weeks, and again went to sea.

He returned, however, in Sept. 1899 to his wife, and remained for some time, and again left to go to sea.

On each of these occasions the husband and wife lived and cohabited together.

The next time the husband returned to his wife at his home was on the 27th Jan. 1900 (which was after the birth of the child), and continued to cohabit as husband and wife, though the husband alleged he did not sleep in the same house with the appellant during this visit.

On the 31st Jan. 1900, while the husband and wife so cohabited together as above mentioned, the appellant, accompanied by her husband, laid an information in which she described herself as a "single woman," and applied to a justice for a summons under sect. 3 of the Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) to be served on respondent as putative father of the child, and such summons was issued and served.

Subsequently on the 7th Feb. 1900, while the husband and wife cohabited together as husband and wife, as mentioned above, the appellant accompanied by her husband, attended upon the solicitor who appeared for the appellant at the hearing. On that day—namely, the 7th Feb. last—she, after being advised by her solicitor that it was necessary for her and her husband to separate, then left the office, and immediately afterwards and on the same day she laid an information in which she described herself as "a single woman," and applied for another summons under sect. 3 of the before-mentioned Act to be served on the respondent as putative father of the said child, and such summons was duly issued and served.

At the hearing on the 28th Feb. 1900 the first above-mentioned summons—namely, the one issued on the 31st Jan. 1900—was withdrawn, and the matter proceeded on the second summons issued on the 7th Feb. 1900. The solicitor who appeared for the appellant at the hearing admitted that he had advised the appellant that she could not obtain an order upon the respondent unless

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the appellant and her husband lived apart, and that thereupon the appellant and her husband, it was said in evidence, separated, the appellant returning to her husband's home at a village called Aberarth, and the husband going to the appellant's father's house, at New Quay, both in the county of Cardigan, and about seven miles apart.

The husband and wife alleged that from the time the appellant and her husband said they had separated on the 7th Feb. 1900 to the 28th Feb. they had not again seen each other, but on the latter date they both attended the hearing of the application, and the husband at such hearing sat by and instructed the solicitor who appeared for the appellant. Afterwards the wife went to the union workhouse at Aberayon, and the husband returned to his home at Aberarth.

The husband in his evidence admitted that on the occasion when the second summons was issued, namely, the 7th Feb. 1900, he was told by the appellant's solicitor that he (the husband) and his wife should live apart, and that he thereafter lived apart for the purpose of the affiliation proceedings. The following question was put to the husband by the chairman of the justices: "It has been stated here that you mean to live with your wife after these proceedings are over." The husband in reply stated: "Yes, I think I will; that is according as she behaves, and she gets her rights," and immediately after he added, "No, I don't think I will."

It was contended on behalf of the respondent that the appellant was not a single woman within the meaning of sect. 3 of 35 & 36 Vict. c. 65, and that an order to affiliate the child could not under the circumstances be made on her application.

The justices found as facts (1) that the husband became aware of the pregnancy of his wife in about four months after conception; (2) that with such knowledge he lived and cohabited with her for lengthened periods in July and Sept. 1899 and Jan. and Feb. 1900; (3) that the summons applied for and issued on the 31st Jan. 1900 was withdrawn because at the time the husband and wife lived and cohabited together; (4) that the alleged separation on the 7th Feb. was not a *bona fide* separation, but colourable and for the purpose of the proceedings, and that the parties intended to and did cohabit together.

They considered that the words "single woman" did not apply to a married woman living with her husband at the time the information was laid, the summons issued, and the application made under the circumstances before stated.

They therefore dismissed the information without going into further evidence as to the respondent being the father of the child or deciding upon the sufficiency of the evidence tendered of non-access, on the ground that the appellant was not entitled to prefer the information to issue the summons, or to obtain an order thereon, because she was a married woman living with and cohabiting with her husband at the time the information was preferred, the summons issued, and the application made.

S. T. Evans for the appellant.—The point here is whether a married woman living with her husband can or cannot obtain a bastardy order, if her husband can prove that the child is a bastard. The justices decided on a misapprehension of two

cases that were cited to them. The first one was *Stacey v. Lintell* (40 L. T. Rep. 553; 4 Q. B. Div. 291) which decided that no application for a bastardy order could be made when the mother married since the birth of the child and at the time of the application was living with her husband. In *Tozer v. Lake* (41 L. T. Rep. 280; 4 Q. B. Div. 322) the facts were the same, except that the summons against the putative father was issued before the marriage, and could not be served because of his default. But the circumstances here are different. What is held in both those cases is that when a woman has an illegitimate child and marries afterwards she cannot get a bastardy order against the putative father. By 4 & 5 Will. 4, c. 76, a man marrying a woman is made liable to maintain a child, but there is no liability to maintain a child born to his wife during his marriage in adulterous intercourse. By sect. 3 of the Bastardy Act 1872 (35 & 36 Vict. c. 65) "any single woman" may make an application for a summons to be served on the man alleged by her to be the father of the child. That section is substantially the same as sect. 2 of 7 & 8 Vict. c. 101, which it has replaced. In 6 Geo. 2, c. 31, the words are "if any single woman," therefore the cases under that Act are authorities here. The case that governs the present is *Rees v. Luffe* (8 East, 193). The child being a bastard, the question is, Who will have to support it? Lord Ellenborough says at p. 204: "The second exception which arises upon the wording of the statutes of Elizabeth and George II. in effect resolves itself into the third. For when the question is whether this were a child born out of lawful matrimony—that is, out of the limits and rights belonging to that state—it is the same in substance as the question whether it be a bastard. It is so for the general purposes of the Act. The matrimony does not cover the child if it be in other respects (according to the rule of law applicable to the subject) a bastard, and so it seems that a child born by adulterous intercourse is as much within the provision of the Act of Geo. 2 as one born of a single woman." He also referred to

Reg. v. Collingwood, 12 Q. B. 68.

The proper test is that laid down in *Peatfield v. Childs* (63 J. P. 117) as to who has to support the child. The point to be considered is whether there would be two persons liable to support the child. That is the reason why we have 4 & 5 Will. 4. The justices here refused to go into the case at all, because they said that the appellant was not a single woman for the purposes of these Acts. For the purpose of this case it must be taken that the child was a bastard, although that point was not gone into at the hearing. There are no cases against me, except those under the statute of Will. 4. These decide that where a man marries, and the woman gives birth to an illegitimate child, that the man is bound to support it. He also referred to:

Aylesford Peerage case, 11 App. Cas. 1;

Burnaby v. Baillie, 61 L. T. Rep. 634; 42 Ch. Div. 282.

Bryn Roberts for the respondent.—The cases of *Stacey v. Lintell* (sup.) and *Tozer v. Lake* (sup.) do not turn on the ground of estoppel. The only question there discussed was whether a married woman living with her husband could be con-

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sidered a single woman. The cases show that a married woman living with her husband cannot be considered as a single woman. He referred to

Hardy v. Atherton, 44 L. T. Rep. 776; 7 Q. B. Div. 264.

[KENNEDY, J.—If adultery has been committed and there is a child, and afterwards the husband goes on living with his wife, would he be bound to support such child?] I submit, yes. He referred to the judgment of Lord Ellenborough in *Rez v. Luffe* (8 East, 193). [KENNEDY, J. referred to *Gardner v. Gardner* (2 App. Cas. 723).] After the change in the law by 7 & 8 Vict. c. 101 *Rez v. Luffe* (sup.) is no authority. In no case has it been held that a woman was single when living with her husband. In *Reg. v. Collingwood* (12 Q. B. 681) the husband and wife were not living together. *Stacey v. Lintell* (40 L. T. Rep. 553; 4 Q. B. Div. 291) expressly gives as a ground that the husband and wife were living together. That is laid down in the judgment of Mellor, J.

Evans in reply.—*Rez v. Luffe* is treated as an authority in *Reg. v. Collingwood*. [KENNEDY, J. referred to the judgment of Lord Campbell, C.J. in *Reg. v. Pilkington*.] If the status remains the same—i.e., that of a married woman—if the child is born in wedlock the same principle applies whether the husband and wife are living together or not. He referred to

Bosville v. Attorney-General, 57 L. T. Rep. 588; 12 P. Div. 177.

LAWRENCE, J.—In this case I think that the magistrates were right, and on this short ground. In no case that has been cited to us has it been shown that, in fact, a married woman was looked upon as a single woman when living with her husband. No doubt a single woman was within the Bastardy Acts. A difficulty arose with regard to married women, but the courts got over it by holding that a woman living apart from her husband might be considered as a single woman within these Acts. But in no case has a woman living with her husband been considered a single woman. In *Stacey v. Lintell* (40 L. T. Rep. 553; 4 Q. B. Div. 291) Mellor, J. says: "It is unnecessary for us to discuss the cases that have been decided upon the construction of the earlier bastardy statutes, that the term 'single woman' is not restricted to a woman who has never married, for in the present case the mother at the time of the application was not living separate from her husband as in those cases, so that the ground on which they proceeded—that there would otherwise be no provision for the child—is removed from our consideration." Lush, J. also says: "It is another question whether the applicant was a 'single woman' qualified to apply for the order, and I think that having married and living with her husband she cannot be considered as a single woman within any construction that has been put upon the term." The ground, therefore, of my decision is that no case has been cited showing a married woman living with her husband has been considered as a single woman. As a matter of fact, the case that I have cited is a direct authority to the contrary.

KENNEDY, J.—This case raises a question of some difficulty. The point is whether, when the justices have found conclusively that a husband

and wife are living together, the woman can under those circumstances obtain a bastardy order against another man who she alleges is the father of her child, if it is proved that the child was in fact the child of such person. The section of the Act in terms relates to a single woman, and *prima facie* a married woman would not be able to maintain an application under the section, because she was not within that category. But there are a number of authorities by which we are bound, that "single woman" may apply to a married woman, and that there may be a successful application by a married woman within the section, being a "single woman" in the eye of the law. But we must not deviate from plain words, and create exception upon exception. However, under certain circumstances, the words "single woman" apply to married women. In *Stacey v. Lintell* (40 L. T. Rep. 553; 4 Q. B. Div. 291), as far as that case goes, the woman was not separate from her husband when the application was made. The woman might have said that she had forfeited her right to her husband's protection. With regard to the liability to maintain an adulterous wife, there is no distinction between the parish and an individual applying: (see Littledale, J. in *Rez v. Flintan*, 1 B. & A. 227). That is as to maintenance. *Rez v. Luffe* (8 East. 193; 9 R. R. 406) was an application by the poor law authorities, and the woman was in the position of being separate from her husband, although married. *Reg. v. Collingwood* (12 Q. B. 681) was also a case where an order was again obtained while the married woman was living apart from her husband. The order said that 1s. 6d. per week shall be paid by the putative father until "... the said George Rance shall again live and cohabit with his said wife." The fact that they were living separate was relied on. Lord Denman, C.J., in giving judgment, says: "The single question is whether a married woman, becoming the mother of an illegitimate child, is within the Act 7 & 8 Vict. c. 101, which authorises the justices to make an order in bastardy. The language of the statute applies only to single women; so did the language of 6 Geo. 2, c. 31, yet Lord Ellenborough and the whole court in *Rez v. Luffe* held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose." The words "under the existing circumstances," as in this case, mean when away from her husband. The next case to consider is *Ex parte Grimes* (22 L. J. 153 M. C.). There it is stated: "At the time of the making of this order Elizabeth Grimes, in fact, was a married woman, but her husband then was, and had been for several years before, absent from her, and residing as a convict under sentence of transportation in Van Diemen's Land." The husband came back, and the justices put an end to the order, taking the view that the putative father was discharged from the order by reason of the husband of the mother having returned and cohabited with her. The court held that this was not so, and Lord Campbell, C.J., in dealing with the cases of *Rez v. Luffe* and *Reg. v. Collingwood*, said: "I think that decision" (*Reg. v. Collingwood*) "is quite right, for the reason given in *Rez v. Luffe*, that in contemplation of law a married woman living separate from her husband

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may be within the meaning of the Act, which was passed for the purpose of providing for the support of the child, which, according to the present argument, would otherwise be altogether unprovided for." It is suggested that the meaning of single woman should be applied at the time of conception. The authorities are against it, and Mellor, J. says that the time is the time of the application. It seems to me that there is no authority that a married woman living with her husband can be treated as a single woman for the purposes of the Bastardy Acts. I do not think that we ought to extend the decisions that have been given in any way. Upon the whole, in my opinion, the true view is that the justices were right.

Appeal dismissed.

Solicitors: J. T. Lewis, for D. Pennant Jones, Aberayron; Owen, Aberystwith.

Oct. 26 and Nov. 6, 1900.

(Before LAWRENCE AND KENNEDY, JJ.)

CAMERON (app.) v. WIGGINS (resp.). (a)

Merchandise marks—False trade description—Letters inserted in invoice of goods—Verbal representation as to their meaning—Merchandise Marks Act 1887 (50 & 51 Vict. c. 28), s. 3.

When on the sale of goods there is a figure, word, or mark applied to them which is devoid of or ambiguous in meaning, to constitute that figure, word, or mark a trade description of the goods within sect. 3 of the Merchandise Marks Act 1887 it is not necessary to show that by the custom of the trade it indicates a trade description, if it can be shown that at the sale it was inserted by the seller for the express purpose of indicating a trade description within sect. 3.

THIS was an appeal against a decision given by the Blackpool justices under the Merchandise Marks Act 1887. The respondent was summoned for unlawfully selling to the appellant a leg of mutton as to which a false trade description—namely, "New Zealand mutton"—was applied contrary to the provisions of that Act. The justices dismissed the summons without requiring the respondent to call evidence.

The facts as proved by the prosecution were as follows:—

On the 16th March 1900 the appellant saw the respondent at his (respondent's) shop at Blackpool, and produced to him a handbill. This handbill was headed, "Canterbury Meat Stores," and the material parts of it were:

Wiggins and Co. beg to inform the inhabitants of North Shore and district that they are selling their best chilled beef and pork and Canterbury (New Zealand) mutton and lamb of the very best qualities at the following low prices . . . legs of mutton 5d. and 5½d. per lb. . . . Try our Canterbury (New Zealand) lamb: Legs, 5½d. per lb.

Several exactly similar handbills were in the shop of the respondent.

The appellant said to the respondent, producing and showing him the handbill at the same time: "I understand you are selling New Zealand mutton. I am desirous of procuring a leg of

mutton. My wife objects to River Plate meat, and I want New Zealand mutton. Do you supply it?" To this the respondent answered: "I do." Appellant then said: "Have you got a fresh leg you can supply me with—one that will keep for the end of the week?" The respondent replied: "I have one in this morning; it is perfectly fresh."

Upon the request of the appellant the respondent produced to him a leg of mutton and weighed it. It was 7lb. The appellant then said to the respondent: "Please give me an invoice for it." The respondent handed to the appellant an invoice, of which a copy is as follows, save that the letters "N.M." were not then written thereon: "7lb. leg of mutton at 5½d."

The appellant then said to the respondent: "You have charged me 5½d., I see" (at the same time pointing to the handbill); "you have two charges, 5d. and 5½d." The respondent replied: "Sometimes at the end of the week I have River Plate meat in; I charge 5d. for it, and 5½d. for New Zealand legs." The appellant then said to the respondent: "Then I understand this is New Zealand mutton?" To this the respondent replied: "Yes." The appellant then said to the respondent: "Do you mind marking in the invoice that this is New Zealand meat, so that I can show my wife that I have bought New Zealand mutton at 5½d., and that I have not been supplied with 5d. meat at the higher price?" The respondent then, with the intent, as the justices found, to warrant to the appellant that the mutton was New Zealand mutton, wrote upon such invoice the letters "N.M."

No evidence was offered on behalf of the appellant that the letters "N.M." had any particular indication in the meat trade.

The justices found as a fact that the mutton sold by the respondent to the appellant was not New Zealand mutton.

At the hearing before the justices it was contended on behalf of the appellant that the giving of the invoice by the respondent to the appellant with the letters "N.M." written by him thereon with the intention of the conversation and the production of the handbill at the time of sale by the respondent with the circumstances above set forth and the references thereunto made constituted an application of a false trade description to the mutton within the meaning of the Merchandise Marks Act, and that the mutton was sold with such description.

For the respondent it was contended (1) that an oral statement did not constitute a false description within the meaning of the Merchandise Marks Act; (2) that, the letters "N.M." being put on the invoice at the request of the appellant himself, no fraud was intended or committed by the respondent in putting them in, and that therefore no offence was committed; (3) that the said letters did not constitute a trade description within the meaning of the Merchandise Marks Act by reason of its not being established that according to the custom of the trade they were commonly taken to be an indication of the place or country in which the mutton was produced; and that the facts before stated did not establish that the trade description "New Zealand" in the handbill was applied by the respondent to the said mutton within the meaning of the Act.

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The justices were of opinion that the letters "N.M." on the invoice did not constitute a trade description within the meaning of the Act by reason that, although they were written thereupon by the respondent with the intent to warrant to appellant that the mutton which was sold to him and to which the invoice referred was New Zealand mutton, it was not established that according to the custom of the trade such letters were commonly taken to be an indication of the place or country in which the mutton was produced; and, secondly, that the facts above found did not as a matter of law amount to the application of a false trade description "New Zealand mutton" in the handbill to the mutton so sold by the respondent within the meaning of the Act.

The questions submitted for the decision of the court were: (1) Do the letters "N.M." in the invoice constitute a false trade description? (2) Do the facts constitute the application of a false trade description? (3) Do they constitute the application by the respondent of a false trade description within the meaning of the Act?

By the Merchandise Marks Act 1887 (50 & 51 Vict. c. 28):

Sect. 3. The expression "trade description" means any description, statement, or other indication, direct or indirect . . . (b) as to the place or country in which any goods were made or produced . . . and the use of any figure, word, or mark which according to the custom of the trade is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within the meaning of this Act.

Horace Ivory for the appellant.—The justices have been misled by the latter part of sect. 3. They have assumed that it is a qualification of the whole preceding parts. This is a mistake; it is merely an addition to them. The chief enactment is the general one that "the expression 'trade description' means any description, statement, or other indication, direct or indirect." Then follows the addition that the use of a figure, word, or mark under certain circumstances shall be deemed a trade description for the purposes of the Act. In this case the letters "N.M." are an indication—indirect perhaps—that the mutton was New Zealand mutton. The evidence shows that that was the precise meaning that was intended to be indicated by them. [KENNEDY, J.—It seems to me a difficulty may arise in that you are really making the case extend to other cases in which something which is intelligible as a trade description is to be implied by some evidence of oral statements made at the time. That is the very thing, or one of the very things, intended to be obviated—i.e., questions as to disputed evidence regarding what took place at the sale. If you have got an intelligible written description applied to the thing sold—such, for instance, as "New Zealand Mutton"—you want no more. But if the so-called description is simply a mark or word unintelligible in itself, then the only way in which it may be interpreted is by evidence that by the custom of the trade it means a certain kind of article. This Act was not intended to cover all cases of selling goods under false characters. It was intended merely to apply to a certain class of such frauds—where a written description or mark by trade custom indicating a description is applied to the goods.] Is not your Lordship overlooking the words "indication direct or indirect"?

Putting an intelligible description on the goods would of course be a direct indication. My contention is that putting a word or mark on them in any particular case and explaining to the buyer that it means that the goods are of a certain description is an indirect indication that they are of this description. That, I think, is the principle of *Coppen v. Moore* (78 L. T. Rep. 520; (1898) 2 Q. B. 300). There the seller, at the purchaser's request, put into the invoice of the goods the word "Scotch." The goods were a ham, and the ham was sold as a Scotch ham. Could it have made any difference if, instead of putting "Scotch," he had put "S."? I contend that, provided there is any word or mark put upon the goods and it is put upon them with the intention of indicating their character, then that amounts to an indirect indication within the Act of their character. [LAWRENCE, J.—Suppose in this case "Australian" had been put on the invoice, the mutton being in fact Australian, and the seller had explained that "Australian" meant that it really was New Zealand, how would your argument stand?] That is a more difficult case, but I would not hesitate to contend that under such circumstances the word "Australian" constituted a false trade description of the mutton. [KENNEDY, J.—This may be said in favour of your argument, that the last words of the section may mean this, that where a word or mark is upon the thing sold, once you show that by the custom of trade it means a certain thing, then it is without more to be "deemed a trade description," but if it does not by the custom of the trade mean a certain thing, then you must give express evidence of what it actually was intended to mean in this particular case.] That is my contention. If there had been no conversation here, then we should have had to produce evidence that "N.M." by the custom of the trade means New Zealand mutton, and if we could not do so we must have failed. But we are not therefore precluded from proving that "N.M.," whether it has or has not a meaning by the custom of the trade, was in this case expressly inserted for the purpose of indicating that the mutton was New Zealand mutton. [KENNEDY, J.—Was the "N.M." inserted in the invoice after the money had been paid?] There is no statement in the case to that effect, and I think, seeing that the term used is invoice, not receipt, the fair inference is that it was not, and I am instructed that in fact it was not paid before the invoice was finally handed to the appellant. [KENNEDY, J.—What I am trying to put to you is a possible distinction between this case of *Coppen v. Moore* (sup.) and your case. In that case no money had passed. The transaction was still inchoate. The judge in fact says that the ground on which he finds is that the sale was not complete when the representation that the ham was Scotch was made. If in your case the sale was complete before the description was inserted in the invoice then there could be no sale under a false trade description within the Act.] The facts in *Coppen v. Moore* (sup.) seem to me to be identical with those in this case, and in fact the money here was not paid. [KENNEDY, J.—I do not think the point arises. The magistrates do not say that the respondent contended that the sale was complete before the invoice was altered, and there is no finding that it was.] Then the whole point is that the seller puts "N.M." on

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the goods, and says that means "New Zealand mutton." Surely, then, "N.M." is an indirect indication of their place of origin. [KENNEDY, J.—It really comes to this: The indication of the letters written is susceptible of another meaning; but it becomes indicative of a particular meaning by reason of the words spoken.] Precisely.

The respondent did not appear.

Cur. adv. vult.

Nov. 3.—LAWRENCE, J.—This is a case stated by the justices of the borough of Blackpool, and raises a question under the Merchandise Marks Act 1887 under the following circumstances: [His Lordship stated the facts.] The question is whether what the defendant did and said amounts to a description under the Merchandise Marks Act. Now, the definition of a trade mark in the Merchandise Marks Act is contained in sect. 3. The expression "trade mark" means a trade mark registered, and so forth. The expression "trade description" means any description, statement, or other indication, direct or indirect, of the number, weight, &c., of goods, the place or country in which the goods were produced, the manufacture and material, and the use of any figure, word, or mark which according to the custom of the trade is commonly taken to be an indication of any of the above matters within the meaning of the Act. Now, the question in this case discussed before the magistrates was as to whether putting the letters "N.M." on the invoice came under the enactment which I have already read, or whether if he put a "figure, word, or mark" it was necessary to show that it was a mark which according to the custom of the trade was "commonly taken to be an indication of any of the above meanings." What was done undoubtedly was—there is no question whatever as to that—a fraud practised upon the purchaser. It is found as a fact that the mutton sold was not New Zealand mutton. The respondent put "N.M." on the invoice, which the magistrate found (and most properly found) to be an indication by him that the mutton was sold as New Zealand mutton. Now, counsel for the appellant cited to us the case of *Coppen v. Moore (sup.)*, in which practically the very same point arose. I think the provisions of sect. 2 (2) of the Merchandise Marks Act, which makes it an offence to sell goods to which a false trade description is applied, do not apply where the description is entirely oral. There can be no doubt here that if this had been only a representation orally that this was New Zealand mutton, whereas it was not, there would be no offence under the Act. In this case of *Coppen v. Moore (sup.)* the respondent asked the salesman in the appellant's shop for a small English ham. The salesman pointed to some American hams on the shelf and said: "Those are Scotch hams." The respondent then chose one, and the invoice, which did not contain the word "Scotch," was handed to respondent by another assistant. The respondent told the assistant to put the word "Scotch" in the invoice as he had bought the ham as such. The assistant did so, and handed the invoice to respondent, who then paid the account. It was held that the description in the invoice was a false trade description sufficient to satisfy the statute. I do not think that it is necessary I should read the judgment. That was what was held. Putting in the word "Scotch"

after the representation which had been made as to the bargain, seems to me precisely on all fours with the present case. Here the respondent is asked to put in something to show that the goods sold are New Zealand mutton. He put in the letters "N.M." The justices have found that these were intended to mean New Zealand mutton. The case thus seems to me to be on all fours, in principle at all events, with *Coppen v. Moore (sup.)*, and in my judgment the magistrates were wrong to dismiss the summons on the ground that "although the words were written thereon by the respondent with the intent to indicate to the appellant that the mutton sold to him, to which the invoice referred, was New Zealand mutton, it was not established according to the custom of the trade that such letters were commonly taken to be an indication of the place or country in which the mutton was produced; and, secondly, that the facts above found do not as matter of law amount to the application of a false trade description," &c., "within the meaning of the said Merchandise Marks Act." Now, this is the mistake the magistrates seem to have made: Referring once more to sect. 3, they seem to put it that all matters contained in the clauses of that section marked (a), (b), (c), (d), and (e) must be subject to "putting a figure, word, or mark . . . according to the custom of the trade." It is obvious what that applies to, I think. That is this. If in this case the mutton had been sold simply with "N.M." upon it, if the purchaser had taken it away, brought it back, and was told then that it was well known in the trade to indicate that it was New Zealand mutton, then, if it was well known in the trade that these letters meant New Zealand mutton, there can be no doubt that would have been an offence against the statute. But that is not the case here. This is a case which comes under the principle of *Coppen v. Moore (sup.)*, where the words are added for the very purpose of showing that the mutton was New Zealand mutton. Therefore the question relating to the latter part of the section, as to whether the word or mark is "according to the custom of the trade to be an indication in the above matters," seems to me to be entirely irrelevant. That is the mistake the magistrates seem to me to have made. There is only one other observation I should make in respect to the case. I find the magistrates in the first paragraph of the case say the case was "heard and determined by us the said parties respectively being then present, and upon such hearing we dismissed the said information without requiring the respondent to call any evidence." That being so, it seems to me that we cannot say they ought to find the respondent guilty without hearing the case which he had prepared. Therefore the matter must go back to the magistrates with the intimation that, if the facts remain as found by the justices, then in our judgment there ought to be a conviction of course subject to any alteration which may be made in the case on the evidence given on behalf of the respondent.

KENNEDY, J.—I entirely concur in the judgment, and have nothing to add to it.

Solicitors for appellant, *Mackrell, Maton, Godlee, and Quincy*, for *Butcher and Barrow*, Bury.

Respondent did not appear.

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BROADBENT (app.) v. SHEPHERD (resp.).

[Q.B. Div.]

Thursday, Nov. 15, 1900.

(Before Lord ALVERSTONE, C.J. and
KENNEDY, J.)

BROADBENT (app.) v. SHEPHERD (resp.). (a)

*Public health—Nuisances—Abatement—Collector of rents of property—"Owner"—Structural defects—Liability of collector for structural defects—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 94, 95.**A person who collects the rents of property as agent for another, is "owner" within sect. 94 of the Public Health Act 1875, and may be served with a notice under that section and required to abate a nuisance on the premises arising from structural defects of the premises.*

CASE stated by justices of the peace for the West Riding of the County of York.

At a petty sessions held at Castleford, in the division of Upper Osgoldcross, in the West Riding, on the 27th June 1900, a complaint was preferred by the appellant, Broadbent, on behalf of the Castleford Urban District Council, against the respondent as agent for one Mr. Doukersley, of Huddersfield, the owner of Nos. 75 to 91 (odd numbers), Regent-street, Castleford, under sect. 95 of the Public Health Act 1875 (38 & 39 Vict. c. 55), for that on the 7th Feb. 1900 a notice was served upon the respondent requiring him to abate a certain nuisance in or on the above premises in the district of the urban council, and that he had made default with the requisitions thereof within the time therein specified—that is to say, that he had not provided earthenware trapped gulleys, under fall pipes, connected same to sewer, covered all yard areas with hard and impervious material, repaired roofs of ash-pits and floors of wash-houses, &c.

This complaint was heard and determined by the justices, who dismissed the same, subject to this case.

It was admitted by the appellant that the nuisances were caused by structural defects.

No attempt had been made by the appellant to ascertain the real owner or owners of the property, and the respondent and rent collector or agent stated that he had never been asked for the name of the owner.

Two notices had been sent by post, addressed to a Mr. Doukersley, of Berry Brow, Huddersfield, as owner, and Mr. Shepherd, of Castleford (the respondent), as agent. The notice addressed to Mr. Doukersley had been returned through the post with a statement that it could not be delivered as there were several Doukersleys residing there.

It was contended by the appellant that the definition clause (sect. 4) of the Public Health Act 1875 (notwithstanding the special provision in sect. 94 which throws the responsibility of structural defects on the actual owner) included all agents and receivers and collectors of rent, as owners, and relieved the appellant from the responsibility of ascertaining the ownership of the property.

The justices took the view that it was not the intention of the Act of Parliament to create two ownerships under the special provision in sect. 94; that the respondent was a mere rent collector, and that the definition clause extending ownership to agents was only intended to apply where

it was not inconsistent with the context; that the definition clause relied on by the appellant was governed by the earlier portion of it, which reads as follows: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them"; and that the appellant ought to have served the proper owner with the notice and summoned him for default.

The question of law for the opinion of the court was whether "owner" in that portion of sect. 94 of the Public Health Act 1875 which refers to structural defects includes a mere collector of rent or agent.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 4. In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them. "Owner" means the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.

Sect. 94. On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided—First, that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner.

Then sect. 95 provides that where the person on whom a notice to abate a nuisance has been served makes default in complying with the notice, complaint may be made to a justice and the justice may issue a summons.

Macmorran, Q.C. (Scholefield with him) for the appellant.—The short point is whether a person who in fact collects the rents of property, or who acts as agent for collecting the rents, is an "owner" within the meaning of the Public Health Act, and can, as such owner, be required to execute works for the abatement of a nuisance, when such nuisance arises from structural defects. The justices were wrong in holding that a rent collector was not an "owner" for the purpose of remedying these structural defects, and it is only necessary to refer to the two sections—sects. 4 and 94—to see that they were wrong. The point as to whether the person who collected the rents of property was "owner," within a similar definition in the Nuisances Removal Act 1855 (18 & 19 Vict. c. 121), was considered in the year 1872 in the case of *Cook v. Montagu* (26 L. T. Rep. 471; L. Rep. 7 Q. B. 418). In sect. 2 of that Act the word "owner" was defined as including "any person receiving the rents of the property in respect of which that word is used . . . on his own account, or as trustee or agent for any other person," and Blackburn, J., in delivering the judgment of the court, thus laid down the principle on which the definition of owner proceeded in such cases: "The object was, on the one hand, that a structural improve-

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ment should be thrown upon the owner, and that the local authority should not be bound to proceed against temporary occupiers who might also not be worth powder and shot; but, on the other hand, inasmuch as it might often be very difficult indeed to ascertain who were the real owners, and the collectors of rent might easily be found, this definition of 'owner' was given; and in a vast number of cases they would thus reach the real owner": (L. Rep. 7 Q. B., at p. 422). Under the same definition of owner in a local Act it was held by Lopes, J. in *Mayor, &c., of St. Helens v. Kirkham* (16 Q. B. Div. 403) that an agent employed to collect the rents of property was an "owner," and was liable as such for the payment of paving expenses. There is not the same necessity for making an agent or collector of rents liable as owner in respect of paving expenses as there is in making him liable for the abatement of nuisances, yet the collector of the rents was in that case held liable for the paving expenses, though he had no funds in his hands. This has been followed repeatedly, as in *Tottenham Local Board v. Williamson* (69 L. T. Rep. 51), decided in 1893. The justices were therefore wrong in their decision.

The respondent did not appear.

LORD ALVERSTONE, C.J.—I think this case must go back to the magistrates. In order that there might be no difficulty in enforcing the provisions of this Act, for the purposes of the Act the word "owner" is expressly defined in sect. 4 as meaning "the person for the time being receiving the rack rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person." Now, it appears that it has been held that that definition of "owner" includes the person who collects the rent in the case of liability for paving expenses. If so, I certainly think it ought also to be applied in cases in which the question is as to the abatement of nuisances. I therefore think this case ought to go back to the magistrates with this intimation of our opinion.

KENNEDY, J.—I agree.

Appeal allowed. Case remitted to the justices.

Solicitor for the appellant, G. T. B. Thurnell, for Claude Kemp, Castleford.

Nov. 15 and 16, 1900.

(Before Lord ALVERSTONE, C.J. and KENNEDY, J.)

VESTRY OF ST. JAMES AND ST. JOHN, CLERKENWELL (apps.) v. EDMONDSON AND SON (resps.). (a)

Metropolis—Management Acts—"New street"—Sewering—Expenses of—Liability of frontagers—Old street with line of new buildings on one side—Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), ss. 52, 53.

An old highway formed a boundary between the parish of C. in the county of London and the

parish of H., in the county of Middlesex, the actual boundary being nearly in the centre of the road. Before 1856, when the Metropolis Management Act 1855 came into operation, buildings had been erected on the H. side of the road along nearly the whole of its length, but on the C. side there were only a few buildings. During the last few years and since 1856 the greater part of the C. side of the road had been covered with buildings, and in 1898 a sewer was constructed on the C. side for draining the houses on that side, and the cost was apportioned on the frontagers on that side as being a "new street" within the Metropolis Management Acts.

Upon a summons against a frontager for the apportioned cost of the sewerage, the justices found that the road taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act 1855 came into operation, and dismissed the summons.

Held, that the road must be dealt with as a whole, and that the C. side could not be dealt with by itself for the purpose of determining whether it was a new street within the meaning of the Metropolis Management Acts so as to render frontagers on that side liable to the cost of the sewerage, and that the justices were therefore right in dismissing the summons.

CASE stated by justices of the peace sitting at the Highgate Petty Sessions, in the county of London.

A complaint was preferred by the appellants under the Metropolis Management Amendment Act 1862 against the respondents, that the appellants, during the years 1897 and 1898, in accordance with the provisions in that behalf of the Metropolis Management Acts, executed or caused to be executed certain works—namely, the construction of a sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets with the necessary manholes and inspection chambers, and other incidental charges and expenses under the Acts, in or in part of a new street known as Colney Hatch-lane, for or in respect of certain premises in the street of which the respondents were the owners; and that the appellants had thereby incurred expenses of which the amount apportioned in respect of the respondent's premises were 190l. 6s. 8d. and 7l. 2s. 10d. respectively, and that the respondents had not paid these sums.

Colney Hatch-lane is an old highway forming the boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey, in the county of Middlesex.

The actual boundary is nearly in the centre of the lane, but the greater part of the surface is within the parish of Clerkenwell.

Before the year 1856, when the first of the Metropolis Management Acts (18 & 19 Vict. c. 120) came into operation, buildings had been erected on the Hornsey or Middlesex side of the lane along nearly the whole of its length, but on the Clerkenwell or London side of the lane there were at that time only seven or eight buildings at various points.

The entire length of the lane is 2993ft., and the character and extent of the buildings was shown on the Ordnance Map published in 1862.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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BROADBENT (app.) v. SHEPHERD (resp.).

[Q.B. Div.]

Thursday, Nov. 15, 1900.

(Before Lord ALVERSTONE, C.J. and
KENNEDY, J.)

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This complaint was heard and determined by the justices, who dismissed the same, subject to this case.

It was admitted by the appellant that the nuisances were caused by structural defects.

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The justices took the view that it was not the intention of the Act of Parliament to create two ownerships under the special provision in sect. 94; that the respondent was a mere rent collector, and that the definition clause extending ownership to agents was only intended to apply where

it was not inconsistent with the context; that the definition clause relied on by the appellant was governed by the earlier portion of it, which reads as follows: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them"; and that the appellant ought to have served the proper owner with the notice and summoned him for default.

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ment should be thrown upon the owner, and that the local authority should not be bound to proceed against temporary occupiers who might also not be worth powder and shot; but, on the other hand, inasmuch as it might often be very difficult indeed to ascertain who were the real owners, and the collectors of rent might easily be found, this definition of 'owner' was given; and in a vast number of cases they would thus reach the real owner": (L. Rep. 7 Q. B., at p. 422). Under the same definition of owner in a local Act it was held by Lopes, J. in *Mayor, &c., of St. Helens v. Kirkham* (16 Q. B. Div. 403) that an agent employed to collect the rents of property was an "owner," and was liable as such for the payment of paving expenses. There is not the same necessity for making an agent or collector of rents liable as owner in respect of paving expenses as there is in making him liable for the abatement of nuisances, yet the collector of the rents was in that case held liable for the paving expenses, though he had no funds in his hands. This has been followed repeatedly, as in *Tottenham Local Board v. Williamson* (69 L. T. Rep. 51), decided in 1893. The justices were therefore wrong in their decision.

The respondent did not appear.

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KENNEDY, J.—I agree.

Appeal allowed. Case remitted to the justices.

Solicitor for the appellant, *G. T. B. Thurnell*, for *Claude Kemp*, Castleford.

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(Before Lord ALVERSTONE, C.J. and KENNEDY, J.)

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An old highway formed a boundary between the parish of C. in the county of London and the

parish of H., in the county of Middlesex, the actual boundary being nearly in the centre of the road. Before 1856, when the Metropolis Management Act 1855 came into operation, buildings had been erected on the H. side of the road along nearly the whole of its length, but on the C. side there were only a few buildings. During the last few years and since 1856 the greater part of the C. side of the road had been covered with buildings, and in 1898 a sewer was constructed on the C. side for draining the houses on that side, and the cost was apportioned on the frontagers on that side as being a "new street" within the Metropolis Management Acts.

Upon a summons against a frontager for the apportioned cost of the sewerage, the justices found that the road taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act 1855 came into operation, and dismissed the summons.

Held, that the road must be dealt with as a whole, and that the C. side could not be dealt with by itself for the purpose of determining whether it was a new street within the meaning of the Metropolis Management Acts so as to render frontagers on that side liable to the cost of the sewerage, and that the justices were therefore right in dismissing the summons.

CASE stated by justices of the peace sitting at the Highgate Petty Sessions, in the county of London.

A complaint was preferred by the appellants under the Metropolis Management Amendment Act 1862 against the respondents, that the appellants, during the years 1897 and 1898, in accordance with the provisions in that behalf of the Metropolis Management Acts, executed or caused to be executed certain works—namely, the construction of a sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets with the necessary manholes and inspection chambers, and other incidental charges and expenses under the Acts, in or in part of a new street known as Colney Hatch-lane, for or in respect of certain premises in the street of which the respondents were the owners; and that the appellants had thereby incurred expenses of which the amount apportioned in respect of the respondent's premises were 130l. 6s. 8d. and 7l. 2s. 10d. respectively, and that the respondents had not paid these sums.

Colney Hatch-lane is an old highway forming the boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey, in the county of Middlesex.

The actual boundary is nearly in the centre of the lane, but the greater part of the surface is within the parish of Clerkenwell.

Before the year 1856, when the first of the Metropolis Management Acts (18 & 19 Vict. c. 120) came into operation, buildings had been erected on the Hornsey or Middlesex side of the lane along nearly the whole of its length, but on the Clerkenwell or London side of the lane there were at that time only seven or eight buildings at various points.

The entire length of the lane is 2993ft., and the character and extent of the buildings was shown on the Ordnance Map published in 1862.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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Since the year 1856, and more particularly within the last few years, the remainder of the Clerkenwell or London side has been laid out for building, and the greater part of the frontage to the lane is now covered with buildings.

In or about the year 1887 the Hornsey Local Board laid a sewer on their side of the lane for the drainage of the houses in their district. By agreement between that board and the appellants two of the houses on the Clerkenwell side were drained into such sewer until the sewer mentioned in the complaint was constructed; and by agreement between the same board and the owners of two other houses on the Clerkenwell side, those owners connected their drains with the Hornsey sewer. The sums paid by such owners to the Hornsey Local Board under the agreements were repaid to them by the appellants when their drains were connected with the sewer mentioned in the complaint. On the Clerkenwell side of the lane there was no sewer of any kind save a surface water sewer which had been laid for the drainage of the road itself partly by the owners of adjoining land and partly by the appellants, and for a short distance an old brick sewer running obliquely across the lane and taking the drainage of three or four of the houses on that side. The old houses at the south end of the lane on the Clerkenwell side were drained into a sewer behind these houses, running into another parish.

The part of the parish of Clerkenwell which comprised the eastern side of the Colney Hatch-lane is wholly detached from the rest of the parish, and is entirely surrounded by the county of Middlesex. For this reason it was found to be impracticable to provide an outlet into the metropolitan main drainage system from this part of the parish.

By the Metropolitan Board of Works (Various Powers) Act 1887 (50 & 51 Vict. c. cvi.), s. 44, the Metropolitan Board of Works (now the London County Council) were enabled, by agreement with the local authorities of certain adjoining districts, or any of them, to cause any sewer or sewers constructed or to be constructed by such board in the said detached portion of Clerkenwell to communicate with the sewers of one or more of such authorities, and an agreement for this purpose was made in the year 1896 by the London County Council with the Friern Barnet Urban District Council, and an outlet for the sewage of this detached part of Clerkenwell into a sewer of the county council and thence into the Friern Barnet sewers was provided in pursuance of the agreement in the year 1897. As soon as such outlet was provided, the appellants laid the sewer, which was the subject of this case, for the drainage of the houses and buildings which then were or might thereafter be erected on the Clerkenwell or London side of the lane, and such sewer was completed in the year 1898.

The total cost of the sewer and the works appertaining thereto was 1106*l.* 14*s.* 5*d.*, of which the appellants charged to sewer rates the sum of 103*l.* 7*s.* 3*d.*, and apportioned the balance among the owners of the premises on the Clerkenwell side of the lane according to their respective frontages.

The amounts apportioned in respect of the respondents premises were 130*l.* 6*s.* 8*d.* and 7*l.* 2*s.* 10*d.*

The respondents having refused to pay these sums, a complaint was preferred under sects. 52 and 53 of the Metropolis Management Amendment Act 1862.

It was contended before the justices on behalf of the appellants that so much of Colney Hatch-lane as is within the parish of Clerkenwell was a "new street" within the meaning of the Metropolis Management Acts; that it became a new street by reason of the erection of buildings fronting it as above mentioned; that in order to determine whether it had become a new street, no regard could be had to the portion of the lane in the parish of Hornsey or to the buildings on the Hornsey side, these being in a different parish, district, and county, and subject to entirely different statutes.

It was contended on behalf of the respondents that Colney Hatch-lane taken as a whole had become a street in the ordinary sense of the term by reason of the buildings erected along it before the year 1856, and was an old street when the Metropolis Management Act 1855 came into operation; that no part of such street could become a new street subsequently by reason of the erection of additional buildings along it, and that the portion of the lane which is in Clerkenwell could not be dealt with by itself without regard to the portion which is in Hornsey, or to the buildings on the Hornsey side for the purpose of determining whether it was a new street within the meaning of the Metropolis Management Acts.

The justices found that Colney Hatch-lane taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act 1855 came into operation, and they were of opinion that that portion of the lane which is in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a new street, and for these reasons they dismissed the summonses.

The question for the opinion of the court was whether that portion of Colney Hatch-lane which is in Clerkenwell could be dealt with by itself without regard to the portion which is in Hornsey or to the buildings on the Hornsey side for the purpose of determining whether it is a new street.

The Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) provides:

Sect. 52. Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in or for the drainage of any new street, or of any house or houses erected since the 1st day of January 1856, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportion as they may deem just, &c.

Sect. 53. Where any sewer shall be constructed by any vestry or district board in a street in which, previously to such construction, there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto . . . shall be borne and defrayed in part only by the owners of the houses situated in and of the

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land bounding and abutting on such street respectively, &c.

Macmorran, Q.C. (*C. F. Pritchard* with him) for the appellants.—The question is whether this lane, the half of which is in the metropolis and the other half of which is in Middlesex, is a new street within the meaning of these Acts. The magistrates were wrong in holding that it was not a new street. They went on a wrong basis, as they assumed that the road must be treated as a whole. "Street" is defined in sect. 250 of the Act of 1855 (18 & 19 Vict. c. 120), and it includes "a part of any such highway, &c."; and "new street" is defined in sect. 112 of the Act of 1862, and it applies to "all streets hereafter to be formed or laid out" and "a part of such street." That definition of "new street" may not apply here, but the expressions show that the words "street" and "new street" apply not only to the whole street but to a part of such street. Then sects. 52 and 53 of the Act of 1862 deal with the expenses of constructing sewers in "new streets." Applying these provisions here why should not that portion of the highway which is in Clerkenwell be regarded as a street and a new street for the purpose of the authority doing what they could not otherwise do? Although this lane was an old highway it had become a new street by the erection of these buildings on the Clerkenwell side since the passing of these Acts:

Pound v. Plumstead Board of Works, L. Rep. 7 Q. B. 183.

This half of the road—the Clerkenwell half—is a street in itself, and was not so in 1856, though the lane as a whole is found to be a street, but the Clerkenwell side of the road was not then a street in the ordinary acceptation of the term. The half of the road on the Clerkenwell side can be dealt with by itself as a street and a new street, and in fact had to be so dealt with because in dealing with these matters the local authority cannot go beyond the extent of their local jurisdiction, this part of the road alone being in the county of London. This part of the road ought therefore to be considered by itself. It is the same as if there were a fence down the middle of the road along the boundary line, and in that case there would be houses on the one side—the Clerkenwell side—and a fence on the other, which would constitute the Clerkenwell side a street:

Richards v. Kessick, 59 L. T. Rep. 318.

This vestry would only have jurisdiction to deal with a certain width of this road, and they were not able to deal with this sewerage until they had got an outfall. Instead of considering this lane as one street, there are in fact two streets, namely, that on the Hornsey side, which, being in the county of Middlesex, is under the Public Health Acts, and that on the Clerkenwell side, which, being in the county of London, is under the Metropolis Management Acts. The justices were therefore wrong in holding that the Clerkenwell side of the lane could not be dealt with by itself.

Alexander Glen for the respondents.—The justices were right in treating the road as a whole. Two questions arise, whether this road is a street, and if so, whether it is a new street. The question whether it is a street is a question as to its

physical condition at the time, and sect. 52 itself shows that the physical characteristic of the road attaches to the whole street. There is authority for this proposition, as in *Simmonds v. Fulham Vestry* (82 L. T. Rep. 497; (1900) 2 Q. B. 188), a highway of which one side was covered with houses and the other consisted of vacant building land, was held to be a "street." This Clerkenwell half of the street is the half of an old street, and having once had that characteristic impressed on it, it cannot afterwards acquire a new character. In *Richards v. Kessick* (*ubi sup.*), and in *White v. Fulham Vestry* (74 L. T. Rep. 425), which followed it, the elements of newness had come in since the date of the Act, but it is not so in this case. In *White v. Fulham Vestry* (*ubi sup.*), the strip of 13ft. thrown in on the southern side of the road in the year 1888 had never been a street before and had never acquired the character of a street at all; when thrown in it acquired the character of a street, and as it was new it was a new street. That is the distinction between that case and the present, as this road, taken as a whole, had the character of a street, and had, in fact, become a street by the erection of the buildings on the Hornsey side before the year 1856. The question being really one as to the physical character or condition of the road at the time, and this highway having had impressed on it the character of a street before 1856, and being then an old street, no part of it can afterwards become a new street and the justices were right in so holding. He also referred to

Fulham Board of Works v. Goodwin, 35 L. T. Rep. 907; 1 Ex. Div. 400.

Macmorran, Q.C. in reply.

Cur. adv. vult.

Nov. 16.—Lord ALVERSTONE, C.J.—This case is an appeal from a decision of justices of the county of London sitting at Highgate on a summons to enforce the payment of two sums of 130l. odd and 7l. odd, portions of the expense of making a certain sewer in Colney Hatch-lane which had been charged on the defendants, the respondents in this case, as frontagers. The facts are, and are so found in the case, that Colney Hatch-lane is an old highway forming a boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey in the county of Middlesex. The actual boundary is nearly in the centre of the lane, but the greater part is within the parish of Clerkenwell. The case then goes on to state that "before the year 1856, when the first of the Metropolis Management Acts came into operation buildings had been erected on the Hornsey or Middlesex side of the lane along nearly the whole of its length, but on the Clerkenwell, or London side of the lane, there were at that time only about seven or eight buildings at various points." The case then states the facts as to the construction of the sewer, and the justices having stated the facts which gave rise to this claim proceed to say: "We found that Colney Hatch-lane, taken as a whole, was sufficiently built upon to be a street before the Metropolis Management Act 1855 came into operation, and we were of opinion that that portion of the lane which is in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a new street." The summons was taken out and the expenses had been

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apportioned under sects. 52 and 53 of the Metropolis Management Amendment Act of 1862, whereby if drainage is done in a new street, the expenses can be apportioned on the frontagers. Speaking for myself, I should have been glad if I could have seen my way to adopt the argument for the appellants. I think there is a great deal to be said for the view that it was, so far as the county of London and the parish of Clerkenwell are concerned, substantially a new street, and the sewer being put down in the new street it ought to have fallen within the rule which was applied in the *Plumstead* case (*ubi sup.*). Of course we do not sit here to review findings of fact, and I might go further and say that there is no reason to doubt, or even to criticise, the findings of fact, but in this case the justices have found as a fact that Colney Hatch-lane had become a street before 1856. I think the street for this purpose must be taken to be the whole road. I think the justices must be taken to have found that the portion of the street which was in Clerkenwell is included within the road which had become a street at the date that was mentioned; and I do not think it is open to the appellants to argue that for the purpose of this section the part of the road so forming part of the street can be regarded as having become a new street because building on that side of it has been carried on very extensively since the year 1862. I think the point taken by the learned counsel for the respondents forms a strong argument that, if the boundary had happened to run just upon the other side of the Hornsey side of the road, even though a new sewer had been put down before there had been a large amount of fresh building, it would have been impossible to divide the road; but, whether that is a conclusive argument or not, I think, in the face of these findings, we must come to the conclusion that the justices here arrived at a right finding in saying that they cannot treat the particular portion of Colney Hatch-lane which is in the county of London as a new street for the purposes of sect. 52 of the Act of 1862. For these reasons I think the appeal must be dismissed with costs.

KENNEDY, J.—I am of the same opinion. I think we fully appreciate the argument for the appellants and the suggestion that practically the street may be treated, for the purpose of the parish of Clerkenwell, as a street of which one side is not the other side of the road physically, but is a line drawn at the boundary of the jurisdiction of Clerkenwell, running longitudinally through the highway. But it appears to me that, in the absence of authority, to create one more artificiality in the understanding of a "street" and "new street" is clearly not to be desired; and, in the face of the finding of the magistrates, from which I see no reason to differ, in following what I may call the primary and natural sense of the words "street" and "new street" we do not violate any interpretation of these terms as given by the courts in reference to kindred Acts of Parliament. I prefer to say that the view taken by the magistrates is right, that they are right in law and that there is nothing to find fault with.

Appeal dismissed. Leave to appeal.

Solicitors: For the appellants, *Boulton, Sons, and Sandeman*; for the respondents, *Tatham and Hardy*.

Nov. 17 and 21, 1900.

(Before Lord ALVERSTONE, C.J., WILLS and WRIGHT, JJ.)

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Registration of voters—Borough a county of itself—Freeholders entitled to vote—Borough added to another borough not a county of itself—Right of freeholders to vote in new borough—Representation of the People Act 1832 (2 & 3 Will. 4, c. 45), ss. 8, 31, 33, and sched. E—Redistribution of Seats Act 1885 (48 & 49 Vict. c. 23), ss. 2, 7, 11, 17, and scheds. 1, 5.

The borough of Haverfordwest was at the date of the Reform Act 1832 a county of itself having the right of returning a member to Parliament, and the freeholders therein had the right of voting in the election for such member, and this right of the freeholders was preserved under sects. 31 and 33 of that Act and two adjacent places were added to the borough and shared in the right.

By the Redistribution of Seats Act 1885 the borough of Haverfordwest ceased to exist as a borough and was included in the county of Pembroke, and it was then under the Act added to the borough of Pembroke and a new borough of Pembroke and Haverfordwest was thus created.

Held, that, as the borough of Haverfordwest was added to the borough of Pembroke by the Act of 1885, the freeholders in Haverfordwest lost the right which they possessed up to 1885 of voting in the Haverfordwest district, and were no longer entitled as freeholders to vote in the new borough of Pembroke and Haverfordwest.

CASE stated by Mr. Arthur Lewis, the revising barrister for the borough of Pembroke and Haverfordwest.

At a court held on the 10th Sept. 1900 for the revision of the lists of voters for the parish of St. Mary, in Haverfordwest, within the borough, William Charles Ivey, of 17, Princes-street, Pembroke Dock, on the list of Parliamentary electors for the parish of St. Mary, Pembroke, Peter Ward, duly objected to the name of John James being retained in the Parliamentary list of voters for the borough, intitled "List of the persons entitled to be registered as Parliamentary Voters for the Parliamentary Borough of Pembroke and Haverfordwest in respect of any right reserved by sects. 31 and 33 of the Reform Act 1832."

The facts of the case as proved or admitted before the revising barrister were as follows:

1. The name of John James appeared in the list as under:

Name of the voter in full, surname being first: James, John.

Place of abode: St. Martin's-crescent.

Nature of qualification: Freehold house.

Description of qualifying property: Fountain-row and Pew-street.

2. The town of Haverfordwest was a county of itself, so constituted by Royal Charter and statute, and possessed a separate Court of Quarter Sessions.

3. Before the Reform Act of 1832 the county of the town of Haverfordwest returned a member to Parliament, and this privilege was not partici-

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pated in by any contributory place, but by sect. 8 and sched. E of that Act the towns of Fishguard and Narberth were given a share in the election of the member for Haverfordwest.

By the same section and schedule certain places were given a share in the election of the member for the borough of Pembroke, at that time entirely distinct from Haverfordwest.

By the Redistribution of Seats Act 1885 a new borough was constituted, called the borough of Pembroke and Haverfordwest, and comprising the places till then included in the distinct constituencies of Pembroke and of Haverfordwest. Freeholders in the town and county of Haverfordwest had the right to vote in the election of a member for Haverfordwest before the passing of the Reform Act of 1832, and have continued to exercise that right without interruption or objection down to the present year.

4. The said John James became a freeholder of the county of the town of Haverfordwest before the passing of the Redistribution of Seats Act 1885, but several of the persons whose names appeared in the lists intituled as aforesaid had been admitted to vote as freeholders of the county of the town of Haverfordwest since the passing of that Act.

5. The form of the objection, omitting the formal parts, was as follows:

That you have no qualification to vote in the election of a member for the Parliamentary borough of Pembroke and Haverfordwest, the nature of the alleged qualification as mentioned in the third column of the list not being by law a qualification to vote as aforesaid.

6. It was agreed that the decision of the revising barrister should govern the cases of all voters whose names appeared on and of persons claiming to have their names inserted in the lists of Parliamentary electors in respect of freehold qualifications in the parishes of St. Mary, St. Thomas, St. Martin, Prendergast, Cartlett and Furzy Park, and Portfield within the town and county of Haverfordwest, within the said borough.

It was contended on behalf of the respondents as follows:

7. That by sect. 31 of the Reform Act 1832 the rights of the freeholders of the county of the town of Haverfordwest to vote in the election of a member for the county of the town of Haverfordwest were preserved, and that the Act did not interfere with the right of the county of the town to be represented in Parliament except that by sect. 8 and sched. E the adjacent places of Narberth and Fishguard were admitted to share in the election of the member for Haverfordwest, and, together with the county of Haverfordwest, thenceforth constituted the Haverfordwest district or Parliamentary borough of Haverfordwest.

8. That by sect. 2 and the 1st schedule of the Redistribution of Seats Act 1885 (48 & 49 Vict. c. 23) the Haverfordwest district ceased to return any member, and the county of the town of Haverfordwest was for the purpose of Parliamentary elections included in the county at large of Pembroke.

9. That by sect. 17 of the same Act the rights of freeholders in the area of what was formerly the county of the town of Haverfordwest were preserved for the purpose of enabling them to vote in the election of a member for the county of Pembroke at large in respect of the same

qualifications which formerly enabled them to vote in the election of a member for the abolished Parliamentary borough.

10. That by sect. 7 of the same Act the Parliamentary borough of Pembroke was for all purposes of and relating to Parliamentary elections enlarged so as to comprise the places comprised in the abolished Parliamentary borough of Haverfordwest, and by sect. 11 the law relating to the elections for the Parliamentary borough of Pembroke was made to apply as if the places comprised in the area of the former Parliamentary borough of Haverfordwest were named in the Reform Act of 1832 as places sharing in the election of a member for Pembroke, and the new enlarged borough received the name of Pembroke and Haverfordwest.

11. That by the law relating to the elections for the Parliamentary borough of Pembroke, freeholders had no right to vote for the election of the member for the borough, because Pembroke never was, like Haverfordwest or Southampton, a county of a town or of a city like Bristol, Exeter, and Norwich, and therefore the freeholders who used to have a right to vote for the member for the borough of Haverfordwest district were not given any right to vote for the borough of Pembroke, but had instead a right to vote for the member for the county of Pembroke.

12. That sects. 31 and 33 of the Reform Act 1832 are totally inapplicable to give freeholders any right to vote in the election of the member for the borough of Pembroke, because such member serves not merely for the county of the town of Haverfordwest and places sharing therewith, but he serves for the whole new borough which is Pembroke and places sharing with Pembroke.

It was contended on behalf of the appellant as follows:

13. That Haverfordwest as a county could not be distinguished from Haverfordwest as a place. That the effect of the Redistribution Act 1885 was to transfer Haverfordwest with its contributory places of Fishguard and Narberth and all its franchises (including freeholders) to the new borough of Pembroke and Haverfordwest, and that no section of that Act dealt with the freeholders of Haverfordwest as a separate class of voters.

14. That the disfranchisement of the Parliamentary borough of Haverfordwest as a separate political entity and its junction with the Parliamentary borough of Pembroke in the new borough was sufficiently effected by the first paragraph of sect. 2, the first part of the 1st schedule, sect. 7, and the 5th schedule of the Redistribution Act.

15. That the second paragraph of sect. 2 and the second part of the 1st schedule of that Act made no distinction between Haverfordwest and the other counties of towns and cities mentioned therein (which have become entirely parts of certain counties as set out in the 7th schedule), and no distinction between freeholder and occupation voters in any of the several towns and cities, and that in so far as this section was intended to apply to Haverfordwest (which has not been made part of a county, and is not included in the 7th schedule) it is inconsistent with the later sections of the same Act (sect. 7, sched. 5, sect. 11), and is therefore of no effect.

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16. That sects. 7 and 11 of the Redistribution Act and sched 5 expressly include in the new borough of Pembroke and Haverfordwest the old Parliamentary borough of Haverfordwest with all the franchises theretofore exercised in Haverfordwest itself.

17. That if Haverfordwest had been named in the Act of 1832 as sharing with Pembroke in the election of a member, its freeholders would have been entitled to the protection of sects. 31 and 33 of that Act, these sections not being limited to constituencies including nothing besides a town and county and Haverfordwest then sharing its representation with two other places.

18. That sect. 17 of the Act of 1885 applied only to the question of time for the first registration and operated as far as the Haverfordwest freeholders were concerned to enable them for the purpose of voting for the new borough to have credit for the time of their holding their qualifications in the old borough. That this section applied to all classes of voters and did not operate to preserve any right of Haverfordwest freeholders to vote in the county of Pembroke.

19. It was alternatively contended that even if the contentions of the objector were well founded, John James, having been on the register prior to 1885, was entitled to remain on under sect. 17 of the Redistribution Act and sect. 10 of the Representation of the People Act 1884.

20. The revising barrister was of opinion that the contentions of the respondents were correct and that for the reasons submitted by him the nature of the qualification of the appellant as alleged in the third column of the list, was not by law a qualification to vote in the election of a member for the Parliamentary borough of Pembroke and Haverfordwest, and accordingly expunged his name from the list.

21. The appellant having duly delivered a notice in writing that he was desirous of appealing against the decision and having requested the revising barrister to name William Odyerne Hulm, town clerk of the borough of Pembroke, as respondent, in addition to William Charles Ivey, the revising barrister stated the above case accordingly for the opinion of Her Majesty's High Court of Justice, Queen's Bench Division.

22. If the court should be of opinion that the decision of the revising barrister was right the lists of Parliamentary electors intitled as stated in the special case for the several parishes mentioned in par. 6 of this case and of all claimants to be inserted in the respective lists are to remain as revised by him. If the court should be of opinion that his decision was wrong, then the names of voters and claimants are to be restored to and inserted in the lists respectively.

The Representation of the People Act 1832 (2 & 3 Will. 4, c. 45)—commonly called the Reform Act 1832—provides:

Sect. 8. And be it enacted, that each of the places named in the first column of the schedule (E) to this Act annexed shall have a share in the election of a member to serve in all future Parliaments for the shire, town, or borough which is mentioned in conjunction therewith and named in the second column of the said schedule (E).

In the sched. (E) the places Narberth and Fishguard are mentioned in the first column as sharing with Haverfordwest mentioned in the second column.

Sect. 31. In every city or town being a county of itself, in the election for which freeholders or burgage tenants, either with or without any superadded qualification, now have a right to vote, every such freeholder or burgage tenant shall be entitled to vote in the election of a member or members to serve in all future Parliaments for such city or town, provided he shall be duly registered according to the provisions hereinafter contained; Provided also, that every freehold or burgage tenement which may be situate without the present limits of any such city or town being a county of itself, but within the limits of such city or town, as the same shall be settled and described by the Act to be passed for that purpose as hereinbefore mentioned, shall confer the right of voting in the election of a member or members to serve in any future Parliament for such city or town in the same manner as if such freehold or burgage tenement were situate within the present limits thereof.

Sect. 33. And be it enacted, that no person shall be entitled to vote in the election of a member or members to serve in any future Parliament for any city or borough; save and except in respect of some right conferred by this Act, or as a burgess or freeman, or as a freeman and liveryman, or, in the case of a city or town being a county of itself, as a freeholder or burgage tenant, as hereinbefore mentioned: Provided always, that every person now having a right to vote in the election for any city or borough (except those enumerated in the said schedule A) in virtue of any other qualification than as a burgess or freeman, or as a freeman and liveryman, or, in the case of a city or town being a county of itself, as a freeholder or burgage tenant, as hereinbefore mentioned, shall retain such right of voting so long as he shall be qualified as an elector according to the usages and customs of such city or borough or any law now in force, and such person shall be entitled to vote in the election of a member or members to serve in any future Parliament for such city or borough, if duly registered according to the provisions hereinafter contained, &c.

The Redistribution of Seats Act 1885 (48 & 49 Vict. c. 23) provides:

Sect. 2. From and after the end of this present Parliament the Parliamentary boroughs named in the first part of the first schedule to this Act shall cease as boroughs to return any member. Each of the counties of cities and towns in the second part of the said schedule named shall, for the purpose of Parliamentary elections, be included in the county at large named opposite thereto in that part of the said schedule.

In the first part of the 1st schedule amongst the boroughs which are to cease as boroughs to return any member is the borough of Haverfordwest (district), in the county of Pembroke.

In part 2 of the 1st schedule it is said: "Each county of a city or of a town named below shall, for the purpose of Parliamentary elections, be included in the county at large placed opposite to it," and in this list the county of Haverfordwest is to be included in the county of Pembroke.

Sect. 7.—(1) From and after the end of this present Parliament each of the Parliamentary boroughs named in the fifth schedule to this Act shall, for all purposes of and relating to Parliamentary elections, include the places and be comprised within the boundaries which are respectively specified and described in the said schedule, and shall not include the places which are either therein specified and described as excluded, or are included by this Act in any other Parliamentary borough. (2) Where, by virtue of this section, any area is added to a borough being a county of a city or of a town in which freeholders are entitled to vote for the borough, that area shall, for all purposes of and relating to Parliamentary elections held after the end of this present

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Parliament, form part of the county of a city or town, and not of the county at large of which it has heretofore formed part.

In the 5th schedule referred to in sub-sect. 1 of this section, the Parliamentary borough of Pembroke is to include the present Parliamentary borough of Pembroke, and the places comprised in the area of the present Parliamentary borough of Haverfordwest.

Sect. 11. The law relating to the elections for the Parliamentary borough of Pembroke shall apply as if the places comprised in the area of the present Parliamentary borough of Haverfordwest were named in the Act of the session of the second and third years of the reign of King William the Fourth, chapter forty-five, as places sharing in the election of a member for Pembroke, and the borough shall be called Pembroke and Haverfordwest.

Sect. 17. Where a place in which the qualifying property of any voter is situate is changed from one Parliamentary area to another, then, on the occasion of the first registration of Parliamentary voters which takes place after the passing of this Act, such voter shall, as respects his right to have his name placed on the register and other rights of registration, whether arising out of successive occupation or the occupation of the same lodgings or otherwise, stand in the same position, so far as circumstances admit, in relation to the new area as he would have stood in if this Act had been in force before the commencement of the period of qualification, and such voter had acquired his rights under the law in force at such commencement as amended by this Act and the Representation of the People Act 1884, and so much of the register of voters existing at the passing of this Act as relates to the new area had been a register for the new area. A place shall be deemed to be changed from one Parliamentary area to another when it becomes part of a constituency of which it did not form part before the passing of this Act, &c.

Dickens, Q.C. (Lewis Coward with him) for the appellant.—The revising barrister was wrong in disallowing the appellant's vote. We start with this, that at the time of the passing of the Reform Act 1832 the town of Haverfordwest was a county of itself, and had the right to return a member of Parliament, and, being a county, freeholders therein had the right to vote in the election of that member. Then came the Reform Act 1832, and sect. 31 of that Act preserved the right of the freeholders in every city or town being a county of itself who then had the right to vote, to vote in the election for all future Parliaments. Haverfordwest comes under this section, as it was then a county of itself and its freeholders had the right to vote, and therefore by this section the right of those freeholders to vote is preserved. By the proviso at the end of the section this right of the freeholders to vote is also preserved so far as regards freehold tenements coming within the district of Haverfordwest which might be added to the town of Haverfordwest in pursuance of the Act. That is to say, the freeholder in Haverfordwest has his right reserved to him to vote in Haverfordwest, and he does not have it the less reserved to him if the election is for the larger area brought in under the Act. Then sect. 8 of the Act shows that Narberth and Fishguard are added to the county of the town of Haverfordwest, and the freeholders in those added districts share in the rights reserved to vote in the Haverfordwest district. Then by sect. 9 the boundaries of certain places are to be settled by an Act to be passed in the same session, and by the Parlia-

mentary Boundaries Act 1832 (2 & 3 Will. 4, c. 64), sched. (O), No. 50, the boundaries of Haverfordwest district — comprising Haverfordwest, Fishguard, and Narberth — were settled and described. Then sect. 33 of the Act expressly recognises the right of the freeholder as such to vote in the city or town which is a county of itself; and in the proviso provides that, in the case of a city or town being a county of itself, every person who has the right to vote as a freeholder shall retain such right of voting, and be entitled to vote in any future elections, if he is duly registered. This applies to the Haverfordwest district, and the rights of the freeholders are thus preserved to vote as freeholders in future elections, as Haverfordwest was and still remained up to 1885 a county of itself. The Act contemplated that the electoral area might be larger than the original city or town, but it did not say that the freeholder was only entitled to vote for this city or town being a county of itself so long as the electoral area remained the same. Therefore it is clear that up to the passing of the Redistribution of Seats Act 1885 the freeholder had a right to vote in the Haverfordwest district. Coming to the Act of 1885, the construction of the Act ought to be in favour of the franchise, and if a person has already got a franchise there ought to be clear and express words before that franchise is taken away. There are no such express words in the Act of 1885 which take away the franchise which the appellant admittedly had before 1885. All that sect. 2 does is to say that the borough of Haverfordwest district is to cease as a separate borough and is to be included in the county of Pembroke at large. Then sect. 7 merely included the then existing borough of Haverfordwest in the borough of Pembroke, and it ought to be taken that it included it with all its franchises, including the freehold franchise, and sect. 11 creates the new borough of Pembroke and Haverfordwest, and it is in this new borough that the present vote is claimed. That section is not against the appellant as it does not exclude this right. On the contrary, when taken in conjunction with the definition in sect. 24 of the "law relating to the Parliamentary elections," it seems to preserve the right. Sect. 31 of the Act of 1832 distinctly shows that if you have places sharing in the representation of Haverfordwest, those places are entitled to vote for the whole area. So, under sect. 11, if Haverfordwest shares with Pembroke it shares in the same way, retaining all its franchises. That section does not take away the right which had been preserved by an Act of Parliament; the words of it are not words of exclusion, but of inclusion, and those words of inclusion are not sufficient to exclude the right which had been already reserved. The voter has no less the right to vote for the city or town because the city or town forms part of a larger area. There is nothing in sect. 17 to take away the right, though we do not now rely on it.

Bray, Q.C. and S. G. Lushington, for the respondents, were not called upon to argue.

Lord ALVERSTONE, C.J.—This case is somewhat of a tangle until the sections are carefully examined; but when the sections are carefully examined I think the matter is reasonably clear, and that the decision of the revising barrister was right. The case is of importance because we are

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not dealing here only with the case of the personal claim to vote of this particular appellant, as it has been found by the revising barrister that the decision is to govern the cases of all voters whose names appear on, and of all persons claiming to have their names on, the list of Parliamentary electors in respect of freehold qualifications in certain parishes. Therefore, as was admitted by counsel for the appellant, this is a claim, if it be well founded, for freeholders in Haverfordwest and the two places of Narberth and Fishguard added to Haverfordwest under the Act of 1832, to claim in the borough of Pembroke and Haverfordwest not an occupation vote, or not a vote subject to conditions of ordinary borough votes, but a freehold vote—that is to say, a vote in respect of the possession of freeholds. If the contention for the appellant is right, the freeholders of those two places Narberth and Fishguard would be entitled, as well as the freeholders in Haverfordwest itself, to vote in this borough, and it makes no difference that they may never have voted, as has been suggested. But for the purposes of this point I will deal with it as a claim of a freeholder who has acquired a freehold in Haverfordwest; and I only indicate it to show that there is an important question here beyond the question raised by this particular appellant. At the time of the passing of the Reform Act of 1832, Haverfordwest was a city or town which was a county of itself, and it is taken—and it is not disputed by the respondents—that the freeholders in that town or county of itself were entitled to vote. I assent to the argument for the appellant that the effect of the Act of 1832 and the provisions of sect. 31 read together with the provisions of sects. 8 and 9 and the schedules therein referred to was that freeholders in Haverfordwest were entitled to their vote as freeholders. And it seems to me that the effect of one proviso in sect. 31 was to bring in for the purposes of voting for the town or county of Haverfordwest those two districts, namely, Narberth and Fishguard—which counsel for the respondents now says never have claimed in the borough of Pembroke and Haverfordwest a separate freehold vote—and to make those two districts part of the town or county of Haverfordwest being a county of itself. The proviso to that sect. 31 in my opinion makes it reasonably clear “that every freehold or burgage tenement which may be situate without the present limits of Haverfordwest”—putting in Haverfordwest instead of the words “any such city or town”—“being a county of itself, but within the limits of such city or town as the same shall be settled and described by the Act to be passed for that purpose as hereinbefore mentioned, shall confer the right of voting in the election of a member or members to serve in any future Parliament for such city or town in the same manner as if such freehold or burgage tenement were situate within the present limits thereof.” Therefore I assent to the view presented to us by counsel for the appellant that after the passing of the Act of 1832 the freeholders in Haverfordwest—and I should myself have thought certainly the freeholders in Narberth and Fishguard—were entitled to their vote by virtue of their freeholds. The important question in this case, as the revising barrister has indicated, is whether the rights are continued and saved by the Redistribution of Seats Act 1885, and if

counsel for the appellant had shown us that either the Act is silent, or that the point has not been dealt with sufficiently to alter the character of Haverfordwest with the two additions to it under the Act of 1832, then I think he would have made good his point. But when we look at the Act of 1885, not only has the matter been dealt with, but I think it is reasonably clear that it was dealt with from the point of view of not preserving any longer to Haverfordwest the privileges which it would have had if it had remained a county of itself, and that Haverfordwest both for borough purposes and for county purposes has become part, as to the borough purposes of the borough of Pembroke and as to the county purposes of the county of Pembroke, for the purpose of a person entitled therein having a vote. I will now go through the sections of the Redistribution of Seats Act 1885, which are agreed to be material. First of all, sect. 2 says: “From and after the end of this present Parliament the Parliamentary boroughs named in the first part of the first schedule to this Act shall cease as boroughs to return any member. Each of the counties of cities and towns in the second part of the said schedule named shall, for the purpose of Parliamentary elections, be included in the county at large named opposite thereto in that part of the said schedule.” Again we find that Haverfordwest is in the second part, and therefore becomes part of the county of Pembroke for the purpose of whatever is given by its becoming part of the county. We now come to sect. 7, which, in my opinion, is, taken with sect. 11, the important and governing section. The 1st sub-section of sect. 7 is this: “From and after the end of this present Parliament each of the Parliamentary boroughs named in the fifth schedule to this Act shall for all purposes of and relating to Parliamentary elections include the places and be comprised within the boundaries which are respectively specified and described in the said schedule, and shall not include the places which are either therein specified and described as excluded, or are included by this Act in any other Parliamentary borough.” Then, when we turn to the 5th schedule, we find that the borough of Pembroke includes the present Parliamentary borough of Pembroke and the places comprised in the present Parliamentary borough of Haverfordwest. Therefore, if there is nothing else, the effect of that legislation is to take the area which counsel for the appellant has described as having previously been the county of itself of Haverfordwest and to put it into the borough of Pembroke. Now, if it could be shown that the position of Haverfordwest as a county of itself was intended still to be maintained, or if, in other words, Pembroke had been added to the county of Haverfordwest in the same way as Narberth and Fishguard were added to it in the year 1832, I think the appellant's argument would be absolutely unanswerable. But, as far as I have gone, it seems to me reasonably clear that the language says that Haverfordwest shall be added to Pembroke, and not Pembroke added to Haverfordwest. But when I read on to sub-sect. 2 of the same section, I think it is clear that the point was not overlooked, but was intended to be dealt with in the cases where the state of things which counsel for the appellant has contended for did arise, because sub-sect. 2 says this:

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"Where, by virtue of this section, any area is added to a borough being a county of a city or of a town in which freeholders are entitled to vote for the borough, that area shall, for all purposes of and relating to Parliamentary elections held after the end of this present Parliament, form part of the county of a city or town, and not of the county at large of which it has heretofore formed part." As I have said, if it were true that on the facts Pembroke had been added to Haverfordwest, I think the appellant could then claim the benefit of sub-sect. 2 of sect. 7. Though it is not really necessary for our present purpose to know actually as a fact, yet I believe that there are towns still in the United Kingdom which, since this Act of 1885, have been counties in themselves, and to which sub-sect. 2 of sect. 7 applies. Whether I am right or not in that assumption and belief is immaterial, because it is quite clear that that was the case which the Act of Parliament contemplated. Now, in order to get rid of any difficulty as suggested that this case has been overlooked, this particular district was dealt with by the 2nd sub-section of sect. 11, which is as follows: "The law relating to the elections for the Parliamentary borough of Pembroke shall apply as if the places comprised in the area of the present Parliamentary borough of Haverfordwest were named in the Act of the session of the second and third years of the reign of King William the Fourth, chapter forty-five, as places sharing in the election of a member for Pembroke, and the borough shall be called Pembroke and Haverfordwest." In my opinion, to carry on the benefit to Haverfordwest it would at least have been necessary to say, "and the borough of Pembroke and Haverfordwest shall be deemed to be a county in itself"—words which we do not find. Whether that would have been necessary or not—and other words might have had the same effect—I am clearly of opinion that the effect of this legislation was to add Haverfordwest to Pembroke, and not to add Pembroke to the old borough of Haverfordwest, which was a county of itself. I think sect. 24 to which our attention was properly called by counsel for the appellant, shows that no limited meaning is to be put upon the words "the law relating to Parliamentary elections," because it is expressly said to include all the law respecting the qualifications and registration of voters. I agree with the contention for the appellant that sect. 17 does not tell against him; but I do not think it can be used in his favour. It was, in my opinion, a purely temporary section for the purpose of enabling any qualified voter to put together the qualifications that had arisen from the broken period in the borough when it was being abolished, and add it on to the qualification in point of time in the new borough or county, for it applies to both. I read it as a temporary section enabling the two broken periods of time to be put together. I will only say further that, of course, if the language had admitted of such a construction, I should not have hesitated to decide that freehold voters in this area could now acquire in this borough a vote which no other borough freeholder in other than boroughs which are counties of themselves could have obtained. In my judgment, when the sections are carefully examined, the difficulty which arises when considering the Reform Act of 1832 disappears, and

I think the revising barrister in this case was perfectly right.

WILLS, J.—I am entirely of the same opinion, and, as my Lord has expressed what seems to me to be the leading considerations in the case, I wish to add only one remark. From a very early period in this argument for the appellant it has appeared to me that there was a fallacy underlying it from beginning to end, and that is that Pembroke was added to Haverfordwest, instead of Haverfordwest being added to Pembroke, which makes all the difference, because Haverfordwest was a county of itself and Pembroke was not.

WRIGHT, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Ayrton, Biscoe, and Barclay.*

Solicitors for the respondents, *Russell-Cooke and Co.*

Nov. 13 and Dec. 19, 1900.

(Before Lord ALVERSTONE, C.J., KENNEDY and PHILLIMORE, JJ.)

WILLIAMSON LIMITED (apps.) v. TIERNEY AND ANOTHER (resps.). (a)

Merchandise marks—Watch—Parts imported from abroad—Finished in England—"English lever"—Merchandise Marks Act 1887 (50 & 51 Vict. c. 28).

The appellants sold a watch for 2l. 5s. to which they applied the description "English lever."

Certain parts were imported into this country from abroad in a more or less unfinished state. The value of these parts in their rough condition, including the mainspring, hairspring, and certain screws, was 8d. The price of these parts when finished in England was estimated to be 4s. 5d. All these parts were dealt with in this country to enable them to go into a watch, and the watch was put together here.

The magistrate held that the imported parts were of foreign origin and of such importance that a description which failed to indicate them was a false description in a material respect, and that the finishing operations in this country were not of such a character as to destroy the characteristics of the foreign country in which they were made and produced.

He accordingly convicted the appellants of applying a false trade description to the watch.

Held, on remitting the case to the magistrate, that if he had come to this conclusion as one of fact on the evidence, and had simply stated the case to determine whether there was anything in point of law to prevent him coming to such conclusion, the court would not disturb his decision; but that if he decided upon the view that the inclusion of certain parts partly manufactured abroad compelled him as a matter of law to hold that "English" was a false description, then his decision could not be supported.

CASE stated on an information preferred by the respondents against the appellants for that they, the appellants, did on the 4th Oct. 1899, at 81, Farringdon-road, London, unlawfully and with

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

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intent to defraud, sell certain goods, to wit, a certain watch numbered 22,889, to which had been applied a false trade description whereby the goods were falsely described as made in England contrary to the provisions of the Merchandise Marks Act 1887.

It was proved upon the hearing of the information that the appellants on the 4th Oct. 1899 sold the watch numbered 22,889, at 81, Farringdon-road, London, to the respondents for 2*l.* 5*s.*, the wholesale selling price of the watch as an English watch.

The watch was inclosed in a watchcase made of silver of the value of 7*s.* or 7*s.* 6*d.* marked with an English hall-mark, and there was no other indication of the place of origin of the watch.

The watch, as distinct from the watchcase, consisted of eighty-nine portions, put together by means of forty six screws. These parts, with the exception of the main and hair springs, are set out by name in two columns marked respectively 1 and 2 in the schedule hereto.

The parts named in column 1 of the schedule, except the ruby, were all presumably of English material, manufactured from the raw material, completed to the finished state fit to put in a watch, the whole of the operations being performed in the appellants' manufactory in Coventry, or by outworkers in this country in the employment of the appellants.

The parts named in column 2 were all imported into this country from abroad in a more or less unfinished state, manufactured in Switzerland according to the orders of and after patterns supplied by the appellants, but each and all of these parts underwent certain operations in the appellants' factory to render them fit—and which did render them fit in their finished state to go into the watch 22,889. The value of these parts in their rough condition, including the value of the hairspring, mainspring, and screws when imported, was 8*d.* The price of the parts in their finished condition after the completion of the operations in the appellants' factory was estimated to be 4*s.* 5*d.*, but the exact value of all the parts of the watch and their cost of production were not proved so as to enable a perfectly satisfactory comparison to be made.

The mainspring and hairspring were of foreign manufacture and imported into this country in a finished state, so far as being finished springs is concerned, though not fit to place in a watch, but they were mounted and adjusted in this country so as to work accurately with the other parts. The screws were imported into this country from abroad in a more or less unfinished condition, and after operations and processes performed upon them in this country were rendered fit for placing in the watch. But it was proved to be a recognised practice universally known in the trade that in all watches (except the most complicated and expensive) the mainspring, hairspring, and screws were commonly of foreign manufacture, and that the presence of such foreign springs and screws does not affect the character of the watch as a whole so as to render it false to describe such watch as English.

The whole of the parts of the watch were adjusted and fitted together and placed in the watchcase in the appellants' manufactory at Coventry.

There was no indication that any part of watch 22,889 had been produced or had come from any foreign country.

It was contended by counsel for the appellants that the watch 22,889 was an English watch; that except the hairspring and mainspring, which are almost universally, and the screws which are commonly, of foreign manufacture, no portion of the watch was or could properly be described as a foreign part; that the watch never became a watch until all the parts set out in columns 1 and 2 of the schedule, together with the hairspring and mainspring, were fitted together and adjusted into their proper positions, and that the watch 22,889 being made of certain unfinished (and or) immaterial foreign parts and English parts, fitted together and adjusted in this country was properly described as an English watch.

The magistrate adjudged and determined that the parts mentioned in column 2 of the schedule hereto were of foreign origin and of such importance that a description which failed to indicate them was a false description in a material respect, and that the finishing operations which they underwent in this country were not of such a character as to destroy the characteristics of the foreign country in which they were made and produced, and in consequence thereof the watch 22,889 was a partly foreign watch, and was a watch to which a false trade description was applied, and he accordingly convicted the appellants.

The grounds upon which he based his findings are set out in the judgment which he delivered in this prosecution, and is set out below.

The question upon which the opinion of the court is desired is whether the magistrate, upon the above statement of facts, came to a correct decision in point of law in holding that the parts mentioned in column 2 of the schedule were of foreign make, production, or manufacture, and of sufficient importance as to affect the character of the watch, and that the watch numbered 22,889 was not an English watch, but was a partly foreign watch to which a false trade description was applied, and if not what should be done in the premises.

SCHEDULE.—Column 1.—Third wheel, fourth wheel and pinion, escape wheel, pallet, pallet staff, steel barrel wheel, cannon pinion, hour wheel, minute wheel, index, click, stud, hour hand, minute hand, second hand, balance, pillar plate, balance cock, escape cock, top plate, jewelling, barrel, lever, roller and ruby pin, dial, keyless bar, return spring, washer, bevel wheel, wind-up side wheel, set hands side wheel, click spring. Column 2.—Centre wheel and pinion, pinion of the escape wheel, balance staff, barrel arbor, pinion of the minute wheel, barrel piece.

Three other cases were stated on informations relating to other watches of a different make. The only variance in those cases from the one set out above related to the number of pieces of the watch imported in an unfinished state from abroad.

The judgment of the learned magistrate was as follows:

In this case I find that the defendants have been guilty of applying a false description as to the place or country in which the watches A, B, C, and D, were made or produced. It is not disputed that the watches in question did contain several parts of foreign manufacture, and that they were sold as English lever

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watches with the English hall-mark upon them. The question for me to determine is whether the trade description is false in a material respect, and after giving the matter my best consideration I have come to the conclusion that it is. The defendants have acted deliberately in what they have done, and seem to have considered the question whether they were justified or not in importing the foreign parts which they have used in their watches. They contend that they have not exceeded the limits which are allowed by the statute and the custom of the watch trade. In my opinion they have exceeded these limits, and it is somewhat significant that since the summons was taken out new machinery has been introduced into their factory by the defendants to manufacture in England those parts which were previously imported from Switzerland. The question of materiality is no doubt one of degree, but it is one upon which the evidence of experts is of importance, and that evidence in this case appears to be almost entirely in favour of the prosecution. The defendants did not call a single witness who was unconnected with their own business to say that in their opinion the foreign parts used by the defendants were so immaterial that they might be disregarded in the description. The relative cost of the foreign parts to the cost of the whole watch is an element of some importance in determining the materiality, but the defendants did not call the best evidence upon this point, and I am bound to assume that they refrained from calling it advisedly. It was admitted by Mr. Tucker that the train is a most essential part of a watch, and that the train in each of these watches, consisting of at least three wheels and four pinions, was of foreign origin, in addition to several other parts of greater or less importance. It would, in my opinion, reduce the Act to an absurdity if I were to hold that such parts were not material to the correct description of a watch, in the same way as screws or the dial might be considered immaterial. It was contended for the defendants that the train and other foreign parts used in these watches were on the same footing as the mainspring and hairspring, which are nearly always of foreign origin in what are honestly called English watches. I think they are not on the same footing, because by the custom of the watch trade the main and hair springs are known and allowed to be of foreign origin in nearly every watch, so that no trader could be deceived by their not being taken into account in the description. It was further urged for the defendants that these foreign parts need not be considered in the description, because they were imported in the rough and had to be shaped, polished and fitted in this country. That plan was deliberately adopted by the defendants for some reason which they have not disclosed. The evidence is that the imported parts were made in Switzerland in accordance with the defendants' order, and in my opinion they were essentially made or produced in Switzerland, and that the place of origin was not altered by the fact that they had more or less of work done upon them in England before they fitted into the watch. The orders sent to Switzerland were not produced by the defendants. It was contended by Mr. Moulton, on the authority of *Bischof v. Toler* (73 L. T. Rep. 402; 18 Cox C. C. 199), that a watch was not made or produced until all its parts were put together, in the same way as the materials which, compounded together, made the product known as *le Dansk*, in that case. In my opinion there is a real distinction between a mechanical combination in which all the parts remain unaltered and a chemical combination in which the several parts are lost in the whole composition. Mr. Moulton was not inclined to quarrel with the decision of Mr. Horace Smith in the Raymond movement case, in which a seller was convicted for selling as English a watch which had a French movement, and yet the movement is only part of the watch, although no doubt the most important part. Lastly, as to motive, the onus of

proving innocent intention is thrown upon the defendants, and by not calling Mr. Errington they have failed to bring before me any satisfactory evidence to account for their conduct. They have, it is true, frankly acknowledged what they have done, and I think were justified in having the question brought to a test which will affect my decision on the question of costs. In regard to the watches seized as similar to A, B, C, and D, I can only go by what Mr. Tucker and Mr. Hewitt have told me, and I believe that they were given up as being similar to those found fault with by Mr. Hewitt. If a mistake was made in so doing, the defendants should have an opportunity of correcting that mistake. My order is that the defendants be fined 20*l.* and pay 10*l.* costs, and that the watches in court be confiscated, except such as the defendants may prove to the satisfaction of an independent expert not to contain foreign parts similar to those in A, B, C, or D, such expert to be agreed upon by the parties, or, failing agreement, to be appointed by myself.

Moulton, Q.C. and Lewis Thomas for the appellants.—The representation in this case referred to the completed watch, and was not a representation that each and every part was completely manufactured in England. The watch as a watch was English, and the fact that some of the parts were sent from abroad in an incomplete state, and useless to be used in the watch until worked upon in England, cannot make any difference. It would have been a false representation had the watch been described as Swiss. That was decided in *Bischof v. Toler* (73 L. T. Rep. 402; 18 Cox C. C. 199). The magistrate was therefore wrong in convicting.

Lawson Walton, Q.U., Bodkin, and Maurice Hill, for the respondents.—The conviction is right. The question whether the trade description of the watch as English was true was a question of fact for the magistrate. He said that the description "English watch" would imply that the watch was of English design, or English workmanship, made substantially of English materials. The proper description of the watch in question is an "Anglo-Swiss" watch. A watch is not English because it is put together in England. An article is made where its material and characteristic parts are made. It was held in *Kirshenboim v. Salmon and Gluckstein* (78 L. T. Rep. 658; (1898) 2 Q. B. 19) that, as "false trade description" in sect. 3 of the Merchandise Marks Act 1887 "means a trade description which is false in a material respect as regards the goods to which it is applied," calling machine-made cigarettes hand-made cigarettes is an offence, although they were of equally good quality. *Bischof v. Toler* (*sup.*) is in our favour when the whole facts of the case are looked at.

Dec. 19.—Lord ALVERSTONE, C.J.—These are appeals from the decision of Mr. Chapman, Metropolitan Police Magistrate, upon four informations preferred against the appellants alleging that they unlawfully and with intent to defraud sold certain watches to which had been applied a false trade description, contrary to the provisions of the Merchandise Marks Act 1887. The questions raised are of very considerable importance. The alleged false description was that the watches were sold under the name "English lever" and were inclosed in cases with an English hall mark. From the facts stated in the case it appears that certain parts of the watch varying in number and

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importance had been manufactured in a more or less unfinished state according to the orders and patterns of the appellants, and that when they were received in this country they were not fit to place in a watch and had to be mounted and adjusted so as to work accurately with the other parts of the watch, which were made throughout in England. The adjustment of every part of the watch and its fitting together took place at the appellants' factory at Coventry. We have carefully considered the case, and we have arrived at the opinion that the case should go back to the learned magistrate to be restated on one distinct and important point. It appears to us that we ought not to deal finally with the case without ascertaining from a more explicit statement than appears in the case at present whether the magistrate has held as a matter of law that, because some parts of the watch other than the mainspring, hairspring, and screws were partly manufactured abroad, he was bound to convict the appellants of applying in the term "English lever" a false description; or whether he has arrived at his conclusion as a determination of fact upon evidence, by which we mean evidence, if any, as to a recognised meaning of the epithet "English" as applied to watches in the watch trade, or any other facts proved before him, and showing or tending to show what the term "English" as applied to such watches is understood to connote, as well as the nature of the parts, their importance, and the degree of foreign skill and labour employed in them. If his conclusion is one of fact, and if the question he intended to raise upon this part of the case is whether or not there was anything in point of law to prevent his coming to this conclusion upon the evidence, we are agreed that he dealt with the case rightly, and that we could not disturb his decision. If, on the other hand, he has decided against the appellants upon a view that the mere fact of the inclusion in the watch of certain parts which have been partly manufactured in a foreign country obliged him necessarily as a matter of law to hold that the description "English" was false, we are also agreed that the decision could not be supported. In order, as I have said, to ascertain this to the satisfaction of the court we are of opinion that the case should be sent back so that the point of doubt may be clearly settled. We have only to add that in our view the appellants' contention that the conviction should be quashed upon the ground that the article sold was a watch, and that the watch never existed until the component parts were put together in England, goes too far and cannot be sustained. It would include a case in which all the parts of a watch were made abroad and brought from abroad in a condition to be put together, and the only thing done in England was the actual putting of them together.

Case remitted to magistrate.

Solicitor for the appellants, *Alfred G. Dinn.*

Solicitors for the respondents, *Rowcliffes, Rawle, and Co., for Hill, Dickinson, Dickinson, and Hill, Liverpool.*

Nov. 19, 20, 21, and Dec. 20, 1900.

(Before WILLS and KENNEDY, JJ.)

REG. v. COCKERTON; *Ex parte* HAMILTON AND OTHERS. (a)

Education—London School Board—Power to make payments out of the rates—Science and art schools or classes in day schools and evening continuation schools—Legality—Elementary Education Acts 1870-1891—Technical Instruction Acts 1889-1891—Education Code (1890) Act 1890.

The London School Board have no power to provide at the expense of the ratepayers science and art schools and classes in day schools.

The only education contemplated by the Education Acts is the education of children, and so the teaching of adults must not be defrayed out of the rates.

Inasmuch as science and art schools and classes must, according to the "Directory" published by the Science and Art Department, be carried on in day classes, the question of the power of the board to carry on such schools and classes in evening schools cannot arise.

Science and art classes in evening continuation schools are as much beyond the scope of rate-aided education as in day schools.

Semble, that, by sect. 13 of the Elementary Education Act 1873, there is no objection to any school board expending money, arising from subscriptions or donations, in teaching adults and in other teaching, outside the range of what ought to fall upon the rates, provided that it does not expend any money out of the rates towards such teaching.

CAUSE shown on behalf of T. B. Cockerton, the auditor appointed under the Elementary Education Act 1870, to audit the accounts of the School Board for London against a rule nisi for a *certiorari* to bring up and quash certificates, made by him in regard to the accounts of the board, of disallowances and surcharges of three separate sums which had been expended upon the maintenance of classes registered under the Science and Art Department.

The applicants for the *certiorari* were three members of the School Board for London.

The total expenditure of the board for the half-year ending the 29th Sept. 1898, amounted to 1,582,504*l.* 18*s.* 3*d.* out of which a considerable sum represented expenditure incurred by the board in connection with day and evening science and art schools and classes and schools of science maintained and registered under the Science and Art Department.

The auditor disallowed seven separate sums, selected as representative or test items, entered and charged in the accounts of the board for the half-year as being payments illegally made out of the funds of the board, and surcharged those sums upon members of the board.

Three of the sums selected by the board for the purpose of this case were surcharged upon the applicants respectively.

All the above-mentioned three sums, the payment of which had been disallowed, were paid out of the school fund of the board referred to in sect. 53 of the Elementary Education Act 1870.

The three sums were expended in maintaining

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

and keeping efficient science and art schools and classes which were held in buildings provided and maintained by the board.

The first was a sum of 32*l.* 6*s.* 10*d.* paid for salary to a drawing instructor who was appointed instructor in drawing by a resolution of the board dated the 28th March 1889, and it was provided that he should give the whole of his time to the work at a salary of 300*l.* per annum, rising by annual increases to a maximum of 350*l.* per annum. The principal part of his time was given to the supervision of drawing in accordance with the code of regulations for day schools under the Education Department. Among the classes and schools so supervised by him were art schools and classes under the Science and Art Department of the Committee of Council on Education.

A directory published by this department contained the provisions under which these schools and classes were carried out.

The second of the three sums was 4*l.* paid for special instruction in chemistry at science class No. 7229, held at M.-street Evening Continuation Schools.

The instructor was appointed by a resolution of the board dated the 21st Oct. 1897. Under that resolution he taught theoretical and practical chemistry in evening schools. A large part of his duty was to supervise the science classes held in day schools and evening continuation schools.

The third sum was 58*l.* paid to the Polytechnic for science and art papers and as the remuneration for the services of the local secretary of the Polytechnic in conducting science and art examinations, held in accordance with clause XX. of the directory of the Department of Science and Art.

The remaining four sums were the subject of appeals to the Local Government Board by the persons aggrieved by the disallowances and surcharges thereof, and were not included in the present rule.

The questions for the decision of the court were: (1) Whether it was within the powers of the board, as a statutory corporation to provide science and art schools or classes either in day schools or in evening continuation schools; (2) Whether it was lawful for them to pay the expenses of maintaining these schools or classes out of the school board rate or school fund; (3) Whether the rule should be made absolute in regard to any and which of the disallowances and surcharges.

The *Attorney-General* (Sir R. Finlay, Q.C.) and *Sutton* showed cause on behalf of the auditor. —The procedure to be followed in the audit is set forth in sect. 60 of the Elementary Education Act 1870 (33 & 34 Vict. c. 75). Sub-sect. 6 brings in the remedy allowed by 7 & 8 Vict. c. 101, ss. 32 and 33. Three items only are the subject of this rule; the others have been referred to the Local Government Board. The question is, whether under the present law the expenditure of money out of the rates by the school board upon teaching the subjects comprised in the curriculum of the Science and Art Department, as set forth in their directory, is an expenditure authorised by the Legislature. That question depends upon the Elementary Education Acts of 1870, 1873, 1876, 1890, and 1891, and upon the Technical Instruction Acts of 1889 and 1891. Our con-

tention is that the Elementary Education Acts relate only to the elementary teaching of certain subjects, and that what is authorised to be taught under the Technical Instruction Acts is something quite different. By sect. 3 of the Elementary Education Act 1870 the term "elementary school" means "a school or a department of a school at which elementary education is the principal part of the education there given," and by sect. 5 of the same Act elementary schools are to be provided available for all children "for whose elementary education efficient and suitable provision is not otherwise made. They referred to

Elementary Education Act 1870 (33 & 34 Vict. c. 75);

Elementary Education Act 1873 (36 & 37 Vict. c. 86);

Elementary Education Act 1876 (39 & 40 Vict. c. 79);

Technical Instruction Act 1889 (52 & 53 Vict. c. 76);

Education Code (1890) Act 1890 (53 & 54 Vict. c. 22);

Technical Instruction Act 1891 (54 & 55 Vict. c. 4);

Elementary Education Act 1891 (54 & 55 Vict. c. 56);

The result of all these Acts is to show that the Legislature has only authorised the teaching in board schools of elementary education. At what point education ceases to be elementary it is difficult to say, but, at any rate, the education given in the science and art classes goes beyond the limits of elementary education; and this education also goes beyond what was comprised in the code of regulations issued by the Education Department for day schools and for evening continuation schools. The day school and evening continuation school codes contain the maximum of what may be taught in the elementary schools. The question is how far the school board has been allowed by all these statutes to apply the rates for any purpose other than elementary education. The school board has power under sect. 13 of the Elementary Education Act 1873 to accept gifts for educational purposes, but due regard should be had to the proviso of that section. We submit that, taking all the provisions of the Acts into consideration, the rates may only be used for elementary education, and it is impossible to say that the limits of the present classes are within the bounds of elementary education.

Lord Robert Cecil, Q.C. and Hon. M. M. Macnaghten showed cause on behalf of the Camden School.

Danckwerts, Q.C. and Lochnis showed cause on behalf of the Corporation of the City of London.

Asquith, Q.C. and Llewelyn Davies in support of the rule.—The whole question here depends upon the construction to be placed on the definition of "elementary school" given in sect. 3 of the Act of 1870. There is no definition of "elementary education." It is true that elementary education was defined in reference to the duty of a parent towards his child. For that purpose it was defined to include "reading, writing, and arithmetic." But when dealing with the powers of the school board the Legislature purposely abstained from defining the term. The

term is flexible, and no fetter is placed upon the authorities appointed to administer the Act. The term may mean "the three R.'s" or it may be confined to the subjects mentioned in the codes or only to those which were obligatory, or it may extend to all subjects taught through both the Education Departments. The Legislature has, however, defined elementary school as "A school or department of a school at which elementary education is the principal part of the education there given." That is to say, not the education given to each child but at the school. Therefore, where at a school in which the principal part of the education given is elementary education, that school is within the Act of 1870, and, provided it conforms to the other conditions of the Act, it is one which a school board has power to carry on and maintain out of the rates. With regard to evening schools the case was even stronger, because the restriction that the principal education taught there must be elementary has been removed. The only limitation on teaching advanced subjects is that the school must essentially teach elementary subjects. Otherwise you cannot go to the rates. The code has nothing to do with the matter. Statutory recognition is to be found of this power existing in the school board. They referred to Technical Instruction Act 1891 (54 & 55 Vict. c. 4), s. 1 (1). If this was not so these provisions would be meaningless.

Dec. 20.—WILLS, J.—The concrete question we have to determine is whether certain items in the account of the London School Board have been properly disallowed by the auditor. It is common ground that such a question involves an inquiry whether the expense of maintaining either schools or classes of science and art in which the teaching follows the lines laid down by the Science and Art Department in its "directory" as distinguished from those laid down by the Education Department in its code, can be thrown upon the rates by which the board schools are maintained or assisted. The latter question is not, in my opinion, and for reasons which will hereafter appear, exhaustive, but it may be usefully dealt with in the first instance. It will be convenient, and indeed necessary, to preface a description of the Acts of Parliament the construction of which is involved, by a short statement as to the constitution and functions of the two departments. The Education Department means in the phraseology of the first Elementary Education Act, and of every other Act unless the contrary intention appears (52 & 53 Vict. c. 63, s. 12), which it never does, "The Lords of the Committee of the Privy Council on Education." It is a department of Government having offices at Whitehall and exercising a number of definite functions. It was, in fact, a Government office for the conduct of which the Lord President of the Privy Council was the Minister responsible to Parliament; and for many years before 1870 Parliament had annually allotted to it in the Appropriation Acts large sums of money for the promotion of public education to be distributed under rules framed by the department. The distribution took the form of grants made to schools carried on otherwise than for profit. The Science and Art Department was also a branch of the establishment of the Lords of the Committee of the Privy Council on Education,

and separate grants were made to it which were similarly distributed under its regulations to schools and institutions not for private profit where science or art was taught. It is described as having then been "a department of the Government established for the promotion of science and art, and being under the superintendence of the Lord President of the Privy Council and the Vice-President of the Committee on Education of the Privy Council," but in the year 1864, by a Royal Charter, from the recitals in which the foregoing description is taken, the Lord President of the Privy Council for the time being, and the Vice-President of the Committee on Education for the time being were constituted a body corporate with perpetual succession, a common seal, &c., under the name of the Department of Science and Art. And, therefore, in 1870, the two departments, though having no doubt a common policy, were essentially distinct, and it is only in popular language that they can be described as branches of the same administration. The Science and Art Department has for very many years had its offices and its seat of administration at South Kensington. The forms which the grants assumed in the Appropriation Acts were generally "for public education in Great Britain" and "to defray the expenses of the general management of the Department of Science and Art of the schools throughout the kingdom in connection with that department, and of the Geological Survey of Great Britain and Ireland." The same language was used in the Appropriation Act of 1864, which received the Royal Assent three months later than the date of charter of incorporation of the Science and Art Department. In 1865 the two grants were: (1) "For public education in Great Britain"; (2) "for the general management of the Department of Science and Art and of the establishments connected therewith." In 1867 the first vote was described as "for public education in England and Wales, including the expenses of the Education Office in London. In 1868 the second vote was described as "for the salaries and expenses of the Department of Science and Art and of the establishments connected therewith," and since these respective dates practically the same designations have been used in every Appropriation Act down to the present time. The departments were, therefore, in 1870 separate in name, separate in habitation, separate in constitution, and separately intrusted with public funds to be administered by each department independently of the other. Each has from time to time published its own prospectus and laid down for itself the conditions under which it would make grants from the annual vote to schools and institutions engaged in teaching. For the sake, I presume, of avoiding confusion, the Education or Whitehall Department has called its syllabus of conditions "the code." The analogous publication of the Science and Art or South Kensington Department has been called "the directory." A comparison of the code and directory now in force shows that the code deals with many subjects not embraced in the directory and with an education much less advanced in the subjects common to both than those dealt with by the directory. To some extent the course of study with which the Whitehall establishment is concerned in the common subjects may overlap

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the lower portions of the South Kensington scheme, but the broad distinction remains that the South Kensington curriculum, while narrower than the Whitehall scheme, is of a much more advanced character. South Kensington makes grants substantially larger than Whitehall, and the extreme limit of the teaching which it aims at encouraging reaches a very high standard and extends into the higher mathematics, into chemistry of a very advanced character, both theoretical and practical, into hygiene, geology, physiography, and a multitude of subjects in the domain of science which are carried as far as might well suffice to give a successful student a high place in a Tripos or in the honour list of most of our Universities. The department aims at the encouragement of what it calls science schools and science classes as well as schools of science. A school of science is an establishment with all the necessary appliances for a complete and methodical scientific education adapted for students whose education is such as would fit them to enter standard 7 of the code (see directory, arts. 56, 57, and *passim*.) No definition is given of science schools and science classes, but they are at all events schools or classes of the South Kensington as distinguished from the Whitehall type, and giving instruction in the subjects which they may happen to teach, aiming at the South Kensington standard and intended to earn the South Kensington grant. The Act upon the provisions of which the present questions chiefly turn is the Elementary Education Act 1870 (33 & 34 Vict. c. 75). By sect. 5, where in any school district (as defined by the Act) there is not a sufficient amount of public school accommodation in public elementary schools, in the Act referred to as "public school accommodation," available for all the children resident in such district for whose elementary education provision is not otherwise supplied, the deficiency shall be supplied in manner provided by the Act—that is to say, by the creation of a school board and the establishment of board schools. By sect. 19 the school board may, for the purpose of providing sufficient "public school accommodation" provide schoolhouses and supply everything necessary for the efficiency of the schools provided by them. By sect. 53 the expenses of the school board shall be paid out of the school fund, which is to consist of fees from scholars, money provided by Parliament or raised by loan or in any manner whatsoever by the school board, and any deficiency is to be made up out of the rates to be raised as provided by the Act. The condition, therefore, of the existence of a school board, other than the School Board for London, is the want of proper provision by the existing schools for the elementary education of all the children in the district; and in determining the question whether such deficiency exists, the Education Department is to take into consideration every school in the neighbourhood which gives efficient elementary education to the children in the district. The School Board for London was constituted by sect. 37 of the Act without such inquiry, it being assumed, apparently, that there was no need of it. The board is directed to "supply their district with sufficient public school accommodation" (defined in sect. 8), which is exactly what any other school board has to do, and I cannot find in the Act any trace of

any difference between the powers and duties of the School Board for London and those of any other school board. Wherever the deficiency does exist it is to be supplied by accommodation in public elementary schools as therein defined. This throws us upon sect. 7, which enacts that every elementary school which is conducted in accordance with the regulations that follow shall be a public elementary school. I pause here to say that in sect. 2 an elementary school is defined as meaning "a school or department of a school at which elementary education is the principal part of the education there given," so that sect. 7 says that every school at which elementary education is the principal part of the education there given shall be a public elementary school if it conforms to the regulations therein contained, and as a board school by sect. 14 must be a public elementary school, it follows that it must be conducted in accordance with those regulations. The only regulation that is material here is that it shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual Parliamentary grant (sub-sect. 4). A Parliamentary grant means (by sect. 2) a grant made in aid of an elementary school out of moneys provided by Parliament for the civil service, entitled "for public education in Great Britain," which, as I have shown, is always a distinct thing from the grant to the Science and Art Department, and is the fund which, from its establishment, has been administered by the Whitehall Education Department. The conditions in question, by sect. 97, shall be those contained in the minutes of the Education Department for the time being—i.e., in the present case the code of 1898. That code provides for certain subjects as obligatory, and, unless they are taught to the satisfaction of the Department, no grant can be obtained. Additional grants can be earned by efficient teaching in the other subjects mentioned as optional, the grant being so much per head in respect of scholars showing a certain proficiency. The board school, therefore, under the Act of 1870, must be one in which the principal part of the education is elementary, and, as the school board cannot come into existence unless there is a deficiency in the provision in the district for elementary education, it might very well have been enacted that the education to be provided out of the rates should be elementary only. Indeed, such would have been the natural conclusion had not a contrary intention appeared. I think, however, that it does appear. The definition of "elementary school" is not that it shall include a school at which the principal part of the education is elementary, but that it means such a school; and I do not see how any other conclusion can be arrived at than that the board schools may go beyond mere elementary education if the school board be so minded. It is quite clear to my mind that they are under no obligation to go beyond the subjects and the amount of education required by the Education Code in order to earn a Parliamentary grant. The extent of this obligatory teaching, though a varying quantity, has always been extremely moderate. But I see no indication of anything like a definite superior limit to what may be taught except in so far as such a limitation is involved in the proposition which I hope in due course to make clear—viz., that the only education contemplated by the Act

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as within the province of the school boards is education for children. I think there was good reason for the abstention in the Act from any provisions for a superior limit. The work of the Education Department in 1870 and for some two or three years later had very modest aims, and did not go beyond reading, writing, and arithmetic. No doubt the general standard of primary education was then extremely low. It must have been evident to everyone that if reading, writing, and arithmetic were properly taught there would soon be a great many children who, if they were to be taught anything fresh during their childhood, must learn something beyond that restricted range of instruction, and that there would certainly be exceptional children who would go far beyond it. The code at that time provided for no grants for any instruction beyond what have been called the three R's. I cannot believe for a moment that it ever was intended that in board schools nothing beyond the very low standard to which alone elementary education as then understood had reached should be aimed at by the board schools. The legislation is general. It applies alike to board schools and to schools—not for private profit—maintained out of endowments or by voluntary contributions. Neither the Acts nor the codes are confined to either voluntary or board schools. A great deal of confusion and misunderstanding has, I think, arisen from a failure to appreciate this cardinal fact, and the most extravagant arguments have been founded upon the use of expressions of a general character and intended to apply to all elementary schools (as defined by the Act) and upon the application of them as if board schools were the only schools with which they dealt. It seems to me, therefore, that so long as the board school is devoted principally to elementary education there is not only no provision, express or implied, that the instruction shall not go beyond it, but a distinct intimation that it may, and that the only condition expressly imposed as to the quantum of education is that it must at least come up to the lowest standard required in order to obtain a Parliamentary grant—i.e., must satisfactorily teach the obligatory subjects. Such subjects must almost necessarily form the principal part of the instruction to be administered in a board school which admits children from five years of age upwards, and to which children from five till fourteen can be compelled to go. The higher the age the fewer the children, inasmuch as every child of ten or twelve must have been a child of five, whereas it is not every child of five who lives to be ten or twelve. There is, however, as it appears to me a very important and a very reasonable practical limit imposed on the education to be given at board schools. From first to last the whole series of Acts relating to this subject, which are invariably designated as the Elementary Education Acts, deal with children. No definition is given of "elementary education," which is obviously a term that may shift with the growth of general instruction and attainment. The code, however, in many instances, draws a line, in dealing with subjects for which grants may be made, between the elementary and advanced stages, but such division affects only the amount of the grants, and has really no bearing at all upon any question involved in the present case. Except for the

purposes of one Act, dealing with compulsory attendance, no definition has been given of "child." It is impossible to lay down any definite boundary as separating "children" from young men or young women, or any other description by which an advance beyond childhood may be indicated. Practically I suppose that at somewhere between sixteen and seventeen at the highest, an age has been arrived at which no one would ordinarily call childhood. It seems to me that as far as mere *quantum* is concerned, any education suitable for a child may be given by the school board, but that the one condition must always be fulfilled by the school—viz., that it is conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain a Parliamentary grant, which by the interpretation clause means the Whitehall grant. I think the clear intention of Parliament was to place the elementary schools under the sole administration of Whitehall. South Kensington is never alluded to. The code at one time placed one of its subjects—drawing—under the Science and Art Department, but always with the proviso that the grant would come from that department. Of course, there was nothing to prevent either department from making or withholding a grant upon any terms not inconsistent with the Acts which it chose to impose, but that has absolutely nothing to do with what the public elementary school may, or may not, do. That depends entirely upon the Act of Parliament, which meant, I think, to give to public elementary schools of every sort the same rights and to subject them to the same control. And I think sect. 7, sub-sect. 4, meant to place them all under the control of Whitehall, and to say that all must teach what Whitehall laid down as obligatory in order to get a grant, and that in regard to instruction outside that narrow area, if and in so far as it was given, it was to follow the rules of the Whitehall Code, whatever they might be, from time to time. I have dealt at considerable length upon the Act of 1870, because I believe that it strikes the keynote of all the subsequent legislation on this subject. Between 1870 and 1893 no fewer than nine Acts supplementary to the principal Act were passed, and in every Act the same phraseology is kept up, and in the last of them (the Elementary Education (School Attendance) Act 1893 (56 & 57 Vict. c. 51) the whole of the preceding Acts are styled "The Elementary Education Acts 1870 to 1891." In 1873 an Act was passed (36 & 37 Vict. c. 86) under which a school board was enabled, with certain exceptions not material, to accept and administer any educational trust or endowment. It was provided sect. 13 (2) that any school connected with such a trust or endowment shall be deemed to be a school provided by the school board—in other words, a board school. But then follows the significant qualification that nothing in that section shall authorise the school board to expend any money out of the school rate for any purpose other than elementary education. That is to say, no additional burden was to be thrown on the rates in order to carry out the objects of the trust or endowment. The same Act, in sect. 22, refers to "registers and other books and documents containing information with respect to the attendance of children" at the board school, and sects. 24 and

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25 contain various other provisions with regard to the attendance of children. The Act of 1876 enacts that it shall be the duty of the parent of every child to cause such child to receive elementary instruction in reading, writing, and arithmetic, and is full of provisions about "children" attending the school. Further control in respect to the degrees of instruction and efficiency required to obtain certificates of exemption from attendance at school is given to the Education Department by sect. 24, thus enabling them to raise the standard from time to time. A child is defined to mean in this Act a person between five and fourteen (sect. 48). The only place in which the word "scholars" and not "children" is used is in a section which refers to schools that are not board schools (the third paragraph of sect. 48). The next important Act was that of 1891, which abolished school fees for children between three and fifteen. It appears, I think, to assume that there may be children over fifteen years of age attending the board schools, but I can find no phrase or expression indicating that anything but children were contemplated. Stress has been laid upon the use of the word "scholars" (and not "children") in sect. 8, which provides that nothing in sect. 17 of the Act of 1870 shall prevent a school board from admitting scholars to any school provided by the board without requiring a fee, as if it indicated that the Acts referred to scholars who are not children. But inasmuch as sect. 17 applies to children, and children only, there is absolutely nothing in this argument. The two passages just referred to are the only ones in the whole series in which the pupils are referred to otherwise than as children. The Act of 1893 (56 & 57 Vict. c. 51) simply raises the age under which a child cannot be employed except under a certificate of exemption from ten to eleven. Reference has been made in the course of the argument to the Technical Instruction Act 1889 (52 & 53 Vict. c. 76), but, as it relates entirely to schools to be established and maintained by various local authorities, the enumeration of which excludes school boards, and the only Parliamentary grant contemplated by it is one by the Science and Art Department, its bearing upon the present question is so extremely remote that it is not worth serious consideration. Sect. 1 (a) says in effect that the local authority shall not supply or aid the supply of technical or manual instruction to scholars receiving instruction at an elementary school in the obligatory or standard subjects prescribed by the minutes of the Education Department. Another clause—sect. 1 (3)—says that nothing in the Act shall be construed so as to interfere with any existing powers of school boards with respect to the provision of technical and manual instruction. But in the first place I suppose that it never would have entered into anyone's head to doubt that some technical and manual instruction may properly fall within elementary education, and, further, such instruction had by that time found its way into the code. In my opinion, therefore the board schools can provide instruction more than elementary so long as it is for children, but are placed expressly under the Whitehall Department, and in so far as they teach either elementary or advanced subjects must conform to the Whitehall Code. It follows that they have no

statutory authority to do more, and, therefore, if they do go substantially beyond it, must not spend the ratepayers' money upon the excess. In so far as, while following the Whitehall Code, they may be able to earn the South Kensington grants, I see nothing in the Acts to prevent them from doing so, but, as far as I can gather the facts from the very obscure case in which they are stated, the money expended upon science schools and science classes in respect of which the disallowances were made by the auditor were those which were incurred by teaching the South Kensington subjects in accordance with the South Kensington Directory. So far what I have said applies equally to day schools and evening schools. Before I proceed to deal specially with the evening schools I think it may be useful to trace succinctly the course of action which has been followed by the Education Department. By the courtesy of the Education Department I have been able to see the whole of the codes from 1870 to 1898, and the following summary may be relied upon as accurate, though it does not profess to be absolutely exhaustive. Down to and including 1891 there was one code embracing both day schools and evening schools, though the regulations applying to each have long been on somewhat different lines. From 1870 to 1874 the only education contemplated or spoken of was in reading, writing, and arithmetic. Various modifications had taken place between 1870 and 1875, always in the direction of what I may call natural development, but always confined to these three subjects. But in 1875 a change of the most far-reaching kind was made. To the then elementary subjects were added grammar, geography, and history; a long list was also given of subjects called "specific," for proficiency in which a grant could be made. They included mathematics, Latin, French, German, mechanics, animal physiology, physical geography, botany, and domestic economy (this for girls only). This alteration was coincident with no fresh legislation, but was solely a departmental act. It was, in my opinion, entirely within the competence of the department, and it could have no operation unless the Legislature granted the necessary supplies. What is the effect upon the limits of education to be observed in board schools is a totally different matter which I will deal with in its proper place. The successive codes for some years made no further change, except in the shape of a continual increase in the extent to which the teaching was to be carried. But in 1882 there was a further change of an important character. In this code, as in all the subsequent ones, the subjects for which grants could be made are divided into two classes, obligatory and optional, and for the first time it is stated with regard to evening schools that no attendance of a person over twenty-one or under fourteen will be recognised for a grant. The optional subjects are again subdivided into class subjects (to be taken by classes) and specific classes (to be taken by individuals). It is a curious fact that, though the specific subjects would naturally be selected by the more advanced scholars, who may be between twenty and twenty-one, a note is appended to the schedule of specific subjects that the science subjects are to be taught chiefly by experiment and illustration, inasmuch as if they are taught to children by definition and verbal description they will be worthless as means

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of education. This note did not drop out till 1893, when I suppose it struck someone as absurd under the existing conditions. The code for a long time coquetted with drawing. It was introduced in 1885 as an optional class subject; in 1886 it was made obligatory; in 1887 it was dropped altogether; in 1890 it was restored as an optional subject for boys in infant schools or classes; in 1893 it was promoted to be an obligatory subject for boys in schools for older scholars, but always with a notice that the grant would be made by the Science and Art Department, and upon examinations conducted by that department. It was at length finally taken to itself by the Education Department in 1898, the grants thenceforth being made by the Education Department and the rules applicable being transferred from the South Kensington Directory to the Whitehall Code. No other department of art has *eo nomine* been introduced into the Whitehall Code except in so far as anything that may be called art may fall under the head of "manual instruction." In 1892 for the first time separate codes were issued for day schools and evening schools still called by that name. In 1893 appears for the first time the phrase "evening continuation schools." I do not know, and the learned counsel could not tell us, who invented the expression. It is not to be found in any of the Elementary Education Acts nor in any Act which has been brought under our notice. I gather, however, from two extracts from speeches of Mr. Mundella, given in Murray's Dictionary under the word "continuation," and dated respectively 1887 and 1888, that it was introduced from the educational technology of Germany. They are defined in Murray as "schools in which the education of the elementary school is continued to a more advanced age." By the explanatory memorandum prefixed to the code for each year after 1892 they are to include schools to which "the principal part of the work will be preparatory to the special studies directed by the Science and Art Department or other forms of secondary or higher education." Elsewhere they are spoken of as designed to provide the means for "those who are leaving the day schools to continue their education at evening schools" and as "one of the most important means for turning to better account than at present the money and time now spent in the day schools" (Code of 1893, arts. 6 and 7), which means, I suppose, the money now spent upon and time spent in the day schools. Thenceforth, it is announced, the attendance of persons over twenty-one years of age will be recognised; no limit of age is prescribed; no scholar will be compelled to take the elementary subjects. As to one of the subjects, "The Life and Duties of the Citizen," the code contains the very reasonable statement that it will be found difficult to teach it except to those scholars who are in the habit of reading and thinking intelligently about public affairs. The case finds that a large number of the persons taught at the evening schools in respect of which disallowances have been made were adults. It appears to me, again, to have been perfectly within the competence of the department to lay down the conditions under which it would make grants, and I am not in the least surprised that where it found schools *de facto* fulfilling those condi-

tions the grant followed as a matter of course. But to argue, as has been done, that such action on the part of the department sets the school board free to teach at the expense of the rate-payers to adults and to children indiscriminately the higher mathematics, advanced chemistry (both theoretical and practical), political economy, art of a kind wholly beyond anything that can be taught to children, French, German, history, I know not what, appears to me to be the *ne plus ultra* of extravagance. If the Acts of which the primary object was elementary education and the whole object was education for children are to be transformed into Acts for the higher education—education of a kind usual rather in a college of a university than in a school—of grown-up men and women it must be done by Act of Parliament and not by a stroke of the pen of a Government department. The department has never affected to do anything of the kind, or to do more than lay down the conditions under which a grant of money may be earned. The extravagance is in the application that has been made by the school board of the successive developments of the code. The department is under no restrictions as to the conditions under which it shall grant public money, Parliament being at liberty to withhold or ratify the grant. But it is the strangest of arguments to say that, because the department is prepared to grant money for teaching adults to any school in a position to teach them, it follows that a board, created and existing to supply education for children and for no other purpose, has a right to spend money out of the rates for teaching those who are not children. London and the large towns in the country are full of working-men's colleges, polytechnic institutions, and other similar establishments, which afford teaching for adults, and to whose legitimate work the provisions of the code for instruction to adults apply. An equally extravagant argument has been founded upon the Education Code (1890) Act 1890. The code of 1890 had made some new provisions as to special grants to schools in relation to population and some other local circumstances which it was obviously apprehended might be *ultra vires*. These are confirmed by this Act. The code made no provision that I have been able to find altering the definition of an "elementary school," and in so far as the Act effects that alteration I do not see that it has anything to do with the code of 1890. It is styled "an Act for the purpose of making operative certain articles in the Education Code 1890." This description may well perhaps apply to the provision in question, since there would not be more scope for the work of any evening school than for that of a day school without the removal of the restriction in sect. 2 of the Act of 1870. Be that as it may, it provides specifically that it shall not be required as a condition of a Parliamentary grant to an evening school that a principal part of the education there given shall be elementary, and it is a significant fact that it is silent as to any alteration of the Elementary Education Acts in the way of providing education for adults. This provision is not an alteration of any regulation of the code, and it does not touch the question of whether or not a school is conducted in accordance with the conditions, required by the minutes of the Education Department to be fulfilled in order to get a grant.

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The section means just what it says and no more—namely, that in order to get the grant the school need no longer be confined to teaching principally elementary matter. It is again a general section, not applicable merely to board schools, but to voluntary evening schools and all others which are in other respects public elementary schools. It does not, in my opinion, alter in the least the powers or duties of school boards, and certainly does not confer an entirely new power to teach adults by the aid of the rates. Another matter has been argued as being also a statutory recognition of the practice in question. The Local Government Board has directed board schools to show in their accounts what grants they receive from South Kensington. The Local Government Board has statutory powers to direct in what form accounts shall be kept and returns made, and their orders have to be laid before both Houses of Parliament. Therefore it is said there is a Parliamentary recognition of the fact that school boards are earning Science and Art Department grants. Such an argument only serves to show the straits in which the case for the applicants is found. The Local Government Board, like the Education Department, deals with schools as they find them. *De facto* they teach this and that which earn grants from South Kensington. Parliament votes the money and the department pays it. It is, therefore, natural that orders should be made that the school board should show how much it receives and what is done with it. It is not the business of either department to inquire whether any particular school, voluntary or board, is exceeding its rights with regard either to the public or to individuals by giving the education which has satisfied the conditions and earned the grant. It is, I think, equally futile to say that, because subsidies in respect of the schools and classes objected to in this case have been annually voted by the House of Commons and sanctioned by the Appropriation Acts, the school board must have a right to contribute to the cost of such schools and classes out of the rates. The Appropriation Acts legalise the expenditure of public money in the way proposed. They have absolutely nothing to do with the question whether the school board has exceeded its powers in levying rates to pay for the excess of cost over and above the grants; and, again I have to say that if the case of the applicants depends upon such an argument it must be in a bad way. In my opinion, therefore, in so far as the expenses in question were incurred for science and art schools and classes or for teaching adults they are indefensible, and the auditor was right in dealing with them. We have been asked by both sides to treat the case as if the question of adult instruction had not arisen. I do not know why the respondents joined in the invitation, but it is one which I cannot accept. The question is directly raised by the case, and it is impossible to ignore it. It is immaterial that it is not one of the reasons given by the auditor, but it is quite impossible to exclude it in dealing with the second question proposed to us. If, as stated in the case, it is really impossible to dissect the items and apportion them between the legitimate objects of the schools and those which are *ultra vires*, his disallowance of the whole must stand. But he has power to reduce as well as to disallow items (order of Local Government Board, the 14th July

1880, art. 25), and it seems to me to be little short of absurd to say as the case does that the task of apportionment is impossible. Far more difficult tasks of the same nature are habitually performed by judges and juries, and I can see no insuperable obstacle. The question, however, is probably not important. I do not suppose that any one will even wish that the gentlemen surcharged, who I do not doubt for a moment honestly did what they conceived to be their duty, should be mulcted in the amounts surcharged or in any other amounts. There can be no doubt that the importance of the subject demands that the questions raised should be decided by the House of Lords. Until that is done there can hardly be any disturbance of the existing order of things without the most enormous inconvenience. When the question is finally set at rest, if the views I have expressed be maintained, I can see nothing whatever to prevent the applicants from applying to the Local Government Board under the provisions of 11 & 12 Vict. c. 91), s. 36, to remit the surcharges. It will be only when it is finally decided that the surcharges were proper that the occasion will arise for resorting to that section. Before giving my formal answers to the specific questions which the case presents, I wish to observe that, in respect to expenditure, whether for teaching adults or for maintaining science schools or other teaching, which appears to me to be outside the range of what ought to fall upon the rates, I conceive that under the ample words of sect. 13 (1) of the Act of 1873 any school board which can get subscriptions or donations sufficient to enable them to give such instruction is at liberty to do so, provided that it *bonâ fide* conforms to sub-sect. 3 and expends no money of the rates towards such education. It is true that in the Act of 1870 the school fund is to consist of all moneys received in any manner whatever by the school board, but the provisions of the Act of 1873, s. 13, could not be complied with unless the funds specially allocated, which that Act enabled the school board to accept and administer, were made the subjects of separate accounts, and to that extent the Act of 1873 clearly modifies the Act of 1870. As to question 1, therefore, my answer is that it is not within the power of the board to provide at the expense of the ratepayers science and art schools or classes in day schools; that the question of providing science and art schools in evening schools cannot arise, inasmuch as by art. lvi., of the directory the work of such a school must be carried on in day classes; that science and art classes in evening continuation schools are as much beyond the scope of rate-aided education as in day schools; but that in both such educational work may be carried on by the school board provided the whole of the funds required for it are furnished from sources other than contributions from the rates. (2) Assuming the impossibility of apportioning the items which have been disallowed between legitimate and illegitimate expenditure, the disallowances were properly made. (3) The rule must be discharged.

KENNEDY, J.—In this case I have had the opportunity of reading the judgment which my brother Wills has just pronounced; and, it deals so thoroughly and fully with the historical and general aspects of the very grave and important

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matters before us, that I may without preface, approach the particular questions which the court has to decide. These questions, as stated in the special case, are three in number; but the real and substantial point of controversy is raised in the second of them, and I shall deal with it first. Is it lawful for the school board to pay out of rates levied under the Public Elementary Acts as the London School Board has done in the circumstances stated in the special case, expenses incurred in providing and maintaining science and art schools or classes either in day schools or in evening continuation schools? I will take first the case of day schools. It appears to me that we must chiefly be guided by the enactments of the Elementary Education Act 1870 (33 & 34 Vict. c. 75). It was by that Act that school boards were created. It prescribed their purpose, their powers and their duties; and I have been unable to find that its provisions, so far as the present issues are concerned, are in any essential point affected either by the later statutes relating to elementary education or by the Technical Instruction Acts of 1889 and 1891 (52 & 53 Vict. c. 76; 54 & 55 Vict. c. 4). The central purpose of the Elementary Education Act 1870 is plain and definite—to provide education for children in public elementary schools. The school board, which this Act brings into being, is a piece of administrative machinery whose primary work is to produce within a definite district a sufficiency of such educational provision. "Child" is not defined, as, for the purposes of that Act, it is defined in the Elementary Education Act 1876 (39 & 40 Vict. c. 79). Elementary education is not defined. I infer that Parliament intended both terms to be elastic. "Child" is not to be read as designating a person under fourteen years of age as it is (see sect. 48) in the Education Act 1876. All that is clear, is that it is for the education of persons *in statu pupillari* that the Act intends to provide. "Elementary education" may mean, and in my opinion it does mean, something more than the efficient elementary instruction in reading, writing, and arithmetic, which under sect. 4 of the Act of 1876 the parent of every child between the ages of five and fourteen, is bound to cause that child to receive. This Act gives it neither description nor limit. Now, let us examine the Act in order to see what the school board is to do. According to sect. 5 there is to be provided for every school district a sufficient amount of accommodation in public elementary schools available for all the children resident in such district for whose elementary education, efficient and suitable provision (referred to in the Acts as "public school accommodation") is not otherwise made. Where there is an insufficiency of such accommodation the school board is entitled (sects. 18, 19), and under sect. 10 may be required, to provide and maintain schools. The funds for the attainment of this end are stated in sects. 53 and 54, which give a right of recourse to the rates. These schools must be public elementary schools. What then is meant by a "public elementary school"? We have the answer in sects. 3, 7, and 97. It is, in the first place, a school or a department of a school at which elementary education is the principal part of the education there given; by which phrase I understand to be meant the principal part of the education of each of the children who attend the

school. Secondly, it is to be a school whose scholars are free from any religious test and from compulsion to attend any religious teaching or religious service or Sunday school, and where any religious observance or instruction to those whose parents desire it is subject to certain conditions. Thirdly, it is to be open to inspection by Her Majesty's inspectors of schools under the Education Department; and, fourthly, we have the important stipulation that, in sect. 7 (4), "the school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual Parliamentary grant." The term "Parliamentary grant" is explained by sect. 3 to mean a grant made in aid of an elementary school, either annual or otherwise, out of moneys provided by Parliament for the Civil Service, intitled "For Public Education in Great Britain." Sect. 97 provides that the conditions required to be fulfilled by an elementary school in order to obtain the annual Parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being. The crucial question in this case, in my view is this: Does the phrase "public elementary school"—that is, the school which the school board is to provide and maintain—as defined by the Elementary Education Act 1870, involve or connote any, and, if so, what limitation upon the character or extent of the secular instruction to be given, so far, at any rate, as regards instruction the cost of which may be defrayed out of the rates under sect. 54? Two things, I think, are clear. First, that the education is to be that of children, and not of adults; secondly, that only the principal part of the education and not the whole of it must be elementary education. Is there any further limitation? In my opinion there is. I agree with my brother Wills in thinking that, if the provisions of the Elementary Education Act 1870, and especially sect. 7 (4), are duly considered, it was the clear intention of Parliament to place public elementary schools (it is only such that the board may legally provide and maintain) under the sole administration of the Education Department at Whitehall. I think that the education which might be paid for out of the rates was intended to be education either prescribed or approved by that department as the responsible authority. The minutes of that department now in force are contained in the code of 1898. It lays down certain conditions as necessary for the obtaining of a grant. Some subjects—reading, writing, and arithmetic, needlework (for girls), drawing (for boys), and one "class" subject—it prescribes as obligatory subjects of instruction, and denotes them as "the elementary subjects." Others, less elementary, it authorises as optional subjects, either "class" or "specific"; and after giving a list of these it adds, in art. 16, that a subject outside the list of "specific" subjects may be substituted for one of these optional subjects, "provided that a graduated scheme for teaching it be submitted to and approved of by the inspector." These, obligatory and optional alike, are grant-earning subjects. But further, in art. 17, the code declares that instruction may be given in other secular subjects although they can earn no grant, but they must be subjects approved by the department. So that this Day Schools Code of 1898 contains a scheme of general

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secular education for children in a public elementary school, part of which is obligatory and part optional, but all of which is either prescribed by or requires the sanction of the Education Department at Whitehall, and is subjected annually to examination by the inspectors who belong to that department. It appears to me that the Elementary Education Act 1870, when carefully considered and fairly construed, sufficiently shows that it is for the provision and maintenance of a school where the secular instruction does not pass beyond these limitations, that it has given to the school board statutory authority to draw upon the rates. That which the school board here has done—that which has caused the making of these disallowances and surcharges by the auditor—has been the expenditure of money from this source upon an elaborate system of advanced instruction outside the Day School Code, and with regard to which the Education Department at Whitehall, the director of public elementary education designated, as I read it, by the fundamental statute, has neither responsibility nor control, nor power of maintenance or reward. The science and art schools and classes are schools and classes organised, governed, and examined by the Science and Art Department at South Kensington. As my brother Wills has fully explained, the department, although at its head, as they are also at the head of the Education Department at Whitehall, are the Lord President of the Council and the Vice-President of the Committee in Council on Education, is really distinct and different from the Education Department. It has a separate staff and organisation, separate offices, separate registration of students, separate examinations and separate inspectors. It administers moneys voted annually by Parliament under a separate head of appropriation for instruction in science and art in the United Kingdom; it has no concern with general public education, or any duty towards public elementary schools. Its directory (revised to June 1898), which corresponds to the code of the Education Department, contains in a volume of some 428 pages a statement of the organisation of the schools and classes, the subjects of instruction, the admission of students, the methods of inspection and examination, the conditions upon which grants, &c., are given to teachers and students, and a quantity of important detailed information upon other branches of the organisation and working of the Science and Art Department. A very short inspection of this volume and of a volume of the Science Examination Papers for 1898, which is also in evidence, suffices to show the vast difference between the scope, the method, and the character of the general education provided for children by the code and those of the special education provided by the directory for the science and art students. Art. xviii. of the directory, I may add, provides that no student may be registered for a grant for attendance under the department of science and art whose name is on the register for day attendance under the English Education Department, subject to the exception that a scholar of an elementary school who has been placed altogether in standard VII. of the code may, on personal application, be registered in an evening class with the approval of the department. I feel compelled to

hold that the payment by the school board out of rates for the provision and maintenance of science and art schools and classes in day schools is *ultra vires*. The position of the school board in regard to evening continuation schools does not appear to me to be in any essential respect different from its position in regard to day schools. Whilst upon the whole I have come to the conclusion that I cannot hold as we were asked by Lord Robert Cecil, in his clear and able argument, to hold, that a school board cannot legally expend rate-provided money upon instruction in evening continuation schools, I certainly do hold that in providing and maintaining such schools, they must not in their instruction go outside the system prescribed and sanctioned and controlled by the Education Department in Whitehall. The Education Department has a code of regulations for these evening continuation schools, which corresponds to the code of regulations for day schools. The code in force is that of 1897. It embodies (Appendix I.) many of the regulations of the Day Schools Code, and amongst others (see No. 77) the regulation that every school must be conducted as a public elementary school. Naturally, and, as one would assume from the title, the curriculum of the Evening Continuation School Code is less elementary, more advanced, and more extensive than the Day School Code. It recognises (art. 3) drawing for the purpose of the fixed grant, and seems in the same article to stipulate as a condition of the grant, inspection in that subject by the Science and Art Department. But, as I understand the provision of arts. 3 and 130 and appendix 3, and, as I understand from an inspection of drawings submitted to us, the scheme of drawing contemplated by the code and rewarded by grant from the education department is something of a far less advanced character than the scheme of the Science and Art Department in art schools and classes; and in art. 3 it is provided expressly that no scholar may be registered in an evening continuation school for drawing who is receiving instruction in a School of Art class under the Science and Art Department or has been successful in an examination of the Science and Art Department in connection with the School of Art or art class. In regard to science (p. 8) it is prescribed that "any scheme submitted for approval in a science subject which differs from that given for such subject in this schedule must be more elementary than the elementary stage of the subject as shown in the directory of the Science and Art Department." It appears to me that the curriculum of education marked out for evening continuation schools as public elementary schools by the Education Department at Whitehall in the code of 1897, gives the limits of the instruction in such schools for which the school board is authorised to make provision out of the funds obtained by the rates, and that to go outside these limits and provide out of the rates in such schools science and art schools or classes, not under the Education Department, but under the Science and Art Department and not included in the code of the Education Department is *ultra vires*. In coming to this conclusion I have not lost sight of the Education Code (1890) Act 1890 (53 & 54 Vict. c. 22), s. 1, which enacts in substance that for the Parliamentary grant to an evening school it

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should not be necessary that elementary education should be the principal part of the education there given, and to that extent, and for the purpose of the Parliamentary grant, alters, in regard to evening schools, the definition of "elementary school," and therefore of "public elementary school" in the Education Act 1870. I am unable to see how this enactment entitles the school board to spend the money drawn from the rates on instruction authorised and controlled by a department different from that to which sect. 7 (4) of the Elementary Education Act 1870 refers when it speaks of a Parliamentary grant. The reduction under the Act of 1890 of the quantum of the undefined thing called "elementary education" which was required by the Act of 1870 to constitute a school an "elementary school" does not touch the principle upon which, in my judgment, the propriety of school board expenditures out of rates is to be ascertained. As appears in the Evening School Continuation Code (appendix I, p 57) the evening school must, like the day school, be conducted as a public elementary school. If it were not, it could not legally be provided and maintained by a school board. As it is a public elementary school, the system of instruction in it must, for the reasons which I have felt it my duty to give at length, so far as that instruction is provided by the school board out of the rates, be the system of instruction which is sanctioned and controlled by the Education Department and not that which is administered by the Science and Art Department at South Kensington. I ought, I think, before leaving the subject of evening continuation schools, to advert to one matter relating to their administration which was the topic of discussion in the course of the argument of this case. The code of 1897 (explanatory memorandum, p. 7) declares that "the attendances of persons over twenty-one years of age will henceforth be recognised." In the special case it is stated that "there is no superior limit of age in the evening continuation schools, and a great number of scholars were adults." The special case does not submit to us any question as to the provision and maintenance of science and art schools and classes for adults as distinguished from youthful scholars; and it is, of course, conceivable that all the scholars so instructed in our evening continuation schools might be under age. Having regard, however, to the facts stated in the special case, and the importance of the matter, I feel it to be my duty to say that, in my judgment to educate adults in a public elementary school by means of funds taken out of rates under sect. 54 of the Education Act 1870 is certainly beyond the legal powers of a school board. However wide an interpretation be given to the words "child" and "children" in that statute, they plainly do not include "adults." The fact that the Education Department has deemed it right, for the purposes of a grant, to recognise the attendances of adults in an evening continuation school, cannot, as it appears to me, legally justify the action of the school board in applying to the education of adults, funds to which an Act of Parliament has given a right of recourse only for the purpose of the education of children. I have now dealt with the second and the really important question. The first question, which asks our judgment as to the power to the school board, as a statutory

authority, to provide science and art schools or classes either in day schools or in evening continuation schools, I may, I think, deal with briefly, for, as I understand the facts set forth in the special case, this is an academical and not really a practical question. It is stated in the case that the expenses incurred by the board in respect of science and art schools and classes under the Science and Art Department has always considerably exceeded the grants obtained from the Science and Art Department, and the deficiency has always been made good by the board out of the school fund and the rates levied under the Elementary Education Acts. By the first question, as I understand it, having regard to the terms of the second question, it is intended to ask us whether it is within the power of the school board, as a statutory corporation, to provide science and art schools and classes either in day schools or in evening continuation schools, in cases where there is no need, in order to defray the cost, to have recourse to the rates levied under the Elementary Education Act. I am, upon the whole, inclined to think that there might be circumstances under which a school board might act as suggested without legal objections. In so saying I have in view the provisions of sect. 13 of the Education Act 1873. It appears to me that there might be a gift to a school board for educational purposes under that section, which would enable a school board legally to provide and maintain by means of it a science and art school or class. That is not the present case. In answer to the third question I have only to say that in my judgment the rule must be discharged. No distinction in principle between the disallowances and surcharges was supported by counsel at the Bar, and I do not see how any such distinction could properly be drawn.

Rule discharged.

Solicitors: *Sharpe, Parker, Pritchards, Barham, and Lawford*; *F. W. Hales*; *The City Solicitor*; *C. E. Mortimer*.

CROWN CASES RESERVED.

Saturday, Nov. 17, 1900.

(Before Lord ALVERSTONE, C.J., WILLS, WRIGHT, KENNEDY, and PHILLIMORE, JJ.)

REG. v. STODDART. (a)

Gaming—Betting—Coupon competition—Continuity relating to horse race—Place kept for betting—Newspaper office—Receiving money at newspaper office—Betting Act 1853 (16 & 17 Vict. c. 119), s. 1.

The defendant was the proprietor of a newspaper, each number of which contained coupons entitling the purchaser of the copy to take part in a competition.

The competitions were for money prizes, to be awarded to the person or persons who named on the coupon the winning horses in certain races; the system being that the purchaser of a copy of the newspaper wrote on the coupon the names of the horses he selected as the probable winners of the races named on the coupon, and transmitted the filled-up coupon to the office of the newspaper.

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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On each coupon one guess was allowed free, and subsequent guesses on payment of one penny for each guess.

Sums of money were paid by the defendant to the persons who had correctly named the winning horses.

Held, that the defendant did keep and use the office of the newspaper for the purpose of money being received by her on consideration for undertakings to pay thereafter money on events relating to horse races.

Stoddart v. Sagar considered.

THE case stated for the opinion of the court by Channell, J. was as follows:—

1. Ada Jane Stoddart was tried before me on the 30th Oct. 1900, at the Central Criminal Court, on an indictment charging that she, on the 23rd March 1900 and on divers other days between that day and the 22nd June, in the city of London, being then the occupier of a certain office at 10, Red Lion-court, Fleet-street, in the said City, unlawfully did open, keep, and use the said office for the purpose of money and valuable things being received by and on her behalf as the consideration for undertakings to pay thereafter money and valuable things on events relating to horse races. There were other counts in the indictment, and a copy of it is to be taken to be part of this case.

2. The defendant had been proceeded against summarily for the alleged offence under 16 & 17 Vict. c. 119, and she had, pursuant to sect. 17 of 42 & 43 Vict. c. 49, claimed to be tried by a jury.

3. The defendant was proved to be the occupier of an office at 10, Red Lion-court, Fleet-street, and to be the registered proprietor of a newspaper called *Sporting Luck*, which was published weekly at that office. It was also proved that she personally took some part in the management, but was assisted by her husband and others.

4. The last page of each number of the newspaper contained conditions of a so-called competition, and was similar to the following, which is the last page of the number of the 15th June 1900.

The page was, so far as is material, as follows:

Sporting Luck coupon contests, promoted since 1890, and legalised by Baron Pollock and Justice Wright in the action *Sporting Luck* against the Police of London (*Stoddart v. Sagar*), August 1895.—Coupons for this contest may be posted to *Sporting Luck* not later than (midnight) Monday, and will be qualified to compete if received by post not later than midday (Tuesday); Scotch and Irish letters and those from Isle of Man, South and North Wales, Northumberland, Cumberland, Westmoreland, and the Channel Islands are accepted if received by *Sporting Luck* by post not later than 8 o'clock Tuesday night and have been posted not later than midnight (Monday).

1000l. for three winners on any one coupon. If this prize is not won, 1000l. for two winners.

HIGH WEIGHT HANDICAP.	TWO MILE SELLING HANDICAP.	THE STUBBLES HANDICAP.
Tuesday.	Wednesday.	Wednesday.
1 (Free)
2
3
And so on to 49.		

COUPON CONDITIONS.—As many coupons as desired (not exceeding the limits stated) are allowed but only one free coupon is permitted to be sent by any one com-

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petitor. Combination coupons are accepted as per scale of charges stated below. Cash must accompany each batch of coupons, and if not sent, the coupons will be disqualified. Cross all postal orders, and take a copy of the number. Make postal orders or cheques payable to "A. J. Stoddart." Selections can be made in ink or pencil. A horse's name must be given, "trainer's selected," or "owner's selected," or jockey's mounts are not permitted to qualify. If more than one succeed in securing the prize, the money offered will be equally divided. Only No. 1 coupon in the sheet of coupons is allowed to be used free of charge. This coupon can be filled up, despatched to us, and will be accepted for competition without any charges or fee being sent with it. The three winners or the placed horses, if the contest is a placing competition, must be on any one coupon (one line). In case of dead heats which are not run off, both horses are counted as winners. Where any races selected for coupon contests are postponed, the result of the contest will be held over until the races are decided. If in any week where three winners comprise the contest, and only two races are run, the prize, without any deduction, will be given for those races decided. If two or all the races of any contest are abandoned all money sent in with coupons will be credited to the competitors sending them in, and must be used in the following week's contest. If subscribers desire to make more than one attempt, any number of extra coupons can be filled up if one penny stamp is forwarded with each of these coupons, and thus if forty-nine different attempts are made, and forty-nine of the lines in our coupon sheet are filled up, 4s. must be remitted. If a remittance is sent in excess of the amount required for coupons received the proprietors of *Sporting Luck* do not hold themselves liable to return such excess cash. A successful competitor can only take one share of any prize.

PARTICULARS OF REMITTANCES SENT WITH COUPONS.

(These particulars must be also given if Coupons are sent on plain paper.)

Postal order	Number
State the value.	Give the official number which is on the right hand top corner of the order.
Stamps	Bank cheque or bank notes
If any stamps sent give the value here.	State value.
No. of coupons (lines) sent	No. of sheets of coupons (if more than one.)

NOTICE.—Subscriptions to this Competition must be made subject to the "Coupon Conditions" printed herewith, and every Competitor subscribing his or her name and address hereunder shall be deemed to have thereby signed a written agreement with the Proprietors of *Sporting Luck* that the Coupon Conditions shall be binding in every respect upon such competitor.

Name
Address

5. Copies of the papers of the 23rd March, the 30th March, the 15th June, the 22nd June, and the 7th Sept. were put in evidence, and they are to be taken as forming part of this case. The events the subject of the competition varied every week, but in each case between March and June the events were horse races. The prizes also varied, being usually 1000l. and sometimes 3000l.

6. It was proved that a large number of persons every week sent in coupons filled up in accordance with the conditions of the coupon competitions,

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and sent remittances of money, and that large sums were so received by the defendant, and large sums were paid away by her in respect of the so-called prizes. One witness proved the receipt by himself of 1000*l.*, being successful in one of sixty-eight coupons which he had sent in, and in respect of which he had paid 5*s.* 6*d.*

7. Special arrangements were made by the Post Office for the delivery of letters at the office on Tuesday mornings, and on those days there were usually twenty to twenty-two sacks of letters delivered. Most of these were marked outside "Competition," and the business of dealing with the coupons and remittances requires a much larger staff than would be required merely for the sale and publication of the said newspaper.

Large sums were paid by the defendant to her banking account every week, the total sum so paid in the year 1900 to the month of June being proved to be 60,000*l.* or thereabouts, but this would include sums received in respect of the newspaper other than sums received with coupons.

8. In the newspaper of the 7th Sept. it was stated that 46,000*l.* had been paid away in prizes since January.

9. Counsel for the prosecution contended that the use of the office for receipt of the money paid by the so-called competitors in these competitions was a contravention of the second part of the 1st section of 16 & 17 Vict. c. 119. He admitted that the facts of the case were identical with those proved in *Stoddart v. Sagar* (73 L. T. Rep. 215; (1895) 2 Q. B. 474; 18 Cox C. C. 165), but contended that that decision was wrong, or only to be accounted for by the fact that in that case there had been a finding of the alderman acquitting the defendant. He stated that both sides had expressed a wish when before the magistrate in the present case that the decision in *Stoddart v. Sagar* might be reconsidered by the Court for Crown Cases Reserved. He relied on *Hart v. Hay, Nisbet, and Co.* (37 Sc. L. Rep. 652, number for June 1900).

10. Counsel for the defendant said that the facts were not disputed. He relied on *Stoddart v. Sagar* and contended that the statute did not apply to a receipt of money unless the transaction was a bet, and that in this case there was no bet.

11. I held that if the money sent by the competitors with their coupons to the office (being all the pennies other than those which they paid for the newspapers) was the consideration for the promise by the defendant to pay the so-called prizes depending as they did upon the events of horse races, the case came within the statute, and I asked counsel on each side whether they desired me to leave any question of fact to the jury. Neither counsel did so, and counsel for the defendant said that he would not ask the jury to find that the money received with the coupons was not the consideration for the promise to pay the prizes.

12. I directed the jury that upon the facts proved, which were not disputed, the defendant had contravened the statute, and the jury on that direction found the defendant guilty on the first count of the indictment.

13. The defendant's counsel asked me to state a case for the Court of Crown Cases Reserved which I agreed to do solely in deference to the opinion of the judges as reported in *Stoddart v.*

Sagar. I myself agreed entirely with the views of the Scotch judges particularly with the last paragraph of the judgment of Lord Adam in which he pointed out that the Act sets forth certain things that are declared to be a breach of the Act, and that the things described are exactly what had been done in the case before him and also in that before me. I also thought that if it was necessary that the promise or agreement to pay money referred to in the Act must be an agreement by way of wagering these agreements in fact were so.

14. The jury are to be taken to have found as a fact that the money received by the defendant at the office in respect of the coupons was received as the consideration for her promise to pay the prizes according to the terms set out in the newspapers.

I postponed sentence and directed the defendant to enter into recognisances to come up for judgment after the decision of this case.

The question for the court is whether my direction to the jury was right. If right, the conviction is to stand. If wrong, the conviction is to be quashed.—A. M. CHANNELL.—Dated the 2nd Nov. 1900.

Joseph Walton, Q.C. (L. Kershaw with him) for the defendant.—Sect. 1 of the Betting Act 1853 applies only to houses kept for betting, betting being that which is described in the latter part of the section. The transaction in question is not betting. A competitor for the penny he pays acquires a right to guess a winner. If he guesses correctly, the proprietor of the newspaper pays the agreed sum of money to him, but in every case the proprietor must pay the money to some competitor. Neither is the transaction a lottery, because of the competitor's exercise of skill. The contingency in which the money is payable is not the horse race, but the guess, for it does not matter to the competitor which horse wins the race; his prize depends on his having guessed the right horse. He referred to

Reg. v. Hobbs, 79 L. T. Rep. 160; (1898) 2 Q. B. 647; 19 Cox C. C. 154;

Caminada v. Hulton, 64 L. T. Rep. 572; 17 Cox C. C. 307;

Stoddart v. Sagar, 73 L. T. Rep. 215; (1895) 2 Q. B. 474; 18 Cox C. C. 165;

Hunt v. Hay, Nisbet, and Co., 37 Sc. L. Rep. 652.

Horace Avory and J. G. Mackay for the prosecution were not called upon to argue.

Lord ALVERSTONE, C.J.—The defendant in this case was indicted under sect. 1 of the Betting Act 1853 (16 & 17 Vict. c. 119), which provides that "no house, office, room or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof or any person procured or employed by or acting on behalf of such owner, occupier, or keeper or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper or person as aforesaid, as or for the consideration for any promise or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race." The facts, which are not in dispute, are

that the defendant was the proprietor of a newspaper, each copy of which had attached to it a coupon entitling the holder to take part in a competition for prizes. The conditions of the competition allowed competitors to have extra coupons on payment of one penny for each coupon. The prize depended upon the guessing of the winner in a horse race. It cannot, I think, be denied that the transaction does amount to an undertaking to pay money on the event or contingency of a horse race. It is said by Mr. Walton that we ought to put some limitation on the statute. But in my opinion we ought not to put any limit on the words of the statute directly the case comes within the words "event or contingency relating to a horse race." I think that the framers of the statute did intend to prohibit the receipt of money on consideration of a promise to pay a sum on the contingency of a horse race, and we ought not to decline to give effect to the plain words of the statute. We cannot see the difference between this transaction and ordinary betting. The person who pays the money pays it because the person who receives it becomes entitled to it on the horse winning the race. There is no consideration for any further promise; the substance of the transaction is that the money shall be paid if the event of the guessing is that the horse named by a competitor wins the race. In *Stoddart v. Sagar* it was open to the court to find that the transaction was not only not betting but not an offence under the statute at all. But that the court did not find itself open to draw that conclusion is clear from the words of Wright, J. I read that as reserving the very question with which we have to deal. In *Reg v. Hobbs* there was no promise by the defendant to pay money, he was the custodian only of the money contributed. *Caminada v. Hulton* may clearly be distinguished. On the whole I think that though this transaction is not in popular language "betting" it nevertheless comes within the express words of the statute.

WILLS, J.—I am of the same opinion. I think that the transaction falls within the express words of sect. 1—the receiving of money "as or for the consideration for an assurance, undertaking, promise, or agreement" to pay money "on the event or contingency of or relating to" a horse race. It is said that the 1st section ought to be confined to betting "with persons resorting thereto"; the argument may reasonably be turned the other way, that it means "betting as aforesaid." To my mind this is about as clear a case of betting pure and simple as can be imagined. It is mischievous to refine when in substance there is no doubt as to what has taken place. Supposing the person who buys a coupon backs his chance conglomeration of names, to the extent of 5*l*. He pays 5*l*. to the defendant, and if successful receives 1000*l*.; if unsuccessful, nothing. In substance the defendant becomes a stakeholder until the race is over, when she pays not 1000*l*. plus 5*l*., but 1000*l*., so that the bettor wins 995*l*. Why this is not a bet of 5*l*. to 1000*l*. contingent on a horse race, I cannot see. That it is complicated by the liability of the prize of 1000*l*. to be divided amongst several does not alter the nature of the transaction. The view that I have expressed receives the high authority of the Scotch courts, being that of the Lord Justice General and of Lord Adam in *Hart v.*

Hay, Nisbet, and Co. (37 Sc. L. Rep., at p. 655). On both these grounds it is perfectly clear that the offence prohibited by the statute has been committed.

WRIGHT, J.—I agree for two reasons, which have been stated by my Lord, although I am not sure that for all purposes this transaction is "betting."

KENNEDY, J.—It is difficult to define what is a wagering contract so as to define what is meant by "bet." But however, that may be I think this case is covered by the statute. In *Reg. v. Hobbs* the person convicted had not entered into any contractual relation with the persons who entered into the competition, and the drawing was not similar to the contingency in this case. In my opinion this conviction should be affirmed.

PHILLIMORE, J.—I agree.

Conviction affirmed.

Solicitors for the prosecution, *Malkin and Co.*
Solicitor for the defendant, *Kent.*

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Nov. 8, 1900.

(Before SMITH, M.R., COLLINS and
STIRLING, L.JJ.)

WHYLER v. BINGHAM RURAL DISTRICT
COUNCIL. (a)

APPLICATION FOR A NEW TRIAL.

Highway — Local authority — Misfeasance — Removal of fence — Injury to traveller — Liability of highway authority.

A post and rail fence was erected by the highway authority, the predecessors of the defendants, by the side of a road, which was liable to be flooded from an adjacent watercourse, in order to protect the public from danger in times of flood.

Many years after the defendants, acting upon the report of their surveyor that this fence was in bad repair and was unnecessary, ordered it to be removed and a short length to be erected at each end instead. The fence was removed, but nothing further was done, and about three weeks later, when the road was flooded, a man drove off the road into the watercourse and was drowned.

Held (dismissing the appeal), that there was evidence upon which it could properly be found that the defendants had been guilty of an act of misfeasance which caused the death.

THIS was an application by the defendants for judgment or for a new trial upon appeal from the verdict and judgment at the trial before Wills, J. with a jury at Nottingham.

In this action the plaintiff claimed damages for the death of her husband, under the Fatal Accidents Act 1846 (9 & 10 Vict. c. 93), alleging that his death was caused by the wrongful act, neglect, or default of the defendants.

The defendants were the highway authority of the Bingham Rural District.

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WHYLER v. BINGHAM RURAL DISTRICT COUNCIL.

[CT. OF APP.]

There was a road within the district of the defendants along a part of which the defendants' predecessors had, in 1877, erected a post and rail fence in order to protect persons passing along the road from danger in times of flood.

At the time when this fence was erected, there was a stream by the side of the road, from which floods arose at times and covered the road. This stream was subsequently diverted, but the old watercourse in times of flood became filled with water which sometimes overflowed on to the road.

In 1899 the surveyor of the defendants reported that this fence was in a bad state of repair and would cost a large sum to repair properly, and that it was not needed, except a short length at each end, and that sufficient posts and rails could be got out of the fence to do all that was required.

The defendants ordered that this work should be done.

On the 26th Jan. 1900 the fence was entirely removed, and on the 16th Feb. nothing had been done to replace the fence or to protect that part of the road.

The surveyor of the defendants said, when giving evidence, that it was his intention to place posts at intervals by the side of the road in order to show the course of the road when it was covered with water in times of flood.

On the 16th Feb. the old watercourse was flooded, and the road was covered with water.

The deceased, while driving a carriage along this part of the road on the night of the 16th Feb., drove off the road into the old watercourse and was drowned.

The action was tried before Wills, J. with a jury.

The learned judge directed the jury that if they thought that this removal of the fence under the circumstances was not consistent with reasonable regard for the safety of persons using the road, they could find a verdict for the plaintiff.

The jury found a verdict for the plaintiff for 250*l.*, and the learned judge held that there was evidence upon which the defendants might be held liable, and ordered judgment to be entered for the plaintiff.

The defendants applied for judgment or for a new trial upon the ground that there was no evidence upon which they could be found liable.

Hugo Young, Q.C. and *W. Appleton* for the appellants.—There was no evidence upon which the appellants could be found liable. As highway authority they cannot be made liable to pay damages for any injury arising from any mere nonfeasance on their part, such as the omission to fence the road :

Cowley v. Newmarket Local Board, 67 L. T. Rep. 486; (1892) A. C. 345;

Thompson v. Brighton Corporation, 70 L. T. Rep. 206; (1894) 1 Q. B. 332.

There was no duty upon the defendants to protect persons using the road from danger by fencing the road, or by maintaining the fence erected by their predecessors :

Rees v. Llandilo Commissioners, 2 T. R. 232; 1 B. R. 466;

Wilson v. Halifax Corporation, 17 L. T. Rep. 680; L. Rep. 3 Ex. 114.

Therefore the removal of the fence was not an

act of misfeasance for which the appellants could be made liable. The removal of the fence was not the cause of the accident to the deceased; it was caused by the absence of a fence. The fence had been removed three weeks before the accident happened, and it might just as well be said that, if the fence had been removed ten or twenty years before, the removal was the cause of the accident. The cause of the accident was the omission to fence, and that is mere nonfeasance for which the defendants cannot be sued.

Etherington Smith for the respondent.—The fence along the part of the road in question was erected in order to protect the public from danger; the defendants decided that this fence should be altered, and that a different kind of fence should be provided for the protection of the public; in carrying out that alteration the defendants were guilty of misfeasance in not completing the alteration within a reasonable time after pulling down the old fence, and in not taking reasonable care to protect the public while the alteration was being carried out. The defendants were negligent in carrying out the work which they had undertaken, and that is misfeasance and not mere nonfeasance. The pulling down of the fence without due regard for the safety of the public was misfeasance.

Hugo Young, Q.C. replied.

SMITH, M.R.—This is an appeal by the defendants from the judgment entered for the plaintiff by Wills, J. after the jury had found a verdict for the plaintiff. It is admitted that the position of the defendants is the same as the position of the former surveyors of highways, and that their liability is neither greater nor less than was the liability of surveyors of highways. Long ago, in the case of *Russell v. Men of Devon* (2 T. R. 667; 1 R. R. 585), it was decided that surveyors of highways were not liable for nonfeasance—that is, for doing nothing. The remedy in such case is by indictment. It has also been decided that the law is the same in the case of local authorities in the position of surveyors of highways: (*Cowley v. Newmarket Local Board*, 67 L. T. Rep. 486; (1892) A. C. 345). The real question in this case is whether the plaintiff has not shown that the defendants have been guilty of misfeasance. The facts of this case are that, in 1877, there was a stream by the side of this road which, in times of flood, overflowed the road, and that, this being dangerous to persons using the road, a post and rail fence was erected by the then highway authority in order to protect the public in times of flood. It is said by the defendants that there was no obligation to put up a fence, and I do not say that there was any such obligation. There are indeed provisions, in sect. 24 of the Highway Act 1835, as to the duty of surveyors of highways with respect to highways which are liable to floods, but I am not sure that they apply to the present case. The provisions of sect. 6 of the Highway Rate Assessment Act 1882 have also been referred to, which seem to indicate some kind of duty to put up posts and rails for the protection of travellers from danger; but it is said that merely gives power to charge the expenses upon the highway rate and does not impose any duty, and I do not intend to decide any question as to liability under that Act. Now,

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the fence erected by the defendants' predecessors continued to exist for many years. The defendants, upon the report of their surveyor, in Oct. 1899 ordered this fence to be taken down, and that instead a short length of posts and rails should be put up at each end. On the 26th Jan. 1900 the old fence had been removed in pursuance of their order, but nothing at all was put up in its place, and the ditch was left without protection. Nothing had been done by the 16th Feb. 1900. On that day there was a flood which covered the road, and the deceased drove off the road into the ditch and was drowned, because there was nothing to show the course of the road after the posts and rails had been removed. It is contended by the defendants that at the most there has been mere nonfeasance on their part in not putting up posts or a fence, and that no action will lie because the plaintiff can only complain of their omission to do something. The plaintiff, however, alleges an act of misfeasance on the part of the defendants in pulling down the old fence. In my opinion, the accident was caused by an act of misfeasance on the part of the defendants in pulling down the old fence, for if they had not removed it the accident would not have happened. The jury found that the removal of the fence by the defendants in the manner and under the circumstances in which it was removed was not consistent with a reasonable regard for the safety of persons using the road. In my opinion, the learned judge was right in holding, upon that finding of the jury, that the defendants were liable for a misfeasance. The verdict and judgment must therefore stand, and this appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. The short question in this case is whether the plaintiff's husband met with his death by reason of an act of misfeasance on the part of the defendants. Unless the plaintiff can prove both that there was an act of misfeasance by the defendants and that the death was due to that act, she cannot succeed in her action. It must be admitted upon the authorities that the liability of a highway authority is only for acts of misfeasance, and that there is no liability for mere nonfeasance. This case must, therefore, be dealt with upon the footing that the defendants were not bound to put up a fence by the side of this road. The predecessors of the defendants had in fact erected a fence along this road, because they thought it necessary to protect the public who used the road from danger in times of flood. They thereby brought about a new state of facts. In the exercise of their powers as the highway authority they had turned an unsafe highway into a safe highway. The defendants by what they did afterwards turned this highway, which was safe and not a source of danger to the public, into a dangerous highway by altering its then existing condition by removing the fence. It appears to me that this was clear evidence of misfeasance on the part of the defendants, and also that the death of the plaintiff's husband was the result of that misfeasance. It was argued by the appellants that, if a long interval of time had elapsed between the removal of the fence and the happening of an accident from the absence of a fence, it could not be said that the accident was caused by the act of misfeasance. But that argument does not carry the defendants' case far enough, for it omits the

material element that the fence was only required in times of flood, and in this case the mischief arose from the act of misfeasance at the very time when the floods came. The case might be very different if a long interval elapsed so that it would be difficult to connect the accident with the act of misfeasance. I agree, therefore, that this appeal fails, and must be dismissed.

STIRLING, L.J. concurred. *Appeal dismissed.*

Solicitors for the appellants, *Mason, Edwards, and Mason*, for *B. H. Beaumont*, Nottingham.

Solicitor for the respondent, *G. E. Wright-Motion*, for *Charles Stroud*, Nottingham.

Friday, Dec. 7, 1900.

(Before SMITH, M.R., COLLINS and STIRLING, L.J.J.)

REG. (on the Prosecution of the Guardians of the Hendon Union) v. LOCAL GOVERNMENT BOARD AND THE GUARDIANS OF WILLESDEN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Local government—Poor law—Separation of parish from union—Division of "property" of union—Sum payable yearly by county council to union—Capitalised value of interest of parish—"Fixing" amount to be paid by union to parish—Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76), s. 32—Local Government Act 1888 (51 & 52 Vict. c. 41), s. 26.

When a union is altered under the provisions of sect. 32 of the Poor Law Amendment Act 1834 by the separation from it of a parish, the Local Government Board is required by that section to ascertain the proportionate value to such parish of "the workhouses or other property" held or enjoyed by such union for the use of the poor or benefit of the ratepayers, and to "fix the amount" to be received or paid by every parish affected by such alteration.

Under sect. 26 (1) of the Local Government Act 1888, every county council, except the London County Council, shall grant to the guardians of every poor law union in their county an annual sum for certain purposes there named.

Held, that the annual sum to be granted under sect. 26 (1) is "property" of a union within the meaning of sect. 32 of the Poor Law Amendment Act 1834.

Held also, that it is the duty of the Local Government Board under sect. 32 to ascertain, at the date of the separation of the parish from the union, what is then the proportionate value of the share of the parish in the annual sums to be thereafter received by the union under sect. 26 (1) of the Local Government Act 1888, and to fix definitely as from that moment the amount to be paid by the union to the parish in respect of such share.

THIS was an appeal by the guardians of the Hendon Union from a decision of the Queen's Bench Division (Bigham and Channell, J.J.) discharging a rule for a *certiorari*, which had been obtained by the guardians of the Hendon Union,

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

to bring up and quash part of an order made by the Local Government Board.

Up to the year 1896 the parish of Willesden was included in and formed part of the Hendon Union.

At that time the Middlesex County Council was liable, under sect. 26 (1) of the Local Government Act 1888, to pay to the Hendon Union the yearly sum of 2597*l.*, and also another yearly sum of 18*l.* under sect. 24 of the same Act.

The Local Government Act 1888 (51 & 52 Vict. c. 41) provides as follows:

Sect. 26.—(1) After the 31st March next after the passing of this Act, every county council, other than the London County Council, shall grant to the guardians of every poor law union wholly or partly in their county an annual sum for the costs of the officers of the union and of district schools to which the union contributes; and, until Parliament otherwise determine, the said annual sum shall be such sum as the Local Government Board certify to have been expended by the guardians of each poor law union during the financial year ending the 25th March next before the passing of this Act, on the salaries, remuneration, and superannuation allowances of the said officers (other than teachers in poor law schools), and on drugs and medical appliances.

On the 12th Aug. 1896 the Local Government Board issued an order whereby the parish of Willesden was, on and after the 3rd Oct. 1896, separated from the Hendon Union.

On the 13th Aug. 1896 the board issued another order whereby it was ordered (*inter alia*) that the laws for the relief of the poor in the parish of Willesden should, on and after the 3rd Oct. 1896, be administered by a board of guardians elected for that parish.

On the 23rd Dec. 1898 the board issued another order by which they dealt with the division of the property of the Hendon Union, as it existed up to 1896, between the union as it existed after the separation of the parish of Willesden, and the parish of Willesden. This order dealt with the workhouse, infirmary, schools, and such like matters, and, after reciting that it was necessary to provide for the apportionment of the above-mentioned annual sums of 18*l.* and 2597*l.*, it contained the following article:

Art. 5. As and when the sums of 18*l.* and 2597*l.* are received by the guardians of the poor of the Hendon Union from the County Council of Middlesex in pursuance of the provisions of sect. 24 (2) (d) and of sect. 26 (1) of the Local Government Act 1888, in respect of the financial year ending the 31st March 1889, and in respect of each succeeding financial year, such sums shall be apportioned by the guardians of the poor of the Hendon Union between the Hendon Union and the parish of Willesden according to the respective rateable values of the union and parish for the purposes of the poor rate, according to the valuation lists in force on the 25th March next preceding the financial year in respect of which the payment is made, and the guardians of the poor of the Hendon Union shall forthwith pay to the guardians of the poor of the parish of Willesden the amount so apportioned to that parish.

For the purpose of quashing the order contained in art. 5, the guardians of the Hendon Union obtained a rule *nisi* for a *certiorari*.

Upon cause being shown, the Queen's Bench Division (Bigham and Channell, JJ.) discharged the rule.

The case is reported 19 Mag. Cas. 553; 82 L. T. Rep. 385.

The guardians of the Hendon Union appealed.

The Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76) provides as follows:

Sect. 32. And be it further enacted that it shall be lawful for the said commissioners—(the Local Government Board has since been substituted for the commissioners)—from time to time as they may see fit by order under their hands and seal to declare any union . . . to be dissolved, or any parish or parishes, specifying the same, to be separated from or added to any such union, and as the case may be such union shall thereupon be dissolved, or such parish or parishes shall thereupon be separated from or added to such union accordingly. . . . Provided always that in every such case the said commissioners shall and they are hereby required to ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union for the use of the poor or benefit of the ratepayers therein, and also the proportionate amount chargeable on every parish in respect of all the liabilities of such union existing at the time of such dissolution or alteration of the same; and the said commissioners shall thereupon fix the amount to be received, or paid, or secured to be paid, by every parish affected by such alteration; and the sum to be received, if any, by such parish shall be paid or, as the said commissioners shall direct, be secured to be paid to the overseers or guardians of the same, for the benefit of such parish and in diminution of the rates thereof and of the expense attending such alteration; and the sum to be so paid or secured to be paid by every such parish shall be raised under the direction of the said commissioners by the overseers or guardians of such parish or charged on the poor rates of such parish, as the said commissioners may see fit, and shall be paid or secured for the use and benefit of the union from which the same parish shall have been so separated, or of the persons or parishes otherwise entitled thereto, as the case may be. . . .

Page, Q.C. and Bartley Dennis for the Hendon Union.—The Local Government Board had no jurisdiction to make the order contained in art. 5 of their order of the 23rd Dec. 1898. First, the board had no jurisdiction to make any order at all with reference to the annual sums of 18*l.* and 2597*l.* payable by the Middlesex County Council to the Hendon Union under the Local Government Act 1888. Under sect. 32 of the Poor Law Amendment Act 1834 the board is empowered to make orders as to the division of "the workhouses or other property" held by the union. These annual sums are not "property" within the meaning of sect. 32. The annuity of 2597*l.* is only payable by sect. 26 (1) of the Local Government Act 1888 "until Parliament otherwise determine." The continued payment of the sum is therefore so uncertain that the expectation of receiving it regularly cannot be considered as "property" now in existence. The Legislature, in passing the Act of 1834, did not contemplate the existence of anything in the nature of the annual payments which were introduced by the Act of 1888. "Other property" refers to buildings and land, besides the actual workhouse which a union may have. Secondly, if these annual payments are "property" within sect. 32, the Local Government Board has exceeded its jurisdiction in directing an apportionment to be made every year between the union and Willesden Parish. The duty of the board under sect. 32 is to "fix the amount," once and for all, which is to be paid by the union to the parish. What they have done is to direct a new calculation to be made every year as to the amount which the union is to pay the parish. The board had no

power to do that. There is under this order no finality between the parties such as the Act directs. The board should have ascertained the capitalised value of the annuity and then directed the union to pay, or secure to be paid, to the parish of Willesden the proportionate value of the interest of the parish in the annuity.

The Attorney-General (Sir Robert Finlay, Q.C.) (*H. Sutton* with him) for the Local Government Board.—The order of the board has been lawfully made. The right to be paid these annual sums is "property" within the meaning of sect. 32. "Property" is the widest term that could be used to include everything having a pecuniary value:

Jones v. Skinner, 5 L. J. 87, Ch.;

Potter v. Commissioners of Inland Revenue, 10 Ex. 147.

An annuity payable under a deed of separation and post-nuptial settlement has been held to be "property":

Jump v. Jump, 8 P. Div. 159.

It would be strange if an annuity payable under an Act of Parliament were not "property." The provision that it shall be payable "until Parliament otherwise determine" need not be considered, because a provision of that sort is implied in every Act of Parliament. Parliament can always repeal an Act that it has passed. Then, it being the duty of the Local Government Board to deal with this annuity, it is submitted that the mode in which the board has dealt with it is the proper mode. No directions are given in the Act as to how the property is to be adjusted. That is left to the discretion of the board. It has not been shown that there is anything inequitable in the way that the board has dealt with the matter. They have "fixed the amount" to be paid by the union to Willesden Parish. *Id certum est quod certum reddi potest*. The mode in which each year, as the union receives a payment, the amount which it shall pay over to the parish is to be calculated is perfectly definite.

R. E. Moore (*Danckwerts*, Q.C. and *Courthope* *Munroe* with him) for the parish of Willesden.

Page, Q.C. in reply.

SMITH, M.R.—It is impossible to read the judgments delivered in this case in the court below without seeing that my brother Channell felt considerable difficulty in coming to the conclusion which he finally arrived at, in agreement with my brother Bigham, that the rule ought to be discharged. The guardians of the Hendon Union, who had obtained the rule *nisi* for a *certiorari*, have appealed from the judgment of the Queen's Bench Division. The real point in dispute is as to the true construction of sect. 32 of the Poor Law Amendment Act 1834. Now, the facts which raise that point are very short. The parishes of Hendon and Willesden were formerly parts of one union called the Hendon Union. In 1896 the parish of Willesden was separated from the Hendon Union. Thereupon a question arose as to how the property which belonged to the union at the date of the separation should be divided between the parish of Willesden on the one side and the Hendon Union, as it now exists, on the other side. The question depends on the true construction of sect. 32 of the Poor Law Amendment Act 1834, which runs as follows: [His Lordship read it.] The first

question that arises on reading that section is at what moment are the commissioners—now the Local Government Board—to "ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union"? It seems to me clear that the intention of the Legislature was that, upon the separation of a parish from a union, the property of the union is then to be divided, once and for all, between the parish and the union that is left, so that after the separation the division between the parish and the union shall be complete, and they need have nothing more to do with each other in the future. Then comes the question what is the meaning of the words "workhouses or other property held or enjoyed by such union." It is well known that in many parts of England fields and lands are sometimes owned by parishes, and I think that the words "or other property" were intended to refer to such lands or any other property besides the workhouse which a union might happen to own. The Legislature could not in 1834 have had in its mind such a different class of property as that which, for short, I may call the Parliamentary annuity, which only came into existence under sect. 26 (1) of the Local Government Act 1888. Under that Act the Hendon Union, as well as every other union in England, became entitled to an annual sum payable by the county council. It is true that in this section the expression "until Parliament otherwise determine" is used, but I do not think that there is much virtue in these words, because an Act of Parliament can always alter any previous Act. Under that section, then, the Hendon Union up to 1896 had an annuity from the county council of 2597l. a year, and as long as the parish of Willesden remained part of the Hendon Union, the ratepayers of Willesden participated in the benefits of that annuity jointly with the ratepayers of other parishes in the union. But now that Willesden has been separated from the union, it is in future to pay its own expenses, and the property of the union is to be divided between Willesden and the union as it remains after the separation, under the provisions of sect. 32 of the Act of 1834. How does that section affect the rights of the union to this annuity? In my opinion the difficulty has arisen in consequence of this new kind of property being given to the union by the Act of 1888. The learned counsel who appeared for the Hendon Union argued in the first place that this annuity is not "property" within the meaning of sect. 32, because it could not have been in the contemplation of the Legislature in 1834. I agree that the annuity was not in the minds of the Legislature in 1834 when the Act was passed, but it seems to me impossible to say that a sum of money payable *de anno in annum* under the sanction of an Act of Parliament is not property. In my judgment the annuity payable to the Hendon Union under sect. 26 (1) of the Local Government Act 1888 is "property" within the meaning of sect. 32 of the Poor Law Amendment Act 1834. The next question is, How is "the proportionate value to every parish of such union" of that annuity of 2597l. to be ascertained? I agree that that is a difficult matter, but in my judgment it is not impossible. If this annuity could be put up for sale by auction I am sure that there are plenty of persons who would be ready to buy it, although

they did not know how long its payment would continue to be sanctioned by Parliament. The annuity is payable under an Act of Parliament and, in my opinion, has a marketable value, or, if that be not a correct expression to use, it has an ascertainable value. That is the kind of value that was contemplated by sect. 32. The section contemplates the capitalisation of the value of the workhouse for the purpose of ascertaining the proportions in which the division of the value of the workhouse is to be made between the union and the parish that is separated from it. And in the same way I think that the ready money value or capitalised value of this annuity of 2597l. ought to be found for the purpose of making the division between the Hendon Union and the parish of Willesden. If the Local Government Board had come to the conclusion that the value of the annuity ought to be divided between the union and the parish in proportion to their rateable values, I do not think I should have said that the board had done wrong. But that is not what the board has done. It has arrived at a proportionate value by reference to the rateable values of these two bodies in future years. That, I think, is the vice of the order issued by the board on the 23rd Dec. 1898. With reference to the division of the property of the union, the Act, in my opinion, does not contemplate anything being left to be settled in the future, but requires the adjustment to be made *in presenti*, at the time when the separation takes place. That this was the scheme of the Act is shown, I think, by the subsequent words of sect. 32: "And the said commissioners shall thereupon fix the amount to be received, or paid, or secured to be paid, by every parish affected by such alteration; and the sum to be received, if any, by such parish shall be paid or, as the said commissioners shall direct, be secured to be paid to the overseers or guardians of the same, for the benefit of such parish, and in diminution of the rates thereof and of the expense attending such alteration." The Local Government Board has, in my opinion, exceeded its jurisdiction in making the order contained in par. 5 of their order of the 23rd Dec. 1898, and the rule for a *certiorari* to bring up and quash that paragraph must, in my opinion, be made absolute. For these reasons I think the appeal should be allowed.

COLLINS, L.J.—I am of the same opinion. I think that Channell, J. has put admirably the reason why he ought not to have concurred with the judgment of Bigham, J., but should have insisted on his own doubt in the matter. He says this: "The difficulty in my mind was this—whether or not the Local Government Board had not in this case fixed the proportion between the two new unions in reference to a matter which it was the very object and intention of the order to put an end to. When this area was one union, the different parts of it profited by any increase in the value of any other part; and, if Willesden increased in value, the ratepayers of Hendon profited by that increase of value when the two formed one body. If Hendon increased in value, the ratepayers in Willesden profited by that increase in value; and one of the very objects of dividing the union was, because both Hendon and Willesden had grown rather large, to make each of them entirely independent of any increase in the other." I agree

with Channell, J. that that really is the scheme of this legislation of 1834, and I think that, when the Act is carefully read, there will be found in the language used a direct confirmation of this view. The first proviso in sect. 32 runs as follows: "Provided always that in every such case the said commissioners shall and they are hereby required to ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union for the use of the poor or benefit of the ratepayers therein, and also the proportionate amount chargeable on every parish in respect of all the liabilities of such union existing at the time of such dissolution or alteration of the same; and the said commissioners shall thereupon fix the amount to be received, or paid, or secured to be paid, by every parish affected by such alteration." Surely that is an amount which is to be ascertained in reference to the state of facts existing at the time of such dissolution or alteration. These are the words used in the Act in respect of the liabilities of a union, and they seem to me to involve, with reference to rights as well as liabilities, an ascertainment, then and there, *in presenti*, of the respective rights of the two parties; the object being that they shall no longer be partners in a joint adventure, each reaping the benefit of the fluctuating fortunes of the other, which previously had all enured to their common benefit or their common liabilities, but that in future each should stand on its own base, and that before they are parted their rights *inter se* should be finally ascertained. Now, when we come to consider what is to be done under this proviso, what do we find? The Legislature contemplated that this valuation, when made, was to be made once and for all, so that the result will be, not an obligation to be renewed afterwards from time to time according to a fluctuating standard, but an amount then and there ascertainable, an amount which by the terms of the statute can only be paid or secured to be paid in a particular way. But what has been done in the present case? It seems to me that that which is called a valuation is in point of fact, when it is analysed, a refusal to value at the time. Take the case of a freehold property owned by a union and bringing in certain rents. The Attorney-General hardly disputed, in fact I think he admitted, that the proper way of ascertaining the value of that freehold property under this section would be to take the value of the corpus and then ascertain the proportionate values to the parties by reference to the then existing condition of affairs. That would be one way, and it seems to me it would be the right way. I have the authority of the Attorney-General for saying that at all events it would not be a wrong way. It would certainly be an ascertaining there and then, *in presenti*, of the actual value. Now let us contrast with that the proposed alternative. Instead of assessing the value of the corpus at once, the Local Government Board has left the rights of the parties in each future year to be ascertained by the standard of their then respective rateable values. That is to say, the Local Government Board has declined to fix the valuation, but has left the question to be determined in the future by reference to the yearly varying fortunes of the two parties. That seems to me, as it did to Channell, J., to be the very thing which the

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Legislature wished to be avoided. With reference to the question whether these annual payments under sect. 26 (1) of the Local Government Act 1888 are "property" within sect. 32 of the Poor Law Amendment Act 1834, I feel no doubt whatever. I entirely agree with all that my Lord has said. Though it may be difficult to appraise the capitalised value of this uncertain annuity, it is not impossible. The fact that the Legislature appears to have contemplated the possibility of its being withdrawn does not appear to me to alter the case materially, because whether or not the provision, "until Parliament otherwise determine," was actually inserted in the section it would be equally part of the law, since the Legislature can always repeal that which it has enacted. Therefore I think this annuity is "property," and that its value is capable of assessment, and it seems to me that the proper way to adjust its division is by reference to the existing proportions in which the parties are entitled to it. I do not think it is conceivable that it would be right to apportion the capitalised value of the workhouses or any freehold property possessed by the union except upon one principle—that is, the principle of dividing it there and then, once and for all, upon the existing rateable values. I do not think it would be possible to conciliate with that view a claim to divide an annual sum upon a different principle altogether—namely, upon the principle of the fluctuating values of the future. If one is right, the other seems to me to be wrong. I think that the right principle is that which has reference to values on the existing basis.

STIRLING, L.J.—I am of the same opinion. In this case a union has been divided by the separation from it of a particular parish under the provisions of sect. 32 of the Poor Law Amendment Act 1834. The question is as to the mode in which the property of the union is to be dealt with. Now, it seems to me that one cannot read the enactment without seeing that the scheme of the Legislature was that the rights of the parishes, or rather of the separated bodies, were to be ascertained once for all at the time when the separation takes place. The scheme is not very minute or elaborate, but the general outline of it appears to me to be that one of the separated bodies is to take, not necessarily the whole, but, it may be, a part of the property of the union, and to pay the other the value, to be ascertained at that time, of the interest of that other body in the property which has been thus taken. For that purpose the commissioners, who are now represented by the Local Government Board, are required to ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union. They are to "ascertain the value." No particular mode of doing this is prescribed, but no difference is drawn between the mode of ascertaining the value of a workhouse and the mode of ascertaining the value of other property. As regards a workhouse, it is obvious that the view of the Legislature was that a capital value should be put upon it, and then, if it were kept by one of the separating bodies, that body should pay to the other bodies the proportionate value of the interests which they had in it. The section goes on: "And the said commissioners shall thereupon"—i.e., upon the ascertainment of the proportional values—"fix

the amount to be received, or paid, or secured to be paid, by every parish affected by such alteration; and the sum to be received, if any, by such parish shall be paid, or as the said commissioners shall direct, be secured to be paid to the overseers or guardians of the same for the benefit of such parish and in diminution of the rates thereof and of the expense attending such alteration; and the sum to be so paid or secured to be paid by every such parish shall be raised, under the direction of the said commissioners, by the overseers or guardians of such parish or charged on the poor rates of such parish, as the said commissioners may see fit." This, therefore, is a direction to the commissioners to ascertain first of all the fixed amount to be received or paid, and then the mode in which that sum, when it has been ascertained, is to be received or paid. There is no difficulty in working that scheme out in regard to workhouses and the other property which the Legislature probably had in mind when the Act was passed. The difficulty which has arisen in the present case springs from the fact that in 1888 an Act was passed in which the Legislature provided for the payment by county councils to parishes and unions of annual sums of money. Those payments are property of a totally different kind from anything that they enjoyed in 1834. I need not read the sections of the Local Government Act 1888 which provide for the payment of these annual sums, but it is quite clear that the payment is subject to the future will of Parliament and may hereafter be withdrawn. Consequently a difficulty arises in putting a capital value upon these sums, in the same way as a value might be put upon property like a workhouse. Still, it seems to me that it is possible to put a value upon these annual sums. I have no doubt that they are "property" within the meaning of sect. 32 of the Act of 1834, and that a value can be put upon them. When a value has been put upon them, then the proper sum which is to be received or paid, as the case may be, is to be ascertained on the same principle as the value of the interest of a parish in the union workhouse. For example, if the workhouse in the present case remains in the possession of the Hendon Union, the union would have to pay to the parish of Willesden the value of that parish's interest in the workhouse. So if under the scheme these annual sums continue to be paid to the Hendon Union, it would be the duty of the union to pay to the parish of Willesden the value of the interest of the parish in those sums, such value to be ascertained upon the same principles and at the same time as the value of the interest of the parish in the workhouse. I do not think that there is any difference in principle between the two cases. That being so, it seems to me that the Local Government Board have not complied with the terms of the Act of 1834, and consequently that the appeal ought to be allowed.

Appeal allowed.

Solicitor for the Hendon Union, *D. E. Soames*.
Solicitors for the Local Government Board,
Sharpe, Parker, Pritchards, Basham, and Lawford.
Solicitor for the parish of Willesden, *W. Grant Greig*.

[Ct. of App.]

FARNHAM FLINT COMPANY v. FARNHAM UNION.

[Ct. of App.]

Wednesday, Dec. 12, 1900.

(Before SMITH, M.R., COLLINS and
STIBLING, L.JJ.)FARNHAM FLINT COMPANY v. FARNHAM
UNION (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Poor rate — Assessment — Gravel pit — Gravel
exhausted in part — Annual value — Mode of
ascertaining annual value.**By three agreements, made respectively on the
24th June 1897, the 15th April 1898, and the
14th Nov. 1898, a company purchased from the
landowner three plots of gravel comprising
respectively one acre and a half, one acre, and
one acre of land.**The company was entitled to the exclusive occupa-
tion of the plots until the expiration of the
respective agreements, the first being for one
year and a half and the other two for one year
each.**A poor rate was made on the 8th Dec. 1898, and
the company were rated as occupiers of the three
and a half acres, of which they were then in rate-
able occupation.**At that date the gravel was exhausted in the two
acres and a half comprised in the two earlier
agreements, and the land was used only for
the purpose of storing gravel already dug, and
the gravel in the remaining acre was being dug.
The price paid for the first plot was 150l., and for
each of the other plots 175l.**The company were rated at 400l. rateable value.**The quarter sessions, on appeal, held that the
annual value of the land at the date of the rate
ought to be taken at the amount of rent at which
the land could then reasonably be expected to be
let to a yearly tenant, regard being had to the
value of the gravel in the unexhausted acre of
land and to the value of the other two acres
and a half for storage purposes, and upon that
principle reduced the assessment to 242l. rateable
value.**Held (dismissing the appeal), that the quarter
sessions had applied the proper principle in
ascertaining the annual value of the heredita-
ment in question.**Rex v. Bedworth (8 East, 387) approved; Reg. v.
Whaddon (32 L. T. Rep. 633; L. Rep. 10 Q. B.
230) distinguished.*

THIS was an appeal by the Farnham Union from the order of the Divisional Court (Channell and Bucknill, JJ.) upon a special case stated by quarter sessions.

A special case was stated by the quarter sessions for the county of Surrey upon an appeal against a rate, made on the 8th Dec. 1898, in which rate the Farnham Flint Company were rated as the occupiers of a gravel pit.

The company carried on business as gravel and sand merchants, and for the purposes of their business from time to time entered into agreements with the owners of land for the purchase of gravel therein. By those agreements full right of entry upon the land was given for the purpose of digging for and carrying away the gravel. The company, having dug and removed the gravel, levelled the ground from which the gravel had been taken, replaced the top sod, and restored the land to the owner.

For some time prior to the making of the rate appealed against, the company had been in the habit of making such agreements with the owner in respect of portions of a certain piece of land known as Ward's Pit, each plot of land containing gravel being the subject of a separate agreement.

Upon an agreement being entered into for the sale to the company by the owner of the gravel under any plot of land, the extent of land to which such agreement related was marked out by stumps, and the exclusive occupation of the land so marked out was given to the company upon signature of the agreement. The work of digging for gravel was then commenced by the company.

The land from which the gravel was actually being extracted was constantly shifting as the work progressed, and, when the gravel in any portion of the land was exhausted, that portion of the land was used by the company as a store for gravel not yet sold and removed. Upon the expiration of the period allowed by any agreement, the portion of the land from which the gravel had been dug was made level with the rest of the land, and the whole of the land comprised in the agreement was restored to the owner.

The company purchased gravel from the owner on the following dates and in the following quantities: On the 14th May 1897, one acre; on the 24th June 1897, one acre and a half; on the 15th April 1898, one acre; on the 14th Nov. 1898, one acre; and on the 21st March 1899, one acre.

The agreements were all in writing. The price paid under each agreement was 175l., except under the agreement of the 24th June 1897 when the price was 150l. only, the gravel sold under that agreement being less valuable than the gravel sold under the other agreements. The period allowed under each agreement for the extraction of the gravel was one year, except under the agreement of the 24th June 1897, by which the period of one year and a half was allowed.

At the date of the rate, the 8th Dec. 1898, the company were in rateable occupation of three and a half acres of land. In two and a half acres, being the lands comprised in the agreements of the 24th June 1897 and the 15th April 1898, the gravel was exhausted. The gravel comprised in the former agreement was exhausted in March 1898, and that comprised in the latter agreement on the 1st Sept. 1898. The two and a half acres, however, continued to be in the occupation of the company, and were used by them for the purpose of storing gravel already dug. In the remaining one acre, being the land comprised in the agreement of the 14th Nov. 1898, the gravel was in process of being got.

The company were rated in respect of the land at 420l. gross estimated rental and 400l. rateable value.

The company contended that they were rateable in respect of the land in their occupation at the date of the rate appealed against; that the value of such occupation, so far as the unexhausted land was concerned, was to be ascertained from the consideration paid by the company for the occupation of such land under the agreement relating thereto in force at the date of the rate, including as part of such consideration the cost of making good the land occupied thereunder upon the expiration of the terms thereby created; that the value of such occupation, so far as the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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exhausted land was concerned, was to be ascertained upon the basis of what such land would let for occupation as storing ground in connection with the other lands occupied by the company; and that, if the value of the company's occupation was not to be so ascertained, it was to be ascertained from the value of the gravel in the unexhausted land then in their occupation, added to the value of so much of the exhausted land (then in their occupation) as was used by them for storage purposes.

The union contended that the proper way to ascertain the rateable value of the land was to ascertain the output of gravel dug during the year immediately preceding the making of the rate appealed against from so much of Ward's Pit as had been in their occupation at any time during such year, and to assess the rateable value of the gravel pit at a sum based upon the total royalty which (having regard to the market value of gravel during the year in the neighbourhood) the company would have paid to the owner of the land if, instead of buying the gravel, they had agreed to dig and work the gravel on payment of a royalty on each yard of gravel dug, which method of payment was admittedly frequently adopted in the neighbourhood, and that this method of calculating the rateable value was correct in point of law.

Alternatively, the union contended that the company were in occupation of more than two acres of land; that, having regard to the obligation to level the surface of the ground and replace the surface soil after removing the gravel (which would cost about 40*l.* an acre), the company had, in effect, paid or agreed to pay about 220*l.* per acre for the right to occupy the land for one year, with liberty to dig the gravel therein; that the sum of 220*l.* was equivalent to an annual rent for the land paid by a tenant who had liberty to dig gravel therein; that the company, as occupiers of the land, must be rated at the full annual value thereof during the whole period of their occupation, although during part of that period a portion of the land was available only for the purpose of storing gravel; that the decision of the Queen's Bench in *Reg. v. Whaddon* (32 L. T. Rep. 633; L. Rep. 10 Q. B. 230) showed that the company should be rated during the whole of their occupation of the land under the written agreements at the value thereof as enhanced by the right to dig gravel therein; and that, if the principle of valuation herein stated was correct in law, the assessment appealed against was supported in fact.

The quarter sessions held that the first contention of the union was wrong in law, but that, if it were permissible to adopt that method of calculation, the assessment appealed against would be correct. They further held that the second contention of the union was wrong in law, and that the annual value of the land in the company's occupation at the date of the making of the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel in the unexhausted acre of land, added to the value of the two and a half acres of land for storage purposes, and on this principle they found as a fact that the amount at which the land could reasonably be expected to be so let was 252*l.*, and

they accordingly fixed the gross estimated rental of the land at 252*l.* and the rateable value thereof at 242*l.* They therefore allowed the appeal, and ordered the assessments of the company's land, and the rates, to be reduced accordingly.

The question for the opinion of the court was whether or not the quarter sessions were right in their determination.

The Parochial Assessment Act 1836 (6 & 7 Will. 4, c. 96) provides:

Sect. 1. Whereas it is desirable to establish one uniform mode of rating for the relief of the poor throughout England and Wales, and to lessen the cost of appeal against an unfair rate: Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons, in this present Parliament assembled, and by the authority of the same, that from and after such period, not being earlier than the twenty-first day of March next after the passing of this Act, as the Poor Law Commissioners shall by any order under their seal of office direct, no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent: Provided always, that nothing herein contained shall be construed to alter or affect the principles or different relative liabilities (if any) according to which different kinds of hereditaments are now by law rateable.

The learned judges in the Divisional Court differed in opinion, O'hannell, J. holding that the determination of the quarter sessions was wrong, and Bucknill, J. that it was right. The appeal was accordingly dismissed (19 Mag. Cas. 475; 82 L. T. Rep. 123).

The Farnham Union appealed.

F. Marshall, Q.C. and *W. C. Byde* for the appellants.—The order of quarter sessions was wrong. The judgment of O'hannell, J. in the Divisional Court, that this case was governed by the decision in *Reg. v. Whaddon Overseers* (32 L. T. Rep. 633; L. Rep. 10 Q. B. 230), was correct, and the judgment of Bucknill, J. was wrong. In *Reg. v. Whaddon Overseers* (*ubi sup.*) the appellants were assessed in respect of ten acres of coprolite land at the full enhanced value of the whole, although they were never in profitable occupation at any one time of more than three and a half acres for the purpose of getting coprolites, and the occupation of ten acres was a shifting occupation, and the Court of Queen's Bench held that the appellants were properly rated. The case of *Reg. v. Abney Park Cemetery Company* (29 L. T. Rep. 174; L. Rep. 8 Q. B. 515) is strongly in favour of the appellants. In that case it was held that the cemetery company, which owned the burial ground and sold plots for graves, was properly assessed at the amount received during the preceding year for the sale of plots. Blackburn, J. in that case said: "The Legislature . . . has taken as a basis the rent which a tenant from year to year would give during the year preceding the time of making the rate"; and that "No injustice will be done if the company are rated in every year according to

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the value which a hypothetical tenant would give for the occupation in the preceding year, and according to this rule the company's receipts in one year will govern the rateable value of the cemetery in the next." The case of *Staley v. Castleton Overseers* (33 L. J. 178, M. C.), upon which the respondents rely, does not touch the question in the present case. That case was discountenanced in *Hoyle and Jackson v. Oldham Union* (70 L. T. Rep. 741; (1894) 2 Q. B. 372), in which it was held that mills which were closed owing to a strike were properly assessed at the same value as before the strike, and not as mere warehouses for the machinery. The difficulty in a case like this arises from the difficulty of applying the rule laid down in sect. 1 of the Parochial Assessment Act 1836 to a case in which it is singularly inapplicable because the subject-matter is not such as is let upon a tenancy from year to year. In such a case the words of sect. 1 must have "some reasonable *cy-près* intendment given to them," as was said in *Great Eastern Railway Company v. Haughley Churchwardens* (14 L. T. Rep. 548; L. Rep. 1 Q. B. 666, 685). The definition in sect. 1 ought to be read in the light of the preamble so as to establish "one uniform mode of rating." In cases of this kind that uniformity is obtained by assessing the premises upon the principle for which the appellants contend.

R. Cunningham Glen for the respondents.—The decision of the quarter sessions was based upon the right principle and should be upheld. The appellants are seeking to apply some new principle to the rating of hereditaments of this kind, instead of that which is established by sect. 1 of the Parochial Assessment Act 1836. The principle established by the statute must be applied in a case like this, where the rateable property diminishes or wastes, and the annual value must be ascertained at the time when the rate is made. In *East London Railway Company v. Whitechurch* (30 L. T. Rep. 412; L. Rep. 7 H. L. 81, 85) Lord Cairns, L.C. said: "When an Act of Parliament is passed authorising the construction of a railway—authorising lands and houses to be taken for the purpose of its construction, and the railway to be made upon the site of the houses, if nothing farther should be found in the Act of Parliament, it would of course follow that the railway company would be at liberty to pull down the houses which it had purchased, and to make the line. And if, in the process of constructing the railway, the premises along the line became of a less assessable value than they were before, that, in the absence of any statutable provision upon the subject, would be an occurrence within those ordinary powers which every landowner has over his own land in any parish—powers which enable him to use it for any purpose which he thinks fit. And if, in the course of using it, he renders the land of less assessable value, the parish and parochial authorities have no choice but to submit." All that applies exactly to the present case. The value of this hereditament must be taken at the time of making the rate by ascertaining what a tenant from year to year would then give for it in its then condition. The case of *Reg. v. Abney Park Cemetery Company (ubi sup.)* was one of those exceptional cases in which there is no other method of ascertaining what the hypothetical

tenant will give except by ascertaining what he can afford to give by considering what has been, and therefore is likely to be, made out of the premises:

Cartwright v. Sculcoates Union, 82 L. T. Rep. 157; (1900) A. C. 150.

This is not an exceptional case, and the ordinary rule can be applied. The case of *Rez v. Bedworth* (8 East, 387; 9 E. R. 476) is a direct authority in favour of the respondents. That case has always been followed and applied in practice. The dictum of Blackburn, J. in *Staley v. Castleton Overseers (ubi sup.)*, that *Rez v. Bedworth* "is not law at the present time," which is reported in 33 L. J. 178, 180, M. C., is not to be found in the other reports of the case. The passages in the judgment of Blackburn, J. in *Reg. v. Abney Park Cemetery Company (ubi sup.)*, which have been cited by the appellants, do not appear in any reports except the Law Reports, and, if he said that the value for the preceding year must be taken, he was clearly wrong.

F. Marshall, Q.C. replied.

SMITH, M.R.—This is an appeal by the Farnham Union from the judgment of the Queen's Bench Division dismissing their appeal from the decision of the quarter sessions. The judges of the Queen's Bench Division differed, Bucknill, J. holding that the quarter sessions were right in altering the rate, and Channell, J. holding that the quarter sessions were wrong and that the rate as made was correct. Now, I am going to confine my judgment to the questions which have been stated in the special case, for we have no power to travel outside of those questions. I must say that the learned judges in the court below did not confine their judgments to the questions stated in the special case, but went far outside of those questions, which they had no right to do. The material facts of this case are short and clear. The point raised in the case relates to a tract of gravel, near Farnham, which is called a gravel field. The Farnham Flint Company took from the owner of the gravel field three and a half acres. When those three and a half acres had to be assessed to the rate, in what way ought the rateable value to be ascertained? There can be no doubt that the way in which the rateable value must be ascertained is the way laid down by sect. 1 of the statute 6 & 7 Will. 4, c. 96—that is, it must be ascertained what a hypothetical tenant would give for the hereditament as tenant from year to year, and certain specified deductions must be made. The rating authority must find out what a hypothetical tenant would give for the hereditament as tenant from year to year; they have nothing to do with the occupying tenant. Now, with regard to these three and a half acres of gravel, what has the assessment committee to ascertain? They must find out what a hypothetical tenant would give for the hereditament as tenant from year to year with a right to exhaust the gravel. I will refer to a passage in the judgment of Lord Esher, M.R. in *Hoyle and Jackson v. Oldham Assessment Committee* (70 L. T. Rep. 741; (1894) 2 Q. B. 372), where he said: "It seems to me a plainer case never could be. It is admitted by everybody that what the assessment committee had to do was to assess the occupiers of this mill in respect of their occupation for the coming year, and they had to say what at that moment in

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their judgment a hypothetical tenant from year to year would give as rent for those premises, after making allowance for the Parliamentary deductions." That is an absolutely correct statement of the duty of the assessment committee in ascertaining the rateable value of the hereditament which has to be rated. In the present case the company had been assessed and rated in respect of their previous occupation. Time went on and a new rate was about to be made upon the company in respect of their occupation of the three and a half acres. At that time it happened that the gravel was exhausted in two and a half acres, and unexhausted in the remaining acre. The assessment committee has said that a tenant from year to year for the coming year would give as much for the whole hereditament as if the whole of the gravel had been unexhausted. That cannot be a true proposition. It might just as well be said that, if all the gravel had been exhausted when the new rate came to be made, the hypothetical tenant would pay the same rent for the three and a half acres without any gravel as if all the gravel were still there. It is only necessary to state that proposition to show that it cannot be true. That is really the position of this case when once the facts are made clear. The company say that the assessment committee were wrong in assessing them at the same value as when all the gravel was in the land, because at that time there was only one acre of gravel and the hypothetical tenant would not give as much rent as he would have done when all the gravel was there. It is admitted that if a house was burnt down, the assessment committee could not assess the land upon which it stood at the same rate as before the house was burnt down. The assessment committee here say that the occupiers cannot take the point that the value of the hereditament is not the same as it was before, because they themselves have used up the gravel. What authority is there for such a contention as that? There is none. The position is the same whether the occupiers themselves or anyone else exhausted the gravel. The fact is that the hereditament is of less value than it was before. Those being the facts, What is the result in this case? There are many decisions in respect of exceptional cases in which no comparison with other similar premises is possible. What has to be done in such cases? As was pointed out by Blackburn, J., long ago, in *Jones v. Mersey Docks and Harbour Board* (11 H. of L. Cas. 443), in such cases one must get the best test which one can get in order to ascertain what rent the hypothetical tenant from year to year would give for the premises. In the case of houses a comparison with similar houses is possible, and it is only in exceptional cases that recourse to exceptional means must be had in order to ascertain what the hypothetical tenant would give for the premises because the ordinary means are not applicable. The case decided by Lord Ellenborough, C.J., *Res v. Bedworth* (8 East, 387; 9 R. R. 476), is, in my opinion, of the highest importance upon this question, and governs the present case. Then, as to the questions stated in this special case. The first statement is as follows: "The assessment committee contend that the proper way to ascertain the rateable value of the land was to ascertain the output of gravel dug during the year immediately preceding the making of the rate appealed against

from so much of Ward's Pit as had been in their occupation at any time during such year, and to assess the rateable value of the gravel pit at a sum based upon the total royalty which (having regard to the market value of gravel during the year in the neighbourhood) the company would have paid to the owners of the land if instead of buying the gravel they had agreed to dig and work the gravel on payment of a royalty on each yard of gravel dug, which method of payment was admittedly frequently adopted in the neighbourhood, and that this method of calculating the rateable value was correct in law." That is the first question which arises. I do not agree that the assessment committee ought to take the value to the sitting tenant during the preceding year; they must take the rent which the hypothetical tenant would give for the succeeding year. Therefore I answer that first question against the contention of the assessment committee, and think that the quarter sessions were right. Then comes the second question: "Alternatively, the assessment committee contended that the company were in occupation of more than two acres of land; that, having regard to the burden of the covenant to level the surface of the ground and replace the surface soil after removing the gravel (which work it was found would cost about 40l. an acre) the appellants had in effect paid or agreed to pay about 220l. per acre for the right to occupy the land for one year with liberty to dig the gravel therein; that the sum of 220l. was equivalent to an annual rent for the land paid by a tenant who had liberty to dig gravel therein; that the company as occupiers of the land must be rated at the full annual value thereof during the whole period of their occupation, although during part of that period a portion of the land was available only for the purpose of storing gravel; that the decision of the Queen's Bench in *Reg. v. Whaddon* (32 L. T. Rep. 633; L. Rep. 10 Q. B. 230) showed that the company should be rated during the whole of the occupation of the land under the written agreements at the value thereof as enhanced by the right to dig gravel therein; and that, if the principle of valuation herein stated was correct in law, the assessment appealed against was supported in fact." That contention is not according to the rule laid down in sect. 1 of the Parochial Assessment Act 1836. All that the Act says is that the value is the rent at which the premises might reasonably be expected to let from year to year. Then there is the third, and last, question: "The quarter sessions held that the first contention of the assessment committee was wrong in law, but that, if it were permissible to adopt the method of calculation therein set forth, the assessment appealed against would be correct. They further held that the second contention of the assessment committee was wrong in law, and that the annual value of the land in the company's occupation at the date of the making of the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel in the said unexhausted acre of land added to the value of the exhausted two and a half acres of land for storage purposes, and on that principle they found as a fact that the amount at which the land could reasonably be

expected to be so let was 252*l.*, and they accordingly fixed the gross estimated rental of the lands at 252*l.*, and the rateable value thereof at 242*l.*, and allowed the appeal, and ordered the assessments of the company's land and the rate to be reduced accordingly." With the correction that they ought to have said, "let to a tenant from year to year" and not "to a tenant for one year," the answer to that question is that the quarter sessions were right in their view and followed the rule laid down in sect. 1 of the Parochial Assessment Act 1836 in all essentials, and found the rateable value upon the proper principle. I therefore come to the clear conclusion that the quarter sessions were right, and that this appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. The standard to be applied must be that which is prescribed by sect. 1 of the Parochial Assessment Act 1836, which is this: "The rent at which the same might reasonably be expected to let from year to year free of all usual tenant's rates and taxes," &c. That, in its terms, points to an estimate of a future value, and not to a standard of that which is already ascertained in fact—that is, the antecedent sum paid by a tenant. The assessment committee are to find an estimate of what the hypothetical tenant from year to year would give *rebus sic stantibus*. In the present case there is eliminated one of the elements found in the case of *Reg. v. Whaddon (ubi sup.)*, for we find in the special case the statement that the company were "at the date of the rate in rateable occupation of three and a half acres of land," and that in two and a half of those acres the gravel was exhausted, and that the company occupied those two and a half acres for the purpose of storing gravel already dug. Now, we have to deal with those three and a half acres, and not with any possible accretion thereto by a subsequent letting; and we must consider only those three and a half acres. The main difference between the view taken by Channell, J. in the court below and the view taken by quarter sessions is upon the question whether the annual value is to be ascertained by reference to what was paid by the occupiers during the preceding year, or by reference to what might be got during the coming year. But for the judgment of Channell, J. and some observations of Blackburn, J. in *Reg. v. Abney Park Cemetery Company* (29 L. T. Rep. 174; L. Rep. 8 Q. B. 515), I would have thought that the point was too clear for discussion. The former means of ascertaining the annual value is only to be employed in special and exceptional cases. It is said that Channell, J. relied mainly upon the decision in *Reg. v. Whaddon (ubi sup.)*. Now, that case is open to this obvious and cardinal distinction: In that case there was the initial difficulty that the person rated had a shifting occupation which at all times amounted to a holding of ten acres. The court got over that difficulty, and treated the hereditament occupied as being one of ten acres. Then all the rest followed easily; the tenant had a right to take fresh land, and therefore, in considering what the hypothetical tenant from year to year would give, the fact that the occupier had that right was always kept in view. In the present case, as I have already pointed out, the hereditament in question is limited to the

three and a half acres, and we cannot take into consideration the possibility of the occupier getting more land. Now, the quarter sessions have found that "the annual value of the land in the company's occupation at the date of the making of the rate ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant for one year, regard being had to the value of the gravel in the said unexhausted acre of land added to the value of the exhausted two and a half acres of land for storage purposes," and fixed the rateable value upon that principle. The only exception which can be taken to that is that they say "tenant for one year," instead of "tenant from year to year," but that is not a material error in this particular case, for it is only by straining the principle of ascertaining what a tenant from year to year would give that it can be applied here. That error could not have made any difference in this case. Subject to that correction, the quarter sessions have clearly laid down the right principle. It is necessary, I think, in view of the judgment delivered by Channell, J., and the authorities upon which he relied, to say a few words thereon. The learned judge lays it down that the value during the antecedent year must be considered, upon the authority of the case of *Reg. v. Abney Park Cemetery Company (ubi sup.)* and the observations of Blackburn, J. in that case. Channell, J. said: "If any particular year is to be taken for the hypothetical tenancy, it is in cases of this class the year preceding the rate and not the year after. In *Reg. v. Abney Park Cemetery Company (ubi sup.)* Blackburn, J. is reported as saying, 'the Legislature has taken as the basis the rent which a tenant from year to year would give during the year preceding the time of making the rate.' If that dictum is correct, it is conclusive of the present case. In the same case Blackburn, J., at p. 250 of the Law Reports, repeats almost the same proposition: 'No injustice will be done if the company are rated in every year according to the value which a hypothetical tenant would give for the occupation in the preceding year, and, according to this rule, the company's receipts in one year will govern the rateable value of the cemetery in the next.' My brother Bucknill has drawn my attention to the fact that these two passages are omitted in the report of the *Abney Park* case in the *Law Journal* (42 L. J. 124, M. C.) and in the *LAW TIMES* (29 L. T. Rep. 174)." It seems to me that there are two errors in that part of the judgment of Channell, J. His first error is in relying on those observations of Blackburn, J. as holding what he thought was held, because I do not think that they are an authority for his proposition. The second error is that there is a fallacy underlying his proposition, because he confounds the duration of the tenancy with the continuance of the hereditament occupied. I do not think that Blackburn, J. decided that the preceding year was to be taken as finally fixing the value. The passages in his judgment which have been cited do not appear in the other reports. It was not necessary for that learned judge to say so in that case, and, if he did say so, it would be contrary to the authorities, because there the company received so much during the preceding year, and it was possible to get as much during the next year, and therefore the hypothetical tenant might reasonably be expected to

give as much for the next year. Another dictum of Blackburn, J. in *Staley v. Castleton Overseers* (33 L. J. 178, 180, M. C.) has been referred to and relied on by the appellants, that *Rex v. Bedworth* (*ubi sup.*) "is not law at the present time." There, again, that dictum does not appear in the report in 5 B. & S. 505 and the other contemporary reports. On the other hand, the case of *Rex v. Bedworth* is still regarded as an authority. In that case, where the question arose as to the rating of a coal mine, which had ceased to be productive and was not being worked, Lord Ellenborough, C.J., said: "Here the mine itself is exhausted, the subject-matter of profit is gone, although the rent, which was no doubt calculated upon the probable average produced during the whole term, be still payable. The failure of the coal will not discharge the lessee's covenant to pay rent: perhaps he may have calculated upon that event, and may have received during the former part of his term an adequate value from the then produce of the mine to compensate the continuance of the rent to the end of the term. But, with respect to the parish, he is only rateable for the concurrent annual value during the period for which the rate is made; and when the thing which he occupies no longer affords any such concurrent value the subject-matter of the rating is gone." If that is true in a case where the whole subject-matter is gone, it must be equally true, in my opinion, when a part of the subject-matter is gone. I find that that case was cited in *Reg. v. Westbrook* (10 Q. B. 178), and to a large extent was the basis of the judgment of Lord Denman, C.J. therein. The observations of Lord Denman, C.J. in the latter case are very much in point in the present case. He said: "The rate is always imposed with reference to the existing value; whether temporary or enduring is immaterial. A case was supposed of a brickfield worked out in less than a year to meet the demand of some enormous contract for a public work; the consequence would be that the land would have a very much increased value for the year, and it would be only reasonable that it should have an increased rate for that year: in the following year its value might sink almost to nothing, and the rate ought to fall proportionately, even to nothing, if, the brick earth being exhausted, the land, like a exhausted coal mine, should become entirely unproductive." Now, that reference to an exhausted coal mine is obviously taken from the case of *Rex v. Bedworth* (*ubi sup.*). Lord Denman further goes on to say: "No injustice would be done if in every year the occupier could be assessed according to the actual value in that year; and it is the duty of the overseers to arrive at this as nearly as they can." That seems to me to be exactly in point in the present case, and the observations as to the position when the brick earth is exhausted apply here. Upon these grounds I think that the judgment of Bucknill, J. was right, and that this appeal must be dismissed.

STIRLING, J.—I agree.

Appeal dismissed.

Solicitors for the appellant union, *Johnson, Weatherall, and Sturt.*

Solicitor for the respondent company, *Jackson, Farnham.*

Wednesday, Dec. 19, 1900.

(Before RIGBY, WILLIAMS, and ROMER, L.JJ.)

ATTORNEY-GENERAL v. WILSON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Trial—Venue—Transfer of action—Prerogative of Crown—Selection of tribunal—Discretion of Attorney-General.

Where an action is brought by the Attorney-General, at the relation of private individuals, it is not his practice to exercise the prerogative of the Crown and to select the tribunal by which the action shall be tried. He does not interfere with the discretion of the court. All that he does is by his fiat to authorise the relators to proceed in a matter involving public interest. But he does not clothe them with the prerogative of the Crown, nor has he any intention of so doing.

Decision of Kekewich, J. reversed.

THIS action was brought by the Attorney-General (at the relation of the mayor, aldermen, and burgesses of the borough of Sunderland) and the mayor, aldermen, and burgesses of the borough of Sunderland as plaintiffs against J. and W. Wilson and Sons as defendants.

The writ, to which the fiat of the Attorney-General had been duly obtained, was taken out in the Chancery Division of the High Court of Justice on the 18th April 1900.

The plaintiffs by their statement of claim alleged that the defendants had excavated the soil of certain premises in their occupation, adjoining a street in the borough of Sunderland, which they alleged was a public highway, and had neglected to maintain a retaining wall, and that by reason thereof large portions of the retaining wall had fallen down and a large area of the street had subsided, rendering the highway impassable and dangerous; and they claimed an injunction restraining the defendants from continuing the alleged public nuisances and requiring them to restore the surface of the street and re-erect the wall; and they also claimed damages.

The defence amounted to a general denial of the allegations of the plaintiffs.

An application was made by the defendants, upon a general summons for directions, asking that the action might be transferred from the Chancery Division to the Durham Assizes for trial by a special jury.

The main ground for the application was that it was desirable that there should be a view of the *locus in quo*.

The application was opposed by the plaintiffs on the ground that it was an interference with the prerogative right of the Crown to select its own court; and also on the merits.

It was decided by Kekewich, J. (83 L. T. Rep. 569) that the Attorney-General having, in the deliberate exercise of his discretion, selected the Chancery Division for the trial of the action, and in so doing he was exercising the prerogative of the Crown, his selection could not be interfered with by the court unless an extremely strong case were made against the propriety of his choice. His Lordship accordingly decided that in the present case the action must remain in the Chancery Division, although he was of opinion that if the question had to be decided simply

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

upon the ground of convenience, a transfer of the action to the Queen's Bench Division to be tried at the Durham Assizes ought to be ordered.

Subsequently to that decision, the Attorney-General intimated to the defendants that, as a matter of fact, he had not exercised any discretion in the case, and had not selected the Chancery Division as the tribunal by which the action should be tried.

The defendants accordingly now appealed from the decision of Kekewich, J.

Renshaw, Q.C. (with him *Edward Shortt*) for the appellants.—In deciding the question raised upon the defendants' application in this case, Kekewich, J. did so on the mistaken assumption, as it now appears, that the Attorney-General, when granting his *fiat*, had exercised his discretion as to the Division in which the action should be tried. But since the hearing of the application before the learned judge, the Attorney-General has authorised the defendants to state that, as a matter of fact, he exercised no discretion of the kind. It is not apparently the practice for him to do so. He does not go into the facts of the case for the purpose of determining in which court it shall be tried. On the contrary, the selection of the court rests entirely with the plaintiff in each particular case. As regards the present case, the matter in dispute being a purely local one, it would be more convenient that it should be tried on the spot with a jury who would have a view, and that can only take place at Durham. There would consequently be a saving of expense, and I accordingly ask that there should be a transfer of the action to the Queen's Bench Division, in order that there may be a trial at the Durham Assizes with a special jury. The case comes within the principles laid down in

Jenkins v. Bushby, 64 L. T. Rep. 213; (1891) 1 Ch. 484.

The court has a complete discretion as to the mode of trial in the present case, just as if it were an action between private parties:

President, &c., of the College of St. Mary Magdalen, Oxford, v. Attorney-General, 6 H. L. Cas. 189, at p. 210.

Attorney-General v. Vivian, 1 Buss. 226, at p. 236.

Although Kekewich, J. decided against the defendants, under the misapprehension as to the Attorney-General having exercised a discretion, he expressed his opinion that on the ground of convenience it would be better that the transfer asked for should be made; and therefore he would have so directed if it had been left entirely to him to determine the question.

Alexander Glen (Warrington, Q.C. with him) for the respondents.—There is no difference between the Attorney-General suing *ex officio* and at the relation of private individuals. He might have sued alone for an injunction for obstruction:

Attorney-General v. Cockermouth Local Board, 30 L. T. Rep. 590; L. Rep. 18 Eq. 172;

Attorney-General v. Barker, 4 My. & Cr. 262.

The Judicature Acts have not abrogated the right of the Attorney-General:

Attorney-General v. Constable, 4 Ex. Div. 172;

Dixon v. Farrer, 17 Q. B. Div. 658;

Ann. Pr. 1901, note to Order V., r. 9.

As to the merits, the only thing suggested is that

there should be a view. But a view would not assist. Moreover it would be inconvenient to transfer this action. It is too heavy a case for the assizes, and there is a point of law which would involve two hearings.

No reply was called for.

RIGBY, L.J.—In this case the learned judge in the court below, as I read his judgment, has thought that, on the merits properly so-called, he would have sent the case for trial to the Queen's Bench Division without deciding now whether it should be tried with or without a jury, leaving all that to be determined in the Queen's Bench Division. But he felt himself hampered because he supposed that as Her Majesty's Attorney-General had elected the Chancery Division as his tribunal in which he chose to have the case tried, he was exercising the prerogative right of the Crown, and the court had no right to interfere. Now, with regard to that last point, I think it is perfectly plain. Perfectly plain it is now in one sense, because we have it from the Attorney-General that he never intended to exercise any such prerogative right; and he does not wish to interfere with the discretion of the court in any way. Even if he had not given us that information, I should have arrived at precisely the same conclusion, for, from all that I know of the practice of the Attorney-General, and, I will add, the reason of the case, I think it never has been the practice for the Attorney-General to exercise in that manner the prerogative of the Crown, assuming him to have it. All that he does is by his *fiat* to authorise the relators to go on with the matter involving public interest, so long as he thinks it right that they shall be permitted to go on. He does not clothe them with the prerogative of the Crown. He has no intention of doing so. They take the step which they think right and proper, and they take it with no greater sanction, no greater solemnity, than they would if they were only acting as plaintiffs. I therefore come to the conclusion that the Attorney-General has not expressed his election, and that, therefore, the question of election by him is altogether out of the case. That seems to me to resolve the question without going into questions which may be of importance as to what would take place if he had elected. I think we are at liberty, and we are bound, to treat the case as if it were only an election by the plaintiffs, who are also relators, to bring their action where it has been brought. That being so, I see no reason to differ from the opinion which I understand to be held by Kekewich, J. on the merits of the case. And I think we now ought to make the order for the transfer which he would have made if he had not felt himself hampered by the prerogative of the Crown. The appeal will accordingly be allowed. The appellants will get the costs of the appeal in any event, and the costs below will be costs in the action.

WILLIAMS, L.J.—I agree. Assuming that the Attorney-General was an actor in this case—that is, assuming that he had to be treated as a party to these proceedings, and assuming that he had chosen his court, which I take it the Attorney-General in a case in which the Crown was interested would have a right to do, it still seems to me quite plain, on what we now know the

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Attorney-General says, that if there was any right in the Attorney-General to object to the transfer of the proceedings from the Chancery Division to the Queen's Bench Division, he has done that which he has been requested to do, namely, disclaimed any right of the Crown to raise any such objection.

ROMER, L.J.—I agree, and I have nothing to add.

Appeal allowed.

Solicitors for the appellants, *Crossman, Prichard, Crossman, and Block*, agents for *Kidson, McKensies, and Kidson*, Sunderland.

Solicitors for the respondents, *Johnson, Weatherall, and Sturt*, agents for *F. M. Bowey*, Sunderland.

Tuesday, Jan. 15, 1901.

(Before SMITH, M.R., COLLINS and ROMER, L.JJ.)

UPPERTON v. RIDLEY AND ANOTHER. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Police—Pension—Mode of calculation—"Annual pay"—Special duty allowance—Police Act 1890 (53 & 54 Vict. c. 45), s. 1; sched. 1, part 1, r. 1; part 3, r. 11.

By the Police Act 1890 a constable, who has completed a certain time of service, is entitled to a pension which, by rule 11 of the 1st schedule, is to be calculated "according to the amount of his annual pay at the date of his retirement."

A constable was selected for permanent special duty at the House of Lords, and continued to serve in that capacity for some years up to the date of his retirement."

During the whole period of this special service the constable received a special allowance of 7s. a week in addition to his ordinary pay under the scale for the time being in force by the authority of the Home Secretary.

Held (dismissing the appeal), that the special allowance was not part of the "annual pay" of the constable, within the meaning of the Act, for the purpose of calculating his pension.

THIS was an appeal by Upperton from the decision of the Divisional Court (Channell and Bucknill, JJ.) upon a special case stated by quarter sessions.

Upperton appealed to the quarter sessions for the county of London from the decision of the police authority for the metropolitan police district, under the police Act 1890, refusing to reconsider his claim for an increased amount of pension.

The respondents were Sir Matthew White Ridley, the Home Secretary, and Sir Edward Bradford, the Commissioner of Police of the metropolis.

The appeal was dismissed subject to the opinion of the High Court upon a case stated, which, so far as is material, stated the following facts:

Upperton joined the metropolitan police force on the 30th Dec. 1872, and on the 1st Jan. 1899 he had completed not less than twenty-five years' approved service as a police constable. He had previously duly signed an acceptance of the provisions of the Police Act 1890. He had given all requisite notices of his desire to retire and to

receive a pension, and he was entitled as of right by the Police Act 1890 to retire and receive a pension for life of two-thirds of his annual pay at the date of his retirement.

On the 11th March 1894 Upperton, having already served for nine years as a police constable at the Houses of Parliament, was selected by the Commissioners of Police for permanent duty at the House of Lords, and continued to serve in that capacity until the 2nd Jan. 1899, the date of his retirement.

The duties of Upperton at the House of Lords were to preserve the peace, to keep order, to protect the person and property of the High Court of Parliament and of persons resorting thereto, to attend fire drill, and generally to act as a police constable in pursuance of his oath and under the orders of the commissioners.

From the 11th March 1894 to the 2nd Jan. 1899 Upperton was paid every week the sum of 32s., being the ordinary pay of a constable of his rank and service, and an additional sum of 7s. in respect of the special duty upon which he was employed.

Some constables attend at the Houses of Parliament for special duty during the session of Parliament only; but all constables attending there, whether permanently or for the session only equally receive a special duty allowance of 1s. a day.

It was stated in evidence by Mr. Bathurst, chief clerk to the Commissioners of Police, that the commissioners were under no obligation to pay Upperton the additional sum of 7s. even while he remained on special service, though that is done partly as a recognition of the good conduct for which a constable is placed on special service, and partly because, by being withdrawn from ordinary duty, he loses to some extent his chance of promotion.

From the said sum of 32s. the sum of 7d. was deducted as a contribution towards the pension fund, in accordance with sect. 15 of the Police Act 1890.

The sum of 7s. was paid without any deduction for pension being made therefrom.

Upperton signed the weekly pay list, which contained one column headed "Amount of Pay," and another column headed "Allowance for Special Duties." The sum of 32s. appeared in the former column, and the sum of 7s. in the latter, along with allowances in lieu of coals and boots.

By sect. 15 of the Police Act 1890 the police authority of every police force is authorised and directed to deduct from the pay of every constable such stoppage during sickness as may be provided by the regulations respecting the force.

In the metropolitan police force, during absence owing to sickness, 1s. a day is usually stopped from the ordinary pay of a constable, and in the case of a constable employed on special duty and receiving a special allowance in respect thereof, that allowance is usually stopped in addition to the stoppage of 1s. a day. During the period of his absence the amount of the said allowance would be paid to the constable who actually performed the special duty.

Upon Upperton's retirement the police authority, the respondents, awarded him a pension of 55l. 9s. 4d. a year, being fifty-two times the sum of 21s. 4d., which was two-thirds of the sum of 32s.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

On behalf of Upperton it was contended (a) that he was entitled to receive a pension at the rate of two-thirds of 39s. a week, and that the sum of 7s., which was expressly voted by Parliament as a special duty allowance and had been paid to him for a period of nearly five years, was "pay" within the meaning of sched. 1, part 1, of the Police Act 1890, and that the purpose of that Act would be defeated if a police authority could treat as non-pensionable a special duty allowance attached to a permanent appointment; (b) that his "annual pay" was 365 times his daily pay, and not fifty-two times his weekly pay.

On behalf of the respondents it was contended (a) that Upperton was only entitled to a pension at the rate of two-thirds of 32s. a week, and that the sum of 7s. was not part of his pay as a constable, but was only an allowance in the nature of a gratuity, and that the said sum of 7s. was properly not taken into account in arriving at the pension due to him; (b) that his "annual pay" meant fifty-two times his weekly pay and no more.

The questions for the opinion of the court were: (1) Whether the sum of 7s., though called an allowance, was "pay" within the meaning of the Police Act 1890, and as such ought to have been taken into consideration in arriving at the amount of the pension due to Upperton; (2) whether "annual pay" means fifty-two times the weekly pay, or 365 times the daily pay.

The Metropolitan Police Act 1829 (10 Geo. 4, c. 44) provides:

Sect. 12. The receiver, out of the moneys so received by him, shall be allowed a yearly salary not exceeding seven hundred pounds, to be payable quarterly; and the receiver, out of the same moneys, shall from time to time pay to the persons belonging to the police force appointed under this Act, such salaries, wages and allowances, and at such periods, as one of His Majesty's principal Secretaries of State shall direct.

The Police Act 1890 (53 & 54 Vict. c. 45) provides:

Sect. 1. Subject to the provisions of this Act every constable in a police force:—(a) If he has completed not less than twenty-five years' approved service, and, where a limit of age is prescribed by the pension scale in force under this Act, is of an age not less than the age so prescribed, shall, on the expiration of such time not exceeding four months after he has given written notice to the police authority of his desire to retire as the police authority may fix, be entitled without a medical certificate to retire and receive a pension for life.

Sect. 3.—(1) The pensions . . . shall be in accordance with the pension scale for the force. (2) The pension scale for a police force shall be (a) as regards ordinary pensions, a fixed scale adopted by the police authority within the maximum and minimum limits set forth in part 1 of the first schedule to this Act.

Sect. 11. In any of the following cases—(b) Where a constable . . . claims a pension . . . under this Act as of right and the police authority do not admit the claim the constable . . . may apply to the police authority for a reconsideration of the claim to the pension . . . and if aggrieved by the decision upon such reconsideration may apply to the next practicable court of quarter sessions . . . and that court, after inquiry into the case, may make such order in the matter as appears to the court just, which order shall be final.

Sect. 15. The police authority of every police force shall deduct from the pay of every constable in the

force—(a) Sums at a rate not exceeding two and a half per cent. per annum on his pay.

Sect. 16.—(1) There shall be a pension fund of every police force, and there shall be carried to that fund (a) The deductions . . . made in pursuance of this Act from the pay of the constables in the force.

Sched. 1, part 1.—Ordinary Pensions: (1) The pension to a constable on retirement shall be within the maximum and minimum limits following, that is to say—(c) If he has completed twenty-five years' approved service, an annual sum not less than thirty-sixtieths nor more than thirty-one-fiftieths of his annual pay, with an addition of not less than one-sixtieth nor more than three-fiftieths of his annual pay for every completed year of approved service above twenty-five years, so, however, that the pension shall not exceed two-thirds of the annual pay.

Sched. 1, part 3, rule 11.—In estimating any pension, gratuity, or allowance for the purposes of this Act—(a) a pension or gratuity to a constable shall be calculated according to the amount of his annual pay at the date of his retirement.

Under the scale of pay for metropolitan police constables directed by the Home Secretary, and in force at the date of Upperton's retirement, his pay was 32s. a week only.

The pension scale adopted for the metropolitan police force is the maximum limit allowed by sched. 1, part 1, of the Police Act 1890.

The Divisional Court (Channell and Bucknill, JJ.) held that "annual pay" meant three hundred and sixty-five times the daily pay and not fifty-two times the amount of the weekly pay. Upon the other question the learned judges differed in opinion, Channell, J. holding that the 7s. a week was not part of the "annual pay" of the constable and Bucknill, J. that it was. Upon this point, therefore, the appeal was dismissed (19 Mag. Cas. 495; 32 L. T. Rep. 233).

Upperton appealed.

E. H. Pickersgill for the appellant.—The question on this appeal turns upon the meaning of "annual pay" in the 1st schedule to the Police Act 1890. The pension, to which the police constable is entitled as of right, is to be calculated according to the amount of his "annual pay" at the date of his retirement. This expression "annual pay" is used for the first time in this Act, which contains no definition of "pay" or "annual pay." The statute which provides for the pay of constables in the metropolitan police force is 10 Geo. 4, c. 44, s. 12, which provides that the receiver shall pay to the members of the force "such salaries, wages, and allowances, and at such periods, as one of His Majesty's principal Secretaries of State shall direct," and in the Metropolitan Police Act 1839 (2 & 3 Vict. c. 44), s. 22, the expression used is "pay of every constable"; the expression "pay" therefore seems to be used to include the "salaries, wages, and allowances," provided for in the earlier Act. This special allowance of 7s. a week was part of the constable's pay. It was increased remuneration given to the constable in recognition of his previous good conduct and as recompense for losing his chance of promotion. His employment on special services in the House of Lords was permanent, and the allowance of 7s. a week was permanent. The money out of which this special allowance was paid was provided by Parliament expressly for the purpose of paying these allowances. Upon being appointed on

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special duty at the House of Lords a new contract was made with the constable to pay him his former ordinary rate of pay, and also this further special amount in respect of the special duty. The whole amount, ordinary pay and special allowance, then became his "pay," and it was his "annual" pay, for it continued for several years. The fact that no deduction was made from the special allowance for the pension fund was the fault of the police authority, and the constable ought not to be prejudiced by that omission of the police authority to make the proper deductions. If this constable had not been placed on this special duty he might have been promoted and so obtained increased pay which would have increased the amount of his pension, and he ought not to be placed in a worse position as regards pension because he took this special duty with a special allowance, and thereby lost his chance of promotion. "Pay" is a reward or remuneration for services rendered, and in this case the constable secured the whole of the 7s. a week as remuneration for his services; it was not an allowance to meet expenses or disbursements.

Macmorran, Q.C. and J. P. Grain for the respondents.—This special allowance was not a part of the pay of the constable, within the meaning of the Act. The scale of pay of metropolitan police constables is that which is authorised and directed by the Home Secretary, pursuant to sect. 12 of the Metropolitan Police Act 1829. By that scale the "pay" of this constable at the date of his retirement was 32s. a week only, and did not include this special allowance. The contract under which the constable was employed entitled him to "pay" only in accordance with the scale; he was bound to serve wherever he might be sent; he had no option as to performing, and no permanency of employment, in respect of the special duties at the House of Lords; he had no right to claim payment of the special allowance, which was merely a gratuity paid out of a fund provided by Parliament. This special allowance was never treated as "pay" by anyone, as appears from the pay lists signed by the constable. [They were stopped by the Court.]

SMITH, M.R.—This is an appeal from the Queen's Bench Division in a case in which the two learned judges differed. The question arises as to the meaning in the Police Act 1890 (53 & 54 Vict. c. 45) of the words "annual pay," according to the amount of which the pension of a police constable is to be calculated. The amount of the pension depends upon the amount of the "annual pay" of the constable. In order to see what is the position of this police constable in the metropolitan police force it appears to me to be necessary to consider carefully the document which the police constable signed in order to see what are the terms in respect of "pay" under which he served. When that document is looked at, it seems to me to be perfectly clear that the conditions under which the police constable served in the metropolitan police force were that he was to receive 24s. a week while in the first class, and to advance to 27s. and 30s. a week in the higher classes. This last sum of 30s. a week was subsequently increased to 32s. a week by the direction of the Home Secretary, the proper authority for that purpose. Under those circumstances

what is the amount of pension to which the police constable is entitled? It seems to me, from this document which he signed, that the pay there contracted and stipulated for was the prescribed amount as directed by the Home Secretary and nothing else. Over and above the sum of 32s. a week, the pay according to the prescribed scale, what was the police constable entitled to sue for as the reward for his services? There was no contract under which he could claim or receive the additional sum of 7s. a week. In my opinion, upon considering the statutes and documents, there was nothing whatever to entitle the police constable to any pay over and above the different sums stated in the scale directed by the Secretary of State. The case, however, by no means rests there, because there is in the special case this very material statement: "It was stated in evidence by Mr. Bathurst, chief clerk to the Commissioners of Police, that 'the commissioners were under no obligation to pay the appellant the additional sum of 7s., even while he remained on special service, though that is done partly as a recognition of the good conduct for which a constable is placed on special service, and partly because by being withdrawn from ordinary duty he loses to some extent his chance of promotion.' Therefore, this police constable, who asserts that he is entitled to have taken into consideration as part of his pay this sum of 7s. a week, cannot show any contract to pay that sum, and the above paragraph of the special case shows that there was no obligation to pay that sum. Again, what has been the practice for many years with respect to this special allowance in the police force? It appears from the pay sheets that it has been the practice for many years to treat this as a gratuity or special allowance, but not as pay. If it had been treated as pay, there must have been made a deduction from the 7s. a week for the pension fund in accordance with the provisions of sect. 15 of the Police Act 1890; but this deduction was never made. In my opinion, this sum of 7s. a week was not pay at all within the meaning of the Act. I agree, therefore, with the judgment of Channell, J. in the court below, and I think that this appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. I would have been very glad to be able to differ from the judgment of Channell, J. in this case if it were possible to do so, because of the long and meritorious service of this good and respectable police constable. His right, however, to pension depends upon the terms of the Act of Parliament, and the amount of the pension must be a certain proportion of his "annual pay" at the date of his retirement. Now, the person who alone can determine the amount of the annual pay of a police constable in the metropolitan police force is the Secretary of State. Sect. 12 of 10 Geo. 4, c. 44, provides that "the receiver . . . shall from time to time pay to the persons belonging to the police force appointed under this Act such salaries, wages, and allowances, and at such periods, as one of His Majesty's principal Secretaries of State shall direct," and that provision does not appear to have been since altered. The only evidence before us upon which we are entitled to act is that the scale of pay which was set out in the document signed by the police constable himself was the scale of pay directed by the

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Secretary of State. In that it is stated in terms that the pay of the constable is so much, and it does not include this allowance for special duty. We have it, therefore, upon the highest authority—that of the Secretary of State himself—that this was his pay. We cannot travel outside of that; by that the pay of the constable is defined. The amount of the pension follows absolutely upon that pay. Further, in this very case the Secretary of State has himself in effect stated what in his opinion the pay of this constable was, for he has decided that the pension is to be calculated only upon the pay of 32s. a week, and he is the authority to determine the rate of pay of metropolitan police constables. Again, the whole course of practice of the parties as to deductions for the pension fund points to the same conclusion—that the pay of the constable was only 32s. a week. I agree, therefore, that this appeal fails and must be dismissed.

ROMER, L.J.—I think that this is a hard case for this constable, but I agree that the appeal must fail. Upon the facts it appears to me to be clear that the sum of 7s. a week received by the police constable for service at the House of Lords was expressly paid and received upon the footing that it was not pay, but was a voluntary or gratuitous gift. That is shown by the pay sheets signed by the police constable, and by the fact that no deduction was made from the 7s. for the pension fund, which it was obligatory to make if this sum was pay within the meaning of the Act of 1890, and also by the fact that during absence for sickness the whole of this 7s. was usually stopped and not merely a small part of it, as in the case of ordinary pay. It appears to me, therefore, upon these facts to be impossible to come to the conclusion that this sum of 7s. a week was in the nature of pay. The appeal therefore fails and must be dismissed. *Appeal dismissed.*

Solicitors for the appellant, *Mann and Crump*.
Solicitors for the respondents, *Wontner and Sons*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, Nov. 20, 1900.

(Before KEKEWICH, J.)

CHAMBERLAIN AND HOOKHAM LIMITED v.
BRADFORD CORPORATION. (a)

Public authority — Costs — Taxation — Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61), s. 1.

An action was brought against a public authority to restrain it from infringing a patent by the use of electric meters. The public authority used the meters under powers conferred on it by a provisional order duly confirmed by Act of Parliament. The action was dismissed with costs. Upon summons to review taxation:

Held, that the public authority was entitled to costs as between solicitor and client under

sect. 1 of the Public Authorities Protection Act 1893.

THIS was a summons by the plaintiffs in an action to review taxation.

The action was brought by Chamberlain and Hookham Limited against the Bradford Corporation to restrain them from infringing certain letters patent of the plaintiffs for an invention for improvements in electricity meters. The defendant corporation, it appeared, having been empowered by the Bradford Electric Lighting Order of 1883, duly confirmed by Act of Parliament, to supply electricity within their district, had obtained from certain manufacturers electric meters which they had then let on hire to users of the electricity supplied by them under the powers given them by sect. 53 of their order, which provided:

The undertakers may let for hire any meter for ascertaining the value of the supply of electricity by them to any customer.

These were the meters which the plaintiffs alleged infringed their patents.

The action was dismissed with costs, to be taxed on the higher scale, and when taxed to be paid by the plaintiffs to the defendant corporation.

Upon taxation the taxing master held that the defendant corporation were entitled to costs as between solicitor and client under sect. 1 of the Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61), which provides:

Where . . . any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority . . . the following provisions shall have effect: (b) Whenever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client.

The plaintiffs objected that the costs should be taxed as between party and party, alleging that the defendant corporation were not acting in pursuance, &c., of any Act of Parliament or public duty within the meaning of the section, and, further, that the action had been in fact defended by the manufacturers of the meters in the name of the corporation under an indemnity given to the corporation against costs and damages by the manufacturers, who had no right to the protection of the Act.

The defendant corporation replied that the meters were used by them in execution of a statutory duty to supply electric light under their electric lighting order; and that, although the manufacturers had indemnified them against costs and damages, that did not affect the plaintiffs' liability to pay.

The master overruled the plaintiffs' objections, stating that the court having decided the defendant corporation were entitled to costs, the Act came in, and he had no discretion but to apply it, and that he could only, in the absence of directions, regard the Bradford Corporation as the defendants. He referred to *North Metropolitan Tramway Company v. London County Council* (78 L. T. Rep. 711; (1898) 2 Ch. 145) and *The Ydon* (81 L. T. Rep. 10; (1899) P. 236).

The plaintiffs then took out this summons to allow their objections to the taxation.

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

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ATTORNEY-GENERAL v. COLE AND SON.

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Fletcher Moulton, Q.C. and A. J. Walter for the summons.—The defendant corporation were not acting as a public body, but as private individuals. There was no statutory duty cast upon them to employ these particular meters. What they did was merely a permissive act. They are not therefore within the protection of the section:

Attorney-General v. Company of Proprietors of Margate Pier and Harbour, 82 L. T. Rep. 448; (1900) 1 Ch. 749;

Fielding v. Morley Corporation, 79 L. T. Rep. 231; (1899) 1 Ch. 1;

The Ydun (ubi sup.).

The real defendants are the manufacturers, who cannot be entitled to solicitor and client costs.

Bousfield, Q.C. and J. C. Graham, for the defendant corporation, were not called on.

KEKEWICH, J.—This appears to me to be a simple question, and one in which I ought not to display any hesitation or doubt. The plaintiffs are owners of certain letters patent for electricity meters. The defendant corporation made use of certain electricity meters which were objected to by the plaintiffs as being infringements of their letters patent. The plaintiffs consequently brought an action against the defendant corporation to restrain the alleged infringement. Strictly speaking, the defendant corporation did not themselves use the meters, nor did they manufacture them. They obtained them from third parties, and then let them out on hire. But it is said that that was not done by the defendant corporation "in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority" within the meaning of sect. 1 of the Public Authorities Protection Act, and that they are not therefore within the protection of that section. I am not sure whether or not they were acting in pursuance or execution of an Act of Parliament. I will therefore put that aside, nor am I sure that they were acting in pursuance or execution of a public "duty," because what they did was done voluntarily. I will not express any opinion on either of these points, but they were clearly acting in pursuance or execution of a public "authority" within the meaning of the section, for clause 53 of their provisional order says they "may let for hire any meter for ascertaining the value of the supply of electricity by them to any customer." Let us test the question in this manner: Suppose the corporation had been minded to hire out these meters without having obtained this provisional order confirmed by Act of Parliament. Could they as a public authority have done so? Clearly they could not. Nor could they as a public authority have attempted to do anything else with regard to supplying electricity without first obtaining statutory power to do so, for it is not within their common law powers. But it appears they were expressly authorised by statute to do what they have done, and they are therefore within the protection of the Public Authorities Protection Act 1893. Then it is said the corporation are only nominal defendants, but they are the defendants sued by the plaintiffs, who no doubt took care to sue the right defendants. It is unfortunate for the plaintiffs that those defendants happened to be a public body, but the plaintiffs must take the consequences of that. The defendant corporation are entitled to

their costs as between solicitor and client, and the summons must therefore be dismissed with costs.

Solicitors: *Field, Roscoe, and Co.*, for *Pinsent and Co.*, Birmingham; *Ashurst, Morris, Crisp, and Co.*

Nov. 2, 3, 6, 7, Dec. 11 and 12, 1900.

(Before KEKEWICH, J.)

ATTORNEY-GENERAL v. COLE AND SON. (a)

Nuisance—Noxious trade—Reasonable use of premises—Injunction.

Action by the the Attorney-General at the relation of the Wandsworth District Board of Works for an injunction to restrain the defendants from carrying on their business so as to be a nuisance to their neighbours.

The defence was that the defendants had carried on the business for thirty years, were carrying it on in a reasonable manner, and had taken precautions not to cause a nuisance.

Held, that, notwithstanding that the defendants had taken precautions to prevent their trade from being a nuisance to their neighbours, a nuisance had been proved, and the injunction must go.

THIS was an action brought by the Attorney-General at the relation of the Wandsworth District Board of Works for an injunction to restrain the defendants Cole and Son, fat melters and greaves pressers, from carrying on their business so as to be a nuisance to their neighbours.

The nuisance arose from noxious gases and fumes coming from the defendants' premises.

The defence was that the defendants had carried on the business for thirty years, were carrying it on in a reasonable manner, and had taken precautions not to cause a nuisance.

Warrington, Q.C. and Lyttelton Chubb, for the plaintiffs, relied on *Reinhardt v. Mentasti* (61 L. T. Rep. 328; 42 Ch. Div. 685).

P. Ogden Lawrence, Q.C. and Stewart Smith for the defendants.

KEKEWICH, J. came to the conclusion on the evidence that, although the defendants carried on their business in a reasonable manner from their own point of view, and did everything they could to prevent a nuisance or annoyance being created, yet there undoubtedly was a nuisance, which must be restrained by injunction, and continued:—It fell to me to consider this question, whether a nuisance of a permanent character had been established, in the case of *Reinhardt v. Mentasti* (61 L. T. Rep. 328; 42 Ch. Div. 685), which I refer to because I venture to think that my judgment has been very much misunderstood. I thought in that case that I was not at liberty to consider whether the defendant was doing what was reasonable from his point of view. He was conducting an eating house near another man's dwelling-house, and in a very reasonable manner as regards an eating house. He was doing that which was for the convenience of his customers, and to enable him in the ordinary course of that business to provide what his customers wanted; but in doing so he created a nuisance, and it seemed to me there,

(a) Reported by FRANCIS E. ADY, Esq., Barrister-at Law.

Q.B. Div.]

MARSLAND (app.) v. WALLIS AND SONS (resps.).

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that when once it was established that he was creating a nuisance, the fact that he was doing what was reasonable from his point of view was no defence. Buckley, J. has commented on that in a recent case of *Sanders-Clark v. Grosvenor Mansions Company* (82 L. T. Rep. 758; (1900) 2 Ch. 373), where he seems to think that I differed really in effect from Lord Selborne in *Ball v. Ray* (28 L. T. Rep. 346; 8 Ch. App. 467). Of course nothing could be further from my intention; and although perhaps the blame may have been mine in the use of language, Buckley, J. has a little misunderstood what I intended to say. That case has also been commented on in Garrett on the Law of Nuisances. His criticism is severe, but not too severe if it is just. He seems to think my judgment differs from that of the Court of Exchequer Chamber in *Bamford v. Turnley* (3 B. & S. 62). It so happens that I studied *Bamford v. Turnley* with very great care before I gave my judgment in *Reinhardt v. Mentasti*, and I thought that I was founding my judgment on the judgment of the Exchequer Chamber; it was so intended. I have taken this opportunity of again reading *Bamford v. Turnley*, and I am bound to say that, notwithstanding these criticisms, what I said in *Reinhardt v. Mentasti* was altogether agreeable, as it was intended to be, to what was laid down in *Bamford v. Turnley*. These remarks are not so much meant with regard to my own case as to bring me back to the main question, which I think may be stated in this manner: Can a man reasonably create a nuisance? I think the answer of *Bamford v. Turnley*, from which there has never been, so far as I am aware, any departure at all, is that he cannot. Then he cannot say that he is acting reasonably. The two things are self-contradictory; he is either acting reasonably or he is committing a nuisance. If he is committing a nuisance he is not acting reasonably. That seems to me to be the short result, and I think that ought to apply here.

Solicitors: W. W. Young and Son; Alexander Pope, for Henry Robert Jones, Wandsworth.

QUEEN'S BENCH DIVISION.

Monday, Dec. 17, 1900.

(Before KENNEDY and DARLING, JJ.)

MARSLAND (app.) v. WALLIS AND SONS (resps.). (a)

Metropolis—Surveyor's fees—Land of school board—London Building Act 1894 (57 & 58 Vict. c. cxxiii.), ss. 21, 154.

By sect. 21 of the London Building Act 1894 any building to be erected upon any lands belonging at the time of the coming into operation of the Act, to the London School Board, may be erected in accordance with the provision of any Act in force immediately before the passing of the Act. Held, that the fees payable to the district surveyor were also regulated by such earlier Act.

CASE STATED.

The appellant was the district surveyor under the London Building Act 1894 for the district of Camberwell, in the county of London, and the respondents were builders within the meaning of

sect. 154 of that Act of certain buildings in that district.

The buildings were a school and other buildings erected by the respondents for the London School Board upon lands belonging to such board.

The appellant's claim was to be paid by the respondents the sum of 32l. 1s. 3d. for fees due to him as district surveyor for work done in respect of the buildings.

It is enacted by sect. 154 of the London Building Act 1894 that there shall be paid by the builder, or in his default by the owner or occupier, as the case may be, of the building or structure in respect whereof the same are chargeable, to every district surveyor in respect of the several matters mentioned in parts 1 and 3 of the 3rd schedule to the Act the fees therein specified or such other fees not exceeding the amounts therein specified as may be directed by the council.

By sect. 157 of the same Act it is provided that the fees due from builders to the district surveyor may be recovered in a summary manner.

By sect. 21 of the Act it is enacted that notwithstanding the Act any building to be erected upon any lands belonging, at the time of the coming into operation of the Act, to the London School Board, may be erected in accordance with the provisions of any Act in force immediately before the passing of the Act.

It was admitted by the appellant that the buildings in respect of which the fees were claimed were erected subsequently to the coming into operation of the London Building Act 1894 upon lands which belonged to the School Board for London at the time of the coming into operation of that Act, and under the provisions of the Metropolitan Building Act 1855 so far as that Act could now apply.

It was admitted on the other hand by the respondents that the appellant had performed duties in respect of the buildings for which he was entitled to fees, and that such fees, if calculated in accordance with the provisions of the London Building Act 1894, would amount to the sum claimed, but if calculated in accordance with the enactments in force previously to the passing of the Act of 1894 would amount to the sum of 19l. 7s. 6d.

It was contended on behalf of the respondents that by virtue of sect. 21 of the London Building Act 1894 the fees payable to the appellant in respect of the buildings were not to be calculated in accordance with the provisions of the Act, but in accordance with the provisions of the Metropolitan Building Act 1855, under which Act the buildings in question were erected.

It was contended on behalf of the appellant that the enactment in sect. 21 of the London Building Act 1894 that the buildings therein mentioned might be erected in accordance with the provisions of any Act in force immediately before the passing of the Act referred only to structural erection of the buildings and to the rules in accordance with which such buildings were required to be erected and not to the fees payable to the district surveyor in respect of the supervision of the erection of the buildings. And that the appellant was entitled to the fees prescribed by sect. 154 of the London Building Act 1894 for the services performed by him in respect of the buildings.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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The magistrate was of opinion that the respondents' contention was right, and that the effect of the provision in sect. 21 of the London Building Act 1894 was that the appellant was not entitled for the services performed by him in respect of the buildings to the fees prescribed by the Act, but was only entitled for such services to the fees prescribed by the Metropolitan Building Act 1855. He accordingly refused to make an order for payment by the respondents of the amount claimed and ordered the respondents to pay to the appellant the sum of 19l. 7s. 6d. only, being of opinion that the words "may be erected in accordance with the provisions of any Act in force immediately before the passing of the Act" were wide enough to include all the provisions of the former Act with reference to surveyors' fees.

R. Cunningham Glen.—The magistrate was wrong. The buildings in question are supervised under the Act of 1894 and not under the earlier Act. The fees payable are therefore those under the later statute. If they were being built and not supervised it might be different. Sect. 21 applies only to the structural erection and the rules that apply to such structure, and not to the fees, which are regulated by sect. 154 of the London Building Act 1894.

J. A. Slater (E. E. Humphreys with him).—The district surveyor has no right to any fees except those that are given him by the statute. Sect. 154 gives him fees under the Act of 1894. Where the work is regulated by the Metropolitan Building Act 1855 the fees payable are those given by that Act.

KENNEDY, J.—When the section of a later Act makes provision like sect. 21 of the London Building Act 1894 we have to look back to the earlier Act to see what is required to be done. Now, sect. 21 says that notwithstanding the Act of 1894 any building may be erected upon any land belonging to the school board, in accordance with the provisions of any Act in force immediately before the passing of that Act. The learned magistrate has said that he considers the words "may be erected in accordance with the provisions of any Act in force immediately before the passing" of the Act of 1894 are wide enough to include all the provisions of the former Act—namely, the Act of 1855—with reference to surveyors' fees. I think he is right, and must be upheld.

DARLING, J. concurred. *Appeal dismissed.*

Solicitors: *Walter C. Williams; Avery and Wolverson.*

Tuesday, Dec. 18, 1900.

(Before *KENNEDY and DARLING, JJ.*)

SCOTT (app.) v. MIDLAND RAILWAY COMPANY AND GREAT NORTHERN RAILWAY COMPANY resps.). (a)

Mines—Quarries—Gravel pit—Gravel and sand—Whether gravel and sand are "minerals" and a gravel pit a quarry—Necessity of notices as in case of mines—Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77), ss. 11, 28—Quarries Act 1894 (57 & 58 Vict. 42), s. 1.

Gravel and sand are "minerals" within the

meaning of the words "other minerals" in sect. 1 of the Quarries Act 1894, and consequently, a quarry or gravel pit of more than 20ft. deep from which gravel or sand is being taken, is a "quarry" to which the Act applies, and the provisions of the Metalliferous Mines Regulation Acts 1872 and 1875 apply to such quarry as in the case of mines.

A railway company were the lessees or owners of a ballast siding or gravel pit by the side of their line, and within their limits of deviation, and they used the same for the purpose of getting from time to time gravel and sand, which were used by the company solely for the maintenance and repair of their line, and the place was more than 20ft. deep.

Held, that this place from which the gravel and sand were taken was a "quarry" within the meaning of the Quarries Act 1894; that the provisions of sects. 11 and 28 of the Metalliferous Mines Regulation Act 1872 applied, and that the railway company were therefore bound to give to the inspector of mines notice of a fatal accident in the quarry as required by that Act in the case of mines, and that they were bound to give such notice whether or not it was their duty to give notice of the accident to the Board of Trade under sect. 6 of the Regulation of Railways Act 1871.

CASE stated by justices of the peace for the county of Norfolk sitting as a court of summary jurisdiction.

Three informations were preferred by the appellant (Scott), one of Her Majesty's inspectors of mines, against the respondents, the Midland Railway Company and the Great Northern Railway Company, alleging that the defendants (the respondents) had committed breaches of sects. 11 and 28 of the Metalliferous Mines Regulation Act 1872, as applied to quarries by the Quarries Act 1894.

The first two informations charged:

That the Midland Railway Company and the Great Northern Railway Company on the 15th and 30th March 1900 respectively, then being the owners of a certain quarry called or known by the name of the Corpusty Ballast Quarry situate at Corpusty, in the county of Norfolk, unlawfully were guilty of an offence against the Metalliferous Mines Regulation Act 1872, as applied to quarries by the Quarries Act 1894, in having failed "to cause an abstract of the Metalliferous Mines Regulation Act 1872 with the name and address of the inspector of the district, and the name of the owner or agent appended thereto, to be posted up in legible characters in some conspicuous place at or near the quarry where it might be conveniently read by the persons employed."

The third information charged that the respondents on the 16th March 1900, being the owners of the same quarry:

Unlawfully were guilty of an offence against the Metalliferous Mines Regulation Act 1872 as applied to quarries by the Quarries Act 1894—that is to say, did fail to send within twenty-four hours notice in writing to the inspector of the district of an accident and of the loss of life occasioned thereby which occurred at the said quarry.

The following facts were proved or admitted:—

The respondents were the lessees for the purpose of taking ballast of a certain place in the parish of Corpusty, in the county of Norfolk, called the "Corpusty Ballast Siding," by the side

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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of their line of railway, and running back 150 yards from the main line, and by their workmen from time to time got therefrom gravel and sand which were used by the respondents for the maintenance and repair of their line, and were only used for such maintenance and repair.

The place was more than 20ft. deep with a slope of 40ft. to 50ft. in length in its deepest part, and was within the limits of deviation shown on the deposited plans of the railway.

No abstract of the Metalliferous Mines Regulation Act 1872 was posted up at or near the Corpusty Ballast Siding on either of the dates mentioned in the informations.

On the 15th March 1900 a fatal accident occurred to one of the defendants' workmen, who was engaged in taking gravel or sand from the place. Such accident was caused by the bulging out of a quantity of sand and gravel from the sloping face of the ballast siding. No notice of such fatal accident was given to the informant, the inspector of the district, as required by sect. 11 of the Metalliferous Mines Regulation Act 1872.

It was stated by the respondents' solicitor, and the statement was not challenged by the appellant's solicitor, that notice of the accident was given to the Board of Trade.

It was contended on behalf of the appellant that both gravel and sand were included within the term "other minerals" in sect. 1 of the Quarries Act 1894, and that a place where such substances were got was within the mischief intended to be remedied by the Quarries Act 1894.

For the respondents it was contended that such substances were not minerals within the meaning of that section, and were not included within the term "other minerals" as they were not *ejusdem generis* with "slate," "stone," or "coprolites," which are therein specifically mentioned.

It was also contended for the respondents that taking gravel and sand from this ballast siding whenever the same might be required for the maintenance or repair of the railway was not working within the meaning of sect. 1 of the Quarries Act 1894, on the grounds that (1) the respondents did not take the gravel and sand for the purpose of making profit out of the same, and (2) that the gravel and sand were not taken systematically, but only whenever the same were wanted for the maintenance and repair of the railway.

It was further contended for the respondents that as the gravel or sand was taken for railway repairs or maintenance, and as the Corpusty Ballast Siding was within the limits of the land authorised to be taken for the use of the railway, it was not subject to the provisions of the Metalliferous Mines Act, but was only subject to the general Railway Acts, which require notice of accidents to be given to the Board of Trade.

The justices determined "that the place was used by persons working habitually whenever ballast was wanted; that the regulations had not been posted nor notice of the accident given; that the things taken out were gravel and sand, and that they were not minerals within the meaning of sect. 1 of the Quarries Act 1894," and on this ground they dismissed the informations giving no

determination as to whether the working was otherwise a place within the meaning of the Act.

The question of law for the opinion of the court was whether the justices ought to have convicted the respondents.

The Quarries Act 1894 (57 & 58 Vict. c. 42), provides:

Sect. 1. This Act shall apply to every place (not being a mine) in which persons work in getting slate, stone, coprolites, or other minerals, and any part of which is more than twenty feet deep, and every such place is in this Act referred to as a quarry under this Act.

Sect. 2 (1). The provisions of the Metalliferous Mines Regulation Acts 1872 and 1875, and the Metalliferous Mines (Isle of Man) Act 1891, specified in the schedule to this Act, shall, subject to the modifications therein specified, apply in the case of every quarry under this Act in like manner as they apply in the case of a mine; (2) The inspectors under the Metalliferous Mines Regulation Acts 1872 and 1875, shall be inspectors of the quarries under this Act.

In the schedule to this Act amongst the provisions of the Metalliferous Mines Regulation Act 1872 applied to quarries, are sect 11 with the substitution of the word "explosive" for the word "powder," and sect. 28.

The Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77), provides:

Sect. 11. Where in or about any mine to which this Act applies, whether above or below ground, either— (1) loss of life or any personal injury to any person employed in or about the mine occurs by reason of any explosion of gas, powder, or of any steam boiler; or (2) loss of life or any serious personal injury to any person employed in or about the mine occurs by reason of any accident whatever, the owner or agent of the mine shall, within twenty-four hours next after the explosion or accident, send notice in writing of the explosion or accident and of the loss of life or personal injury occasioned thereby, to the inspector of the district on behalf of a Secretary of State, and shall specify in such notice the character of the explosion or accident, and the number of persons killed and injured respectively. . . . Every owner or agent who fails to act in compliance with this section shall be guilty of an offence against this Act.

Sect. 28. For the purpose of making known the special rules (if any) and the provisions of this Act to all persons employed in and about each mine to which this Act applies, an abstract of the Act supplied on the application of the owner or agent of the mine, by the inspector of the district on behalf of a Secretary of State, and an entire copy of the special rules (if any) shall be published as follows:—(1) The owner or agent of such mine shall cause such abstract and rules (if any), with the name and address of the inspector of the district, and the name of the owner or agent appended thereto, to be posted up in legible characters, in some conspicuous place at or near the mine, where they may be conveniently read by the persons employed, &c. If any owner or agent fail to act in compliance with this section he shall be guilty of an offence against this Act. . . .

The *Solicitor-General* (Sir Edward Carson, Q. C.) (*H. Sutton* with him) for the appellant.—The three informations raise the same question, whether a gravel and sand pit which was being quarried by the railway companies for the purpose of ballast on their lines, comes within these Acts. The Acts provide that certain notices of the Act and of certain rules of the inspector are to be posted in a convenient place at all quarries coming within the Act, and also that

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notice must be given, if an accident occurs, to the inspector of mines. The short question is whether a quarry from which gravel and sand are being taken is within the definition in sect. 1 of the Quarries Act 1894. By that definition the Legislature meant to sweep in every kind of quarry, and there is no reason why gravel pits and sand pits—perhaps the most dangerous quarries of all—should be left out. The object and intention of this legislation was to afford protection to persons working underground in these places, so that there would be the same reason for bringing within the protection of the Acts persons working in these deep gravel pits as for bringing in persons working in mines. The Act of 1894 is an Act “for the better regulation of quarries.” It intended to apply to quarries the inspection and the other precautions rendered necessary where by quarrying a danger arises to the workmen by the earth being allowed to abut over and fall in on the men, as happened here. We say that gravel is a “mineral,” and that sand is a “mineral” within this Act, and that everything that is under the surface and can be worked is a mineral. Even if the words “other minerals” had been wanting, gravel would have come within the section under “stone,” as gravel is merely small particles of stone; but the words “or other minerals” are put in, thereby giving a very wide purview to the section, which was meant to include any other mineral, that is, any other matter which may be quarried out. The question is not one of “other minerals” being construed *ejusdem generis*, as the magistrates thought, as all the things mentioned are of a different character; thus coprolites are not *ejusdem generis* with either slate or stone. That doctrine cannot apply, and the words “other minerals” must be used in a much wider sense. “Minerals” has come to have a definite meaning of the very widest kind unless from the context you are able to cut down that meaning. In *Midland Railway Company v. Checkley* (16 L. T. Rep. 260; L. Rep. 4 Eq. 19), under a reservation of mines and minerals, Lord Romilly, M.R. held that stone was included as a mineral, and also gravel, marble, fire-clay, and the like. In *Hext v. Gill* (27 L. T. Rep. 291, at p. 285; L. Rep. 7 Ch. 699, at p. 712), Mellish, L.J. gives a very wide definition of “minerals,” and says that the result of the authorities is that it “includes every substance which can be got from underneath the surface of the earth for the purpose of profit”; and it was there held to include china-clay. This definition was adopted in *Earl of Jersey v. Neath Poor Law Union* (22 Q. B. Div. 555), where brick earth and clay were held to be included. In *Lord Provost and Magistrates of Glasgow v. Farie* (60 L. T. Rep. 274; 13 App. Cas. 657), clay forming the surface or sub-soil of land, was held not to be included in “minerals.” Lord Watson (13 A. C. at p. 674) and Lord Herschell (at pp. 682-3) deal fully with the meaning of the term “minerals.” The very fact that we have, after the Act of 1872, another Act with very wide words, shows that the word “minerals” in the latter Act ought not to be cut down. The accident did not occur “in the course of working the railway,” and therefore sect. 6 of the Regulation of Railways Act 1871, does not apply. The justices were clearly wrong.

McCall, Q.C. (J. D. Crawford with him) for the respondents.—The decision of the justices is right. The finding of the justices is one of fact in this case where there was evidence to support the finding. That it was a question of fact clearly appears from the judgment of James, L.J. in *Hext v. Gill* (*ubi sup.*). He states that in his view it is a question of fact in each case, and that view of the matter seems to have been adopted in *Lord Provost and Magistrates of Glasgow v. Farie* (*ubi sup.*). This case does not come within either the words or the intention of this Act of 1894, and to understand the matter it is necessary to read the facts as they were proved before the justices. It is not now disputed that before this Act the word “minerals” had been read in a very wide sense as well as in a very narrow sense, and instances of both constructions are given in *Macswiney on Mines*, pp. 9, 10. It is necessary, therefore, in order to determine the meaning to look at the words used. If the Legislature had meant to give this broad meaning to the word “minerals” they would have said so; but they have not done so. On the contrary, they have limited the expression to “slates, stones, coprolites, or other minerals”; and it cannot be supposed that the Legislature intended that every country sand pit or gravel pit was to be a “quarry,” and so come within this section. In the present case the railway company had made a cutting for a branch line and in doing so they came on a bed of sand and gravel which was within their limits of deviation, and they utilised it to get sand and gravel for their line. If the contention for the appellant is right, then every time a railway company makes a cutting for getting sand or gravel for repairs elsewhere, they would be liable under this section. So far as protection to the workmen is concerned, this case is amply covered by a protection which already exists under sect. 6 of the Regulation of Railways Act 1871 (34 & 35 Vict. c. 78). That section provides: “Where in or about any railway or any of the works or buildings connected with such railway, or any building or place, whether open or inclosed, occupied by the company working such railway, any of the following accidents takes place in the course of working any railway; that is to say, (1) Any accident attended with loss of life or personal injury to any person whatsoever . . . the company working such railway, . . . shall send notice of such accident and of the loss of life or personal injury (if any) occasioned thereby to the Board of Trade.” The gravel pit in question was within the limits of deviation as shown on the deposited plans of the railway, and the accident was therefore an accident taking place “in the course of working the railway.” The case clearly comes within sect. 6, and under that section the company was bound to give notice of the accident to the Board of Trade, which they seem to have done. It could never have been intended that the railway company should send two notices, one to the Board of Trade, and one to the inspector of mines. The Legislature cannot be taken to have contemplated that the respondents, having already sent one notice and one account of the accident to the Board of Trade should be bound to send a second notice to the inspector of mines dealing with the very same matter as to which they were already bound to send, and had sent, a notice to another authority.

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The case does not come within the words of sect. 1 of the Act of 1894 at all, and the justices were right in so finding.

KENNEDY, J.—In my opinion our judgment in this case ought to be for the Crown. It seems to me that every requisite to bring the statute into operation has been proved, and also that the judgment which we are asked to give is upon a question of law, and not upon a question of fact. If there had been a decision on a question of fact, then as a matter of course we could not review the decision, however much we might ourselves think that we should differ from that decision as a question of fact. The place here in question was a place from which gravel or sand is taken for the railway companies by workmen as they want it. It is not suggested that it was a place which, in its character as to size or otherwise, was not within the purview of the two Acts of Parliament which are immediately applicable, namely, the Metalliferous Mines Regulation Act 1872 and the Quarries Act 1894. The object of these Acts is plain. It is to afford protection, and also to insure investigation for the benefit of workmen who are working in certain places where there are special dangers. The provisions of the Act of 1872 are made by sect. 2 of the Quarries Act of 1894, to apply to quarries, and while the Act does not define a quarry it provides in sect. 1 that it "shall apply to every place (not being a mine) in which persons work in getting slate, stone, coprolites, or other minerals, . . . and every such place is in this Act referred to as a quarry under this Act." That "minerals" in an Act of Parliament, or in a legal document, *prima facie* include such things as sand and gravel is, I think, now clearly settled; and I see nothing either in the nature of the Act, or in the context in this case, which should narrow that which would *prima facie* be the full and wide meaning of the term "minerals." Here we have the workmen employed in a place some part of which is more than 20ft. deep, in which the things that were being gotten were minerals. Under these circumstances it seems to me that the requisites to bring the case within the Act have been satisfied. The magistrates apparently have decided the case on the ground that the things that were being got, namely, gravel and sand, were not minerals within the meaning of sect. 1 of the Quarries Act 1894. In my opinion in coming to that conclusion they were wrong in point of law. They were wrong in not including in this Act of Parliament under the term "minerals" that which it has been settled is, in such an Act, in the absence of some qualifying reason in the context or in the circumstances, to be taken to be the proper meaning of "minerals," which includes sand and gravel. Then it has been suggested for the respondents that this place and the accidents happening therein are governed by sect. 6 of the Regulation of Railways Act 1871 (34 & 35 Vict. c. 78). It was contended that this gravel pit was a place in which men were at work "in the course of working the railway," and that under sect. 6 of this Act of 1871, if in the course of working the railway an accident happens it ought to lead merely to a notice being given under that section, namely, to the Board of Trade, and that therefore the provisions of the Act of 1872 as to notice do not apply. In my opinion this was not an accident

"in the course of working the railway" within the meaning of sect. 6 of the Regulation of Railways Act 1871. Further, whether or not it be the duty of these two railway companies under sect. 6 of the Act of 1871 to give notice to the Board of Trade of an accident happening in this quarry, I should myself say that they are certainly bound by the Metalliferous Mines Regulation Act 1872 and the Quarries Act 1894, to give the notices and to do the things which are required by these Acts, but which admittedly they have not done. Therefore in my opinion this case ought to be decided in favour of the Crown, and this matter ought to go back to the magistrates to be dealt with by them.

DARLING, J.—I am of the same opinion. The question really to be determined is whether gravel and sand can be taken to be included in the word "minerals" as used in this statute. It is perfectly clear from the cases already decided that "minerals" is a word with a meaning which is very indeterminate. Sometimes it has a very restricted meaning in statutes, and sometimes it has a very wide meaning, and in some cases it has been held to include gravel. That has been so held already. Now, in order to find whether it is used in its wide or in its narrow sense, we must do what Lord Herschell said in his judgment in *Lord Provost and Magistrates of Glasgow v. Farie (ubi sup.)*, ought to be done, namely, we must look at the object of the Legislature. In the way the case was put for the respondents it is perfectly plain that if the object of the Legislature was to prevent people being injured by stones and such like things falling upon them, that object would not be obtained if the stones were a number of small stones instead of being one large stone. If they were a number of such small stones as to be properly denominated gravel, then, if the argument for the respondents be right, the Legislature would not have protected these working people. That would occur certainly in a case where somebody, not a railway company, was making an excavation more than twenty feet deep in gravel or in sand. But, it is said for the respondents, there is another reason why this statute should not apply here, and that is that this case is guarded against and provided for by the Regulation of Railways Act 1871, s. 6. I think the distinction pointed out by the Solicitor-General is a good one, namely, that that section applies to something which takes place in the working of the railway. I am inclined to think that that statute would not cover this case, and if so, this case would not be covered at all if the Acts of 1872 and 1894 did not apply to it. It seems to me that the object of the Legislature really was to give the persons working things which were not metalliferous mines, the same protection by means of a report to the Home Office, which they had given to persons working things properly described as metalliferous mines. If it were otherwise we should have to hold that the object of the Legislature was this, to protect people on whom slates might fall, or stones might fall, or coprolites might fall, or any other mineral, whatever that may mean, which was something like a slate, or a stone, or a coprolite, but that it did not—and intentionally did not—profess to protect anybody who might have gravel falling upon him. I cannot think

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that that was the intention of the Legislature; and my impression is that they intended to protect all those people who, in working in the earth at a depth of more than twenty feet, had not been protected by the Metalliferous Mines Regulation Act of 1872 and with that object they use this word "minerals." It seems to me, therefore, that the widest meaning and intention, and not the narrowest, must be given to the word. If so, there is authority for saying that "minerals" may mean gravel, and in this case I think it does.

Appeal allowed. Case remitted to the justices to convict.

Solicitor for the appellant, *The Solicitor to the Treasury.*

Solicitors for the respondents, *Beale and Co.*

Tuesday, Dec. 18, 1900.

(Before MATHEW, J.)

BURTON v. VESTRY OF ST. GILES-IN-THE-FIELDS AND ST. GEORGE, BLOOMSBURY. (a)

Rating — Metropolis — Valuation list — Person wrongly inserted in list as occupier — Appeal against list — Name ordered to be struck out — Rates paid pending appeals — Right to recover — Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), s. 44.

Where a person whose name is inserted in a valuation list as the occupier of premises in the metropolis, appeals to quarter sessions against the valuation list upon the ground that he is not the rateable occupier of the premises and upon such appeal his name is ordered to be struck out of the list on the ground that he is not the rateable occupier, such person can, under sect. 44 of the Valuation (Metropolis) Act 1869, recover the whole amount of the rates he has paid during the proceedings on appeal, as the entire alteration of the rate, by which the whole amount thereof is ordered to be struck out, is an "alteration" in the valuation list "which alters the amount of the assessment or rate," within the meaning of that section.

ACCTON tried by Mathew, J. without a jury.

The plaintiff carried on business in London as an advertising contractor under the name of Partington and Co.; and the defendants were by virtue of their local Act (11 Geo. 4, c. x.) overseers of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury.

The plaintiff claimed the repayment by the defendants of sums paid by him to the defendants, amounting to 92l. 6s. 4d., in respect of rates in the months of Aug. 1897 and Feb., March, June, and Aug. 1898, and he claimed to be entitled to such repayment on the ground of the alteration of the supplemental valuation list for the parish of St. George, Bloomsbury, in consequence of an appeal by him against that list.

The facts were not in dispute, and were as follows:—

The plaintiff, in order to carry on his business of displaying advertisements for persons desiring to advertise, obtained licences from builders and others to affix during building operations advertisements on the exterior of the hoardings erected during the building, and he then affixed to the

hoardings the advertisements which he had agreed with intending advertisers to exhibit.

In a provisional valuation list made for the parish of St. George, Bloomsbury, the defendants in June 1897 inserted the plaintiff as being the rateable occupier of what was therein described as an "advertising station" and of a "hoarding" situate at Southampton-row, in that parish.

In June 1898 the plaintiff gave notice of objection to the valuation list on the ground that he was not the occupier legally rateable in respect of the advertising station or of the hoardings, and he asked that the valuation list should be corrected and the entry of the premises struck out.

On the 23rd June 1898 the assessment committee confirmed the assessment.

The plaintiff appealed to the quarter sessions sitting as a Court of General Assessment Sessions under the Valuation (Metropolis) Act 1869 and the Local Government Act 1888, his ground of objection being the same, and the quarter sessions in Feb. 1899 dismissed the appeal subject to a case for the opinion of the High Court.

On the 11th Jan. 1900 the Queen's Bench Division allowed the plaintiff's appeal and ordered that the order of the quarter sessions be reversed and that the entry of the plaintiff as the occupier of the advertising station and hoardings in the list be struck out: (see *Burton v. Assessment Committee of St. Giles-in-the-Fields and St. George, Bloomsbury*, 82 L. T. Rep 24; (1900) 1 Q. B. 389).

On the 27th Feb. 1900 the quarter sessions ordered the name of the plaintiff as occupier of the premises to be struck out in the supplemental valuation list, but the name of the plaintiff in the valuation list had not in fact been struck out in pursuance of the order.

The plaintiff paid the various rates which he now sought to recover, on the 6th Aug. 1897, on the 21st Feb., 12th March, 24th June, and 26th Aug. 1898; and the defendants admitted that they had received all these sums from the plaintiff. In respect of two of these rates proceedings had been taken before the magistrates, summonses had been taken out and the money paid with costs.

The plaintiff asked for a return of the rates so paid. The defendants refused to refund the amount on the ground that by the provisions of sect. 44 of the Valuation (Metropolis) Act 1869 as no alteration had been made in the valuation list "which altered the amount of the assessment, contribution, rate, or tax levied thereunder" the plaintiff was not entitled to have the amount refunded.

Sect. 44 of the Valuation (Metropolis) Act 1869 32 & 33 Vict. c. 67) provides:

Notwithstanding any appeal under this Act which may be pending at the commencement of the year, the valuation list shall come into force unaltered, and every assessment, contribution, rate and tax, in respect of which the valuation list is conclusive, shall be made, required, levied, and paid in accordance with such valuation list; and where in consequence of the decision on any appeal under this Act to assessment sessions or a Superior Court, an alteration in such valuation is made which alters the amount of the assessment, contribution, rate, or tax levied thereunder, the difference, if too much has been paid, shall be repaid or allowed, and if too little, shall be deemed to

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be arrears of the assessment, contribution, rate, or tax (except so far as any penalty is incurred on account of arrears), and shall be paid and recovered accordingly.

E. Cunningham Glen (A. A. Bethune with him) for the plaintiff.—By the decision of the Divisional Court it was held that the plaintiff was not the rateable occupier of these hoardings, and was not liable to pay these rates. The plaintiff now brings this action under sect. 44 of the Valuation (Metropolis) Act 1869, to recover back from the defendants the sums which he says he has improperly been called on to pay. That section enables a person to recover sums so paid when in consequence of the decision on an appeal, "an alteration in the valuation list is made which alters the amount of the assessment." In this case in consequence of the decision of the Divisional Court an alteration was, on the plaintiff's application, ordered by the quarter sessions to be made, and it was also ordered that the plaintiff should be struck out of the assessment altogether. But although the quarter sessions ordered judgment to be entered in accordance with the decision of the court, in fact the rating was not altered in the valuation list, and it remained unaltered. It is sufficient in this case that the quarter sessions ordered this alteration to be made in the valuation list, and it makes no difference that the alteration in point of fact was not carried out. If the alteration had in fact been made and the plaintiff's name struck out, there could have been no question. The order takes effect from the moment it was made, and there was an "alteration in the valuation list" within the meaning of the section when the quarter sessions ordered the valuation list to be altered and the name of the plaintiff to be struck out, and that alteration was one which "altered the amount of the assessment."

Macmorran, Q.C. (W. C. Ryde with him) for the defendants.—The plaintiff was altogether mistaken in the procedure adopted by him to raise this question. His proper procedure was when rates were demanded of him, if he were not the occupier, to refuse to pay, and that defence of his not being the occupier, if he could sustain it, would be given effect to by the magistrates before whom proceedings for the recovery of the rates were taken. If a person says he is not the occupier that is the proper way to raise the question; but it is not a matter of appeal to quarter sessions so far as the valuation list is concerned. That list is conclusive only as to the amounts in it, but is not conclusive as to the name of the occupier, as the occupier may, and does, change from time to time, and the name is immaterial in the valuation list, so that an appeal, as in this case, against a valuation list in respect of a matter for which the valuation list is not conclusive, is futile. Then as to sect. 44, the meaning is this: The occupier is placed on a provisional list, against which he has no appeal, but he may defend himself in any proceedings for the recovery of the rates. This provisional list is afterwards incorporated with the supplemental list; then the person rated therein has the right of appeal, and if on such appeal he is found to have been rated at too much then under the section he is entitled to have the excess repaid to him. Here there never was any question or any appeal as to the amount of the valuation,

and there was never any appeal against any rate, and no alteration has been made in the amount as the appeal was only against the valuation list. That amount remains as before, and all the quarter sessions have done is to give effect to the judgment which said the plaintiff was not the occupier. A ratepayer may always show that on the face of the rate he is rated for property of which he is not the occupier. Such a rate in respect of land which a person does not occupy is, as Lord Denman, C.J. said in *Governors of Bristol Poor v. Wait* (1 A. & E. 264, at p. 281): "A rate which the overseers had no power to make, nor the magistrates to enforce," &c. It makes no difference that the ratepayer has already appealed to quarter sessions, and that that court have confirmed the rate:

Milward v. Coffin, 2 W. Bl. 1330;
Overseers of Manchester v. Headlam, 21 Q. B. Div. 96.

The question here was not whether these things were rateable, but whether the plaintiff was the right person to be rated for them, and all that was held was that the plaintiff was not the right person, and was not legally rateable. But there has been no alteration of the valuation list within sect. 44, as the assessment remains as it was before. The section does not apply at all. It only relates to amount, so that if a person, not being assessable and not owing any rates at all, has been compelled to pay, he would have no remedy under the section; but if he were assessable at all, and were assessed at too much, he would have a remedy under the section. The vestries here are simply the rating authority; they get the precepts, and levy the amounts as specified in the valuation list. They are merely conduit pipes for taking the rate and paying it over, and they cannot get the money back. Sect. 27 (10), dealing with the provisional list as distinguished from the supplemental list, has more bearing on the question, and shows that sect. 44 applies only to matters of amount. With regard to the two rates that were enforced by means of summonses, they at all events cannot be recovered, for the reason that when money is paid under compulsion of law it cannot be recovered back, whether it is paid by mistake of law or of fact.

B. C. Glen in reply.—It is said the plaintiff has not adopted the proper procedure, and that he ought to have waited and taken the objection before the magistrates on the ground that he was not the occupier. We do not question the magistrates' jurisdiction in such cases. The magistrates have jurisdiction to inquire into questions of occupation and to refuse to issue a distress warrant; but so also have the quarter sessions on an appeal to them. A person is not bound to go before the justices and raise one point and then have an appeal to quarter sessions to raise questions of value. By appealing to quarter sessions he can raise both questions of value and questions of occupation as well. If that were not so, it would have to be contended that, where a person was objecting to be assessed as an occupier and was also objecting to the amount, two proceedings would be necessary, one an appeal against the rate, and the other an appeal to quarter sessions against the valuation list. Such multiplication of proceedings could not have

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been intended. Sect. 43 deals with the valuation list and the latter part of sect. 44 applies to this case. The first part of sect. 44 compels a person to pay the rate according to the valuation list "notwithstanding any appeal under the Act"—and the only appeals under this Act are appeals against the valuation list under sect. 32 and appeals as to value under sects. 19 and 20. Then, if an alteration is made and a person pays too much, his remedy is under the latter part of sect. 44 which applies to this case. It is conceded that if there were any alteration of amount then sect. 44 would apply; it equally applies in the present case in which there is an alteration in the whole amount. If an alteration in a part of the amount is an "alteration," then an alteration in the whole amount must also be an "alteration" within sect. 44. Here there has been an alteration in the whole amount, because the effect of the alteration has been that, whereas under the earlier part of sect. 44 the plaintiff would have been bound to pay the whole of the rates in consequence of his being wrongly inserted in the valuation list as occupier, he has now nothing to pay. There could not be a larger "alteration," and the plaintiff is entitled to recover.

MATHEW, J.—It seems to me that sect. 44 does apply to the claim in this case. Counsel for the defendants has argued that the appeal contemplated by sect. 44 is an appeal as to amount only, but is not an appeal on the ground that the appellant was not the occupier of the premises in respect of which he is rated. It was argued that any such objection as that must be dealt with differently, and as a defence on an application made to the magistrates to enforce the payment of the rates. If the earlier words of the section were alone to be found there, then there would be something in favour of the contention put forward for the defendants, because it says: "Notwithstanding any appeal under this Act"; and the appeal under the Act seems to be an appeal against the valuation list. But the section goes on to say that "where in consequence of the decision on any appeal under this Act to assessment sessions or a superior court, an alteration in such valuation list is made which alters the amount of the assessment, contribution, rate, or tax levied thereunder, the difference, if too much has been paid, shall be repaid or allowed." What occurred in this case was that there was an appeal by the plaintiff to quarter sessions, and it was a legitimate appeal, on the ground that he was not an occupier. The Court of Quarter Sessions thought that he was the occupier, but reserved its judgment subject to a case to be stated, and on the case coming before the Queen's Bench Division, it was held by the judgment of the superior court that the plaintiff was not the occupier, and was not liable to be rated. Then, that being so, the only question now is whether the fact that the plaintiff is held to be liable for no part of the rate is an "alteration" in the valuation list within the meaning of the section (sect. 44). The objection was taken on behalf of the defendants that this money has been received by the vestry, the defendants in this case, and has been paid away, and that therefore it would be extremely hard, or contrary to law, that they should be compelled to repay the money as to which they were the mere agents, to hand it over, or the mere conduit pipes as they were called.

That argument, however, would strike away the whole of the section, because in the cases to which Mr. Macmorran says the section is confined, the cases, namely, where there is an alteration in the amount not going to the whole of the rate, the same argument might be urged, namely, that the vestry are only conduit pipes and have paid the money away, and that therefore they ought not to be called upon to repay it. The Act has provided for that very case, because there is a provision that where an alteration in the valuation list is made which alters the amount of the assessment or rate, the money shall be repaid in case too much has been paid. I presume that effect will be given to the Act without saying anything about the course to be taken by the vestry. The question then is reduced to an extremely narrow one, namely, whether an entire alteration of the rate is an alteration within the meaning of the Act. I am of opinion that it is. Therefore it follows that the plaintiff is entitled to recover the amount he has paid. As to two of the assessments it appears that they were paid after summonses had been taken out, and that they were so paid by compulsion of law, that is to say, that they were paid after proceedings had been taken before the magistrates to compel payment. There was no appeal against these two rates, but the appeal was against the valuation list on which the two rates were made. I think that these two rates must follow the others. They are all cases in which, within the meaning of the section, an alteration has been made in the valuation list which entitles the plaintiff to recover the amount he has paid. My judgment therefore will be for the plaintiff, and for the amount claimed—namely, 92l. 6s. 4d. with costs.

Judgment for the plaintiff.

Solicitors: for the plaintiff, John H. Mote and Son; for the defendants, Henry C. Jones.

Wednesday, Jan. 16, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

MOSES (app.) v. MARS LAND (resp.). (a)

Metropolis—Building—Houses for infirm children—"Public building"—London Building Act 1894 (57 & 58 Vict. c. cxxiii.), s. 5 (27).

A house used for the reception of some twelve to fourteen children, who by reason of defect of intellect or physical infirmity cannot be trained with other children, for their permanent home, is not a "public building" within sect. 5 (27) of the London Building Act 1894.

CASE STATED.

The appellant was a builder who was engaged in carrying out certain alterations for the managers of the Metropolitan Asylum District at a building, No. 16, Elm-grove, Peckham, within the district of Camberwell, for the purposes hereinafter mentioned.

The respondent was the district surveyor under the London Building Act 1894 (57 & 58 Vict. c. cxxiii.) for the district of Camberwell.

The appellant was summoned by the respondent for neglecting to comply with a notice served on him by the respondent, as such district surveyor, requiring him to do certain things under the pro-

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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visions of the London Building Act 1894 whilst carrying out such alterations.

The following facts were either proved or admitted at the hearing:—

By order of the Local Government Board, dated the 2nd April 1897, the care of children who by reason of defect of intellect or physical infirmity cannot properly be trained in association with children in ordinary schools was placed in the hands of the managers of the Metropolitan Asylum District.

The managers, for the purpose of carrying out such order, prepared a scheme for purchasing various dwelling-houses in different parts of London adjacent to the schools specially provided and staffed by the London School Board for the education of children of this class. Under such scheme the children were to live, sleep, and board in such houses under the care of a responsible matron in numbers generally not exceeding fourteen in any one house, and to attend such special board schools each day for the purpose of their education. Such houses were intended to be permanent homes for the children.

The building, No. 16, Elm-grove, had been an ordinary detached dwelling-house of two floors with one room and a basement below, and had been purchased by the managers under such scheme, and they had instructed the appellant under the supervision of the board architect to alter or convert such dwelling-house to make it suitable for the accommodation of twelve to fourteen children and a matron, cook, and housemaid, the latter in the exclusive service of the board.

The total cubical capacity of such dwelling-house was under 50,000 cubic feet with sleeping accommodation as above.

Before the appellant began the alterations he served a notice under sect. 145 of the London Building Act 1894 on the respondent, stating he was about to make alterations to a private dwelling-house and convert the same into a public building, and during the course of carrying out the alterations the respondent served notices on the appellant making certain requirements with regard to the premises.

No point of estoppel which might possibly arise as against the builder in consequence of the form of his notice to the district surveyor was pressed. But, treating the real parties to the summons as the district surveyor and the managers of the Metropolitan Asylum District and assuming the managers were not to be legally affected by the form in which the builder gave his original notice, the only question that was argued before the magistrate was the question whether this building under the above circumstances was a public building within the London Building Act 1894, ss. 5 (27), 63, 79.

The magistrate was of opinion that, regard being had to the terms of sect. 5, sub-sect. 27, and of sects. 63 and 79, this building was in the hands of the managers of the Metropolitan Asylum District used or constructed or adapted to be used for a public purpose, and he made the order asked for by the district surveyor.

By the London Building Act 1894 (57 & 58 Vict. c. ccciii.), s. 5 (27):

The expression "public building" means a building used, or constructed, or adapted to be used as a church,

chapel, or other place of public worship, or as a school, college, or place of instruction (not being merely a dwelling-house so used), or as a hospital, workhouse, public theatre, public hall, public concert-room, public ball-room, public lecture-room, public library, or public exhibition-room, or as a public place of assembly, or used, or constructed, or adapted to be used for any other public purpose, also a building used, or constructed, or adapted to be used as an hotel, lodging-house, home, refuge, or shelter, where such building extends to more than 250,000 cubic feet, or has sleeping accommodation for more than 100 persons.

Macmorran, Q.C. and *Herbert Smith* for the appellant.—The magistrate was wrong, for this building is not within sect. 5 (27) of the London Building Act 1894. If the children had been put in before the commencement of the alterations nothing could have been done. If the premises had been taken by a private person nothing could have been said, and it can make no difference that the premises have been taken by a public body. The test to be applied in these cases is whether the building is to be used for a public purpose similar to those set out in the section. Clearly it was not. It was decided in the case of *Josolyne v. Meeson* (53 L. T. Rep. 319) that an ambulance station structurally disconnected with any building, and from which the public is rigorously excluded, is not itself a public building within sect. 3 of the Metropolitan Building Act 1885, so as to require the builder to deposit plans and sections of the building with the notice of its erection to the district surveyor under the by-law 5 made under sect. 16 of the Metropolitan Management and the Building Acts (Amendment) Act 1873. So in the same way this building cannot in any sense be described as a public building, and it cannot become so merely because it is controlled by a public body.

B. Cunningham Glen for the respondent.—This building is clearly a hospital within the meaning of sect. 5 (27). The only children taken in are those who are defective in intellect or suffer from a physical infirmity. The only exception in buildings of this kind is that of a private school. At any rate it is a building of the same kind as a hospital, and therefore is a "building . . . used for any other public purpose."

BRUCE, J.—In this case I am of opinion that the building in question was not a public building within the definition given in the London Building Act 1894, s. 5 (27). It is said by Mr. Glen that it is a hospital. I do not think the building is a hospital. No doubt the word "hospital" originally was a word of very wide meaning. It might mean lodging. I see in Mr. Murray's Dictionary a phrase from Spenser's "Faerie Queene" quoted; a line, "Espied a goodly castle for that night's hospital there did thither march." Any place of lodgment may be a hospital in the old meaning of the word, but the modern meaning of the word is very narrowed. It means a place for the treatment of the sick and infirm, and I do not think this place, which is a home for children, not for medical treatment, but a home for them, can be treated as a hospital. Then, if it is not a hospital, is it a place used for "other public purposes" within the words of sect. 5 (27)? Following the decision in *Josolyne v. Meeson* (53 L. T. Rep. 319), which is a decision of this court and binding upon us, I think the substance of

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that decision is this: That "public purposes" means, not a place used in the public interest, but a place to which the public can demand admission or are invited to come; a place to be used by the public. In *Joselyne v. Meeson* the court so limited the words "public purposes," but, even if we were not bound by that decision, "other public purposes" must mean some other purposes *ejusdem generis*, and would not in that case include a home such as the present. But even if it does, I agree with Mr. Macmorran when he says that it appears from the following words that a home is not to come within the definition of "other public purposes" unless it extends to more than 250,000 cubic feet, or has sleeping accommodation for more than 100 persons. As that is not this case, the present building would not fall within that definition. Therefore I am of opinion that the decision of the magistrate was wrong and must be reversed.

PHILLIMORE, J.—I am of the same opinion. I agree it is conceivable this building might be both home and hospital, but I think it is not a hospital in the old sense which my brother has quoted. The statute certainly does not mean to use the word in that sense, nor does it mean to use it in the old legal sense treated by Lord Coleridge. It uses it in the modern popular sense with which we are all very familiar. Now, there is no reason at all for saying these children are there for treatment of their physical ailments. If they were, it might be possible this was a hospital. The Local Government Board and the Metropolitan Asylums Board in 1897 slightly anticipated that which the Legislature has now made a general provision for the whole of England by 62 & 63 Vict. c. 32. They provided for children receiving poor relief, who were incapable of being taught successfully in association with ordinary children, by reason either of defective intellect or physical infirmity, special schools, and, as an adjunct to those schools, the Metropolitan Asylums Board have provided these homes in which the children are maintained. Some of the children may not be infirm at all; but they are not there for treatment of their infirmity—they are there for the purpose of education. No doubt when they are there they must be looked after just as much as any healthy children who get ill must be attended to. So these infirm children must be attended to; but they are not there for the purpose of their physical infirmity being attended to. Therefore it is not a hospital, but it is a home. That would be enough to decide this case, but I also agree with my learned brother, and with the decision by which we are bound—even if we did not agree with it—that this does not mean a building constructed or adapted to be used for "any other public purpose." One sees directly that the words "any other public purpose" were not wise words to use, but they were in the old Act and had been construed by this court; and very wisely the draftman of the new Act left in the old words and did not try to alter them. Those words do not mean "used in the public interest"; they mean, as my learned brother has said, used for a purpose which involves the admission of the public either by right or by invitation, as when you open a lecture-hall to anybody who chooses to pay for his ticket. That is the good sense of

the thing. This building is not used for any public purposes within the meaning of the Act, and the decision of the learned magistrate cannot be supported.

Appeal allowed.

Solicitors: *Williams and James; Walter C. Williams.*

Jan. 11 and 18, 1901.

(Before Lord ALVERSTONE, C.J., GRANTHAM, BRUCE, DARLING, and PHILLIMORE, JJ.)

TRACEY (app.) v. PRETTY (resp.). (a)

Factory—Notice by inspector as to sanitary requirements—Power of justices to inquire into necessity for requirements—Appeal—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 38—Factory and Workshop Act 1878 (41 Vict. c. 16), s. 4—Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59), s. 22—Factory and Workshop Act 1891 (54 & 55 Vict. c. 75), s. 2—Factory and Workshop Act 1895 (58 & 59 Vict. c. 37), s. 3.

Where a factory inspector has given a notice under sect. 22 (2) of the Public Health Acts Amendment Act 1890, and sect. 2 of the Factory and Workshop Act 1891, the justices cannot inquire into the necessity for, or the reasonableness of, the requirements specified in the notice.

The only question that can be raised before the justices is whether there has been a neglect or refusal to comply with the notice, and they cannot decide the question of the suitability or sufficiency of the accommodation in the way of sanitary conveniences in the factory.

Phillimore, J. dissents.

Semble, the only appeal against the requirements contained in the notice is to quarter sessions.

CASE stated on an information charging the respondents with unlawfully neglecting and refusing to comply with the requirements of a notice given under sect. 2 of the Factory and Workshop Act 1891, and amending Acts, and sect. 22 (2) of the Public Health Acts Amendment Act 1890.

The following facts were proved or admitted:—

The respondents were the occupiers of a building used as a corset factory situate at Tower Ramparts.

The Public Health Acts Amendment Act 1890 had been adopted in the borough of Ipswich.

The building in question was a factory within the meaning of the Factory and Workshops Acts 1878-95 and was situate within the sanitary districts of the Ipswich Urban Sanitary Authority.

The appellant was an inspector under the Factory and Workshop Acts 1878-95.

The notices prescribed by sect. 4 of the Factory and Workshop Act 1878 were given to the sanitary authority by means of a letter dated the 2nd March 1899 of which, so far as it is material to this case, the following is a copy:

I beg to inform you that on visiting the corset factory occupied by Messrs. Pretty and Sons, and situated at Tower Ramparts, Ipswich, the undermentioned sanitary matters appear to require attention: Insufficient sanitary accommodation for women. 730 women when visited; full number 1000. Fourteen sanitary conveniences provided.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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It appeared to the appellant that the acts, neglects, and defaults alleged in the letter of the 2nd March 1899 were punishable or remediable under the laws relating to public health, but not under the Factory and Workshop Acts.

Proceedings were not taken by the sanitary authority upon the notice so far as it related to the alleged insufficiency of sanitary accommodation for women against the owners or occupiers of the factory.

It appeared to the appellant that the provisions of sect. 22 (1) of the Public Health Acts Amendment Act 1890 were not complied with on the 15th May 1899 in the case of the factory.

The appellant gave a written notice to the respondents, the occupiers of the factory, of which notice the following is a copy :

Factory Department, Home Office, London, S.W.—I, the undersigned, one of H.M. inspectors of factories, acting in pursuance of sect. 4 of the Factory and Workshop Act 1878, sect. 2 of the Factory and Workshop Act 1891, and sect. 3 of the Factory and Workshop Act 1895, hereby give you notice under sect. 22, sub-sect. (2), of the Public Health Acts Amendment Act 1890 that the provisions of sect. 22, sub-sect. (1), of that Act are not complied with in the building of which you are occupier, used as a manufactory and situated at Tower Ramparts, Ipswich, the same being a factory within the meaning of the Factory and Workshop Act 1878, and I hereby require you within two calendar months from the date of this notice to provide the said building with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed or in attendance at the said building, and with proper separate accommodation for persons of each sex, and for that purpose to provide for the use of the females so employed or in attendance eighteen additional water-closets, with proper fittings and appurtenances. If you neglect or refuse to comply with this notice, you will be liable for such default to a penalty not exceeding 20*l.* and to a daily penalty not exceeding 40*s.*, and proceedings will be taken in pursuance of the said sect. 22 of the Public Health Acts Amendment Act 1890 to recover the same.—(Signed) ANNA TRACEY. May 15th, 1899.—To Messrs. Pretty and Co. Limited, Tower Ramparts.

The respondents, the occupiers of the factory, neglected or refused to comply with the last-mentioned notice.

On behalf of the appellant it was contended upon the above stated facts that the court of summary jurisdiction had no jurisdiction to hear evidence upon or decide the question of the suitability or sufficiency of the accommodation in the way of sanitary conveniences existing in the factory, or the necessity for the further accommodation required by the notice dated the 15th May 1899, and that those questions were by law left to the discretion of the appellant. In support of this contention the following cases were cited: *St. Luke's Vestry v. Lewis* (5 L. T. Rep. 608), *Hargreaves v. Taylor* (8 L. T. Rep. 149), and *Bogle v. Sherborne Local Board* (46 J. P. 675).

On behalf of the respondents it was contended that the matters were questions of fact which the justices had jurisdiction to decide upon evidence to be given before them.

The justices decided in favour of the contentions of the respondents, and accordingly heard evidence on behalf of the appellant and the respondents, and upon that evidence dismissed

the summons and ordered the appellant to pay 6*l.* 4*s.* costs.

They found as facts (1) that the existing sanitary accommodation in the factory was suitable and sufficient; (2) that the sanitary authority had made all due inquiry into the suitability and sufficiency of the sanitary accommodation existing in the factory, and had found the accommodation to be suitable and sufficient.

The question for the opinion of the court was whether they had jurisdiction to hear evidence upon or decide the question of the suitability or sufficiency of the accommodation existing in the factory or required by the notice.

The *Attorney-General* (Sir R. Finlay, Q.C.), *Sutton*, and *Muir* for the appellant.—This case depends upon the construction to be placed upon certain sections in the Factory and Public Health Acts. By sect. 4 of the Factory and Workshop Act 1878 (41 Vict. c. 16), "where it appears to any inspector under this Act that any act, neglect, or default in relation to any . . . water-closet . . . in a factory or workshop is punishable or remediable under the law relating to public health, but not under this act, that inspector shall give notice in writing of such act, neglect, or default to the sanitary authority in whose district the factory . . . is situate, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice and take such action thereon as to that authority may seem proper for the purpose of enforcing the law." So it will be seen that under the Act of 1878 the duty of inquiry and of taking action vested with the sanitary authority only. Sect. 22 of the Public Health Acts Amendment Act 1890 contains the provisions as to sanitary conveniences in factories, and it provides a remedy. Before the magistrates the notice and order are final, though there is an appeal to quarter sessions under sect. 7. The next step in the legislation was sect. 2 of the Factory and Workshop Act 1891 (54 & 55 Vict. c. 75), which provides that "where notice of an act, neglect, or default is given by an inspector under the said sect. 4 . . . to a sanitary authority, and proceedings are not taken . . . for punishing or remedying the act, neglect, or default, the inspector may take the like proceedings for punishing or remedying the same as the sanitary authority might have taken, and can recover any expenses from the sanitary authority not recovered from the other person. So it would seem that if the sanitary authority do not move after the notice mentioned in sect. 4 of the Act of 1878 the inspector can take the like proceedings himself. The question, therefore, is, does this section give the inspector power to serve a notice under sect. 22 of the Public Health Acts Amendment Act 1890, from which there is no appeal except to quarter sessions. We contend that the inspector is in the same position as the sanitary authority, either with or without an appeal under sect. 7 of the Public Health Acts Amendment Act 1890. By sect. 3 of the Factory and Workshop Act 1895 "where notice of an act, neglect, or default is given by an inspector under sect. 4 of the principal Act," that is the Act of 1878, "to a sanitary authority, it shall be the duty of the sanitary authority to inform the inspector of the proceedings taken in consequence of the notice," and

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further, the time in sect. 2 of the Act of 1891 is altered to one month. The summons clearly brings out what the charge was, and the first letter to the sanitary authority was in accordance with sect. 4 of the Act of 1878. Then a notice is given for the non-compliance with which the present summons is issued. The point in this case is a new one. But, even if the sanitary authority come to the conclusion that there is no act, neglect, or default, the inspector can proceed further, otherwise sect. 2 (2) of the Factory and Workshop Act 1891 would be a nullity. The intention of the section is to give a sort of appeal. The effect of the two sections is that the inspector may give notice to the sanitary authority, but if they take no action then the inspector himself can take proceedings. In a borough such as Ipswich the only way by which proceedings can be taken is by a notice, and further it should be noticed that the sanitary authority do not act altogether independently, but under sect. 3 of the Act of 1895 they must keep the inspector informed as to any proceedings taken. They also referred to Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 36, 38. Sect. 38 deals with factories, and shows what the law was at that time before the Factories and Workshops Acts. Sect. 68 of the Factory and Workshop Act 1878 shows the powers inspectors have for carrying the Act into force and for satisfying themselves; and sect. 7 of the Public Health Acts Amendment Act 1890 gives the right of appeal to quarter sessions, except where there is an appeal to the Local Government Board under sect. 268. Where sect. 22 of the Public Health Acts Amendment Act 1890 is in force, and the provisions of sect. 38 of the Public Health Act 1875 superseded, the only remedy is that provided by sect. 22; and so if the local authority will not take proceedings, sect. 2 of the Factory and Workshop Act 1891 is of no use, for the inspector cannot give the notice. [PHILLIMORE, J.—Where in the Public Health Acts Amendment Act 1890 do you get the powers given to the inspector?] The sanitary authority get their powers under sect. 4 of the Factory and Workshop Act 1878, and so all those powers are open to the inspector. Under sect. 3 of the Factory and Workshop Act 1895 the word "proceedings" includes the step by the local authorities in giving the notice. Where the sanitary conveniences are not proper, the factory becomes one kept not in accordance with the Acts; and sect. 81 of the Factory and Workshop Act 1878, and sect. 35 of the Act of 1895 show how such a factory is dealt with. Sect. 35 of the Act of 1895 applies where sect. 22 of the Public Health Act 1890 does not. But the inspector has the same powers as the sanitary authority, and there would be the same appeal under sect. 7 of the Act of 1890. There are, therefore, two classes of proceedings. First, those within the Act of 1890 for non-compliance with sect. 35 of the Factory and Workshop Act 1895, and in such cases the magistrates can go into the facts. The others are those within the Act for non-compliance with the notice, and in such a case the magistrates cannot go into the facts. In such cases the notice is final.

Macmorran, Q.C. (E. E. Wild with him) for the respondent.—Throughout the whole of the sanitary legislation, the person required to do work is

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heard at one stage of the proceedings or another. Sect. 22 of the Public Health Acts Amendment Act 1890 gives no appeal to the Local Government Board, but instead of that an appeal is allowed by sect. 7 to quarter sessions—that is, where the requisition is by the statutory authority. But where the notice is given by the inspector no appeal is provided for. If the Public Health Acts Amendment Act 1890 is not adopted by the urban authority, and in all rural districts, the section that governs is sect. 35 of the Factory and Workshop Act 1895, and in such a case there are two judicial hearings. If the Crown is right in their contention, where an inspector gives a notice under sect. 2 of the Factory and Workshop Act 1891, the owner of a factory has no right of appeal and no means of having an inquiry. Sect. 4 of the Factory and Workshop Act 1878 was intended to enable a factory inspector to call the sanitary authority's attention to nuisances which they ought to get abated. The duty of the sanitary authority under the section is to make inquiry and see if the notice is well founded. In this case they have done all that they are required by law under that section, or sect. 22 of the Act of 1890. The meaning of the word "proceeding" in sect. 2 (2) of the Factory and Workshop Act 1891 is where proceedings ought to be taken. The inspector cannot himself find as a fact that there has been an act, neglect, or default. There must be some judicial determination. He referred to

St. Luke's Vestry v. Lewis, 5 L. T. Rep. 608; 1 B. & S. 865;

Hargreaves v. Taylor, 8 L. T. Rep. 149; 3 B. & S. 613.

The Attorney-General in reply.

Cur. adv. vult.

Jan. 18.—Lord ALVERSTONE, C.J. read the following judgment:—This case raises, in my opinion, questions of very considerable difficulty, and I express my judgment with great hesitation. After the best consideration I can give I have, however, come to the conclusion that the appellant is entitled to judgment. The substantial question which arises is whether upon a summons for penalties under sub-sect. 3 of sect. 22 of the Public Health Acts Amendment Act 1890, for neglect to comply with a notice given by a factory inspector, it is competent for the magistrates to receive evidence upon the merits as to the necessity for the sanitary accommodation required by such notice. The difficulty arises from the fact that the powers of the factory inspector in the matter are given by reference to the powers of the sanitary authority under the Public Health Act; and we have to determine to what extent the powers of the sanitary authority are transferred under the general words used. Certain other incidental points arise which I will consider in the course of my judgment. In dealing with cases of legislation by reference, I think that, as a rule, the primary consideration to be kept in view is the general scope and object of the amending legislation, as this affords more guide as to whether a wide or narrow interpretation is to be put upon general words or expressions capable of a wider or narrower meaning. By the 4th section of the Factory and Workshop Act 1878 it is provided that where it appears to an inspector under the Act that any neglect or

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default under the Act in relation to any water-closet, earth closet, or other matter in the factory or workshop is punishable or remediable under the law relating to public health, and not under the Factory and Workshop Act 1878, the inspector shall give notice in writing of such act, neglect, or default to the sanitary authority of the district, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice and take such action thereon as to the authority may seem proper for the purpose of enforcing the law. By the same section it was provided that an inspector under the Act may for the purposes of the section take with him to the factory a medical officer of health, inspector of nuisances, or other officer of the sanitary authority. The material provisions of the law relating to public health which were in force at that time—namely, at the passing of the Factory and Workshop Act 1878—are to be found in sects. 35, 36, and 38 of the Public Health Act 1875. The most material section is the 38th, which provided that, where it appeared to any local authority by the report of their surveyor that any house is used or intended to be used as a factory in which persons of both sexes were employed, the local authority might, if they thought fit, by written notice require the owners within a time specified in the notice to construct a sufficient number of water-closets, earth closets, or privies for the separate use of each sex. The section provided a penalty for neglect to comply with such notice. No appeal was provided against the requirements of the local authority under this Act. By sect. 22 of the Public Health Acts Amendment Act 1890, which is the section under which this case arises, further powers were given to the sanitary authority. Sub-sect. 1 of that section provides that every building used as a workshop shall be provided with sufficient and suitable accommodation in the way of sanitary convenience, having regard to the number of persons employed, and also where persons of both sexes are employed with proper separate accommodation for persons of each sex. It further provides by sub-sect. 2 that where it appears to an urban authority on the report of their surveyor that the provisions of the section are not complied with they may by written notice require the owner or occupier to make such alterations and additions therein as may be required to give such sufficient, suitable, and proper accommodation. Sub-sect. 3 prescribes a penalty for neglect or refusal to comply with such notice. Pausing for a moment, it was contended on behalf of the respondents that under this section the urban authority could only give a general notice requiring the owner or occupier to provide sufficient and proper accommodation; on behalf of the appellant it was contended that the urban authority must by the notice specify the alterations and additions which they require to be made. I think the latter view is correct. The section provides a penalty for neglect or refusal to comply with the notice. It would, I think, be inconsistent with such an enactment that the notice should be in general terms only, as the person to whom it was given would in that case have no means of knowing how he could avoid the liability to a penalty. But, in addition, by sect. 7 of the same Act, an appeal to quarter sessions is given against any

requirement of a local authority, and I think it was intended that on such an appeal not only the question of the necessity for some additional accommodation, but also the reasonableness or propriety of the amount of the accommodation required by the notice might be raised. It was further contended before us on behalf of the respondents that sect. 4 of the Act of 1878 did not apply to this section, that sect. 4 enabled notice to be given only in the case of some neglect or default in relation to an existing water-closet, earth closet, privy, or ash-pit, and not in relation to alleged insufficiency of accommodation. In my opinion this contention is unsound. I think the factory inspector may give notice to the sanitary authority in respect of a neglect by the owner or occupier of a factory to comply with the provisions of sub-sect. 1 of sect. 22 of the Act of 1890. I may further point out that this seems to be placed beyond all doubt by the provisions of sect. 35 of the Factory and Workshop Act 1895, which provides that in every place where sect. 22 of the Public Health Acts Amendment Act 1890 is not in force every factory or workshop where persons of both sexes are employed shall have separate accommodation, and that a factory or workshop in which there is contravention of this section shall be deemed not to be occupied in conformity with the Factory and Workshop Act 1878. If sect. 22 of the Act of 1890 is in force the rights and duties of the parties must be governed by that section. Thus far I have only considered the powers which were given to the factory inspector to put the sanitary authority in motion; but by sub-sect. 2 of sect. 2 of the Act of 1891, under which the particular question in this case arises, it is provided that where notice of an act, neglect, or default is given by the sanitary inspector under sect. 4 of the Act of 1878 to a sanitary authority and proceedings are not taken within a reasonable time (fixed by sub-sect. 2 of sect. 3 of the Factory and Workshop Act 1895 at one month) for punishing or remedying the act, neglect, or default the inspector may take the like proceedings for punishing or remedying as the sanitary authority might have taken. The question which arises in this case is whether the words "like proceedings for punishing or remedying" are confined to legal proceedings in respect of the neglect of an owner or occupier to comply with the notice given by an urban authority under sub-sect. 2 of sect. 22 of the Public Health Act of 1890, or do they give the factory inspector the right himself to give a notice under sub-sect. 2 of sect. 22 of the Act of 1890 requiring alterations and additions to be made. The question is, as I have said, one of very great difficulty. The word "proceedings" is not the word one would have expected to find as applicable to a notice or requirement. Moreover, unless a requirement given by a factory inspector is subject to the appeal to quarter sessions, under sect. 7 of the Act of 1890, as in the case of a requirement by the local authority, I should without hesitation have come to the conclusion that a factory inspector was not entitled to give such notice. It seems to me clear that the Legislature could not, without express words, make the opinion of a factory inspector as to the amount of accommodation required final and conclusive upon the factory owner or occupier. But the words in sub-sect. 2 of sect. 2 of the Act of 1891 are "the like pro-

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ceedings for punishing or remedying the same," and unless we hold that the factory inspector may give the notice provided by sub-sect. 2 of sect. 22 of the Act of 1890, it seems to me that we should be giving no effect to the words "proceedings for remedying" as distinguished from punishing. It is here, I think, that we get assistance in considering what is the general tendency and scope of the legislation. By the Act of 1878 the factory inspector could only give notice to the sanitary authority. The sanitary authority could only give a general notice to the factory owner. By the Act of 1890 further powers are given to the sanitary authority and an appeal is provided against the requirement. Sect. 2 of the Act of 1891 appears to deal with the case where the sanitary authority for some reason or other does not take sufficient steps to exercise their powers, and I think we can gather from this course of legislation that it was intended to supplement the powers of the sanitary authority by giving the factory inspector an independent power of taking proceedings for remedying and punishing in cases in which the sanitary authority neglected to act. It was contended before us by the respondents that no appeal was given in the case of a notice of requirement served by the factory inspector. I have already said that if I had come to this conclusion I should not have decided in favour of the appellant; but if the view which I have taken is correct—viz., that the factory inspector stands in the place of the local authority for the purpose of giving a notice of requirement under sub-sect. 2 of sect. 22 of the Act of 1890—then in my opinion the words "like proceedings" would render any such notice the subject of appeal under sect. 7 of the same act. If this view be correct, effect would be given to that which I gather to have been the intention of the Legislature without any injustice to the factory or workshop owner. The notice given by the factory inspector will be subject to appeal, and, if not appealed against, would have the same effect as a notice given by the sanitary authority. There remains one other contention of the respondents which must be noticed. It was urged that upon the hearing of a summons under sub-sect. 3 of sect. 22 of the Act of 1890, founded upon the notice given by the urban sanitary authority or the factory inspector, the question of the necessity for, or reasonableness of, the requirements specified in such notice could be examined. That such question cannot be raised in the case of a notice of requirement given by a sanitary authority is in my opinion decided not only by the terms of the section itself, but by a long series of decisions referred to the Attorney-General in reply. Upon such a summons, in my opinion, the only question which could be raised is whether there has been a neglect or refusal to comply with such notice. Any question as to the validity of the requirements must be raised, if at all, by appeal to quarter sessions. I do not think, moreover, that the argument that there is a distinction in the case of a notice given by the factory inspector in this respect can be maintained. It was urged that because such a question would be open, in the case of proceedings taken under sect. 81 of the Factory and Workshop Act 1878 in respect of a breach of sect. 35 of the Factory and Workshop Act 1895, it also ought to be

open in the case of proceedings taken by a factory inspector under sub-sect. 3 of sect. 22 of the Act of 1890. For the reasons I have given in the earlier part of my judgment I do not think this contention can prevail. I think that if a notice can be given by a factory inspector under sub-sect. 2 of sect. 22, it has the same effect, if not appealed against, for all purposes, as a notice given by the sanitary authority. For the above reasons I am of opinion that judgment should be given for the appellant and the case remitted to the magistrates. My brother Darling desires me to add that he agrees with my judgment I have just delivered.

GRANTHAM, J. read the following written judgment:—The difficulty that has arisen in this case in determining the power of factory inspectors, has been caused entirely by the system, unfortunately so often adopted in the present day, of legislating by reference to other Acts and by the incorporation of sections of earlier Acts of Parliament. The references backwards and forwards throughout the Act and sections of Acts in dispute are most bewildering and perplexing, and I am not surprised that the magistrates misunderstood, as I think they did, their powers in the proceedings when the matter came before them. If the history of the factory legislation of the nineteenth century is considered, and particularly that of the past twenty or thirty years, it will, I think, be found that the Legislature has advisedly done what it intended to do—viz., gone on step by step in its endeavour to compel the owners of factories to put them in a healthy and sanitary condition. Finding its earliest efforts often frustrated and failed by the supineness or self interest of the sanitary authorities—whose aid was first sought to carry out its views—the Legislature has at last adopted more drastic measures, and as the inspectors have been, in later years at any rate, always selected for this work on account of their special qualifications for it, the Legislature as a last resort has placed the inspectors in the same position that the sanitary authorities previously occupied, and given them power to order the necessary work to be done, and if not done of enforcing the fines leviable for the breaches of the law in failing to obey the inspectors' orders. It should not be forgotten that the experience of factory inspectors is gained by their supervision of factories over the whole of England, whereas the surveyor of the local authority in many cases has no experience of this kind whatever, and as the Legislature has given to the sanitary authority (as many legal decisions show) the absolute discretion of determining whether work is to be done or not subject to the overriding decision of the court of quarter sessions, it would be strange indeed if this same power should not be confided to the more experienced inspector. Not only is the sanitary inspector often inexperienced in the special requirements of factories to make them properly healthy and sanitary, but he is sometimes liable to be influenced by the factory owner, who is not infrequently one of the leading magistrates of the borough in which the factory is situate. Let us see therefore whether the sequence of legislation does or does not bear out the views that I have thus far expressed. The first Factory Act was passed as long ago as 1802 (42 Geo. 3, c. 73). That Act dealt not only with the morals and the

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religious teaching of those working in factories, but also with the hours of labour, and the ventilation and light of the factory. It was in fact the foundation of all subsequent factory legislation. It was amended by various subsequent Acts until we come to the Act of 19 & 20 Vict., which incorporated most of the preceding Acts, and was called the Factory Act 1856. But no sooner was that Act passed than amendments and extensions followed each other in rapid succession until after the passing of the Public Health Act 1875 we came to the Act of 1878, which practically repealed all former Acts, and codifying as it did the existing legislation, also enlarged the powers of the sanitary authorities, and brought more factories within the purview of the Act. Unfortunately even in this comprehensive Act of 1878, the Legislature referred back to the Public Health Act of 1875, and incorporated some of its sections instead of making it a complete Act. The Acts now applying to this particular matter commence therefore with the Act of 1875, sect. 38 of which is in these words: "Where it appears to any local authority by the report of their surveyor that any house is used or intended to be used as a factory or building in which persons of both sexes are employed or intended to be employed at one time in any manufacture, trade, or business, the local authority may, if they think fit, by written notice, require the owner or occupier of such house, within the time therein specified, to construct a sufficient number of water-closets, earth closets, or privies and ashpits for the separate use of each sex. Any person who neglects or refuses to comply with such notice shall be liable for each default to a penalty not exceeding 20*l.*, and to a further penalty not exceeding 40*s.* for every day during which the default is continued." That Act was extended by the Public Health Acts Amendment Act of 1890, sect. 22 of which is as follows: "(1) Every building used as a workshop or manufactory, or where persons are employed or intended to be employed in any trade or business, whether erected before or after the adoption of this part of the Act, in any district, shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed in, or in attendance at, such building, and also where persons of both sexes are employed, or intended to be employed or in attendance, with proper separate accommodation for persons of each sex. (2) Where it appears to an urban authority on the report of their surveyor that the provisions of this section are not complied with in the case of any building the urban authority may, if they think fit, by written notice, require the owner or occupier of any such building to make such alterations and additions therein as may be required to give such sufficient, suitable, and proper accommodation as aforesaid. (3) Any person who neglects or refuses to comply with any such notice shall be liable for such default to a penalty not exceeding 20*l.*, and to a daily penalty not exceeding 40*s.* (4) Where this section is in force sect. 38 of the Public Health Act 1875 shall be repealed." By this sect. 22, therefore, suitable accommodation was to be provided by way of sanitary conveniences having regard to the number of persons employed in any factory; and the initiation of proceedings is to be "on the report of the surveyor of the urban autho-

riety," which authority by written notice could require such additions to be made as would provide sufficient accommodation in the factory, the enforcement of their notice being by application for penalties in the usual way. By these Acts, therefore, the local authority—that is to say, the mayor, aldermen, and burgesses in a borough like Ipswich—had power in such a factory as this, by written notice, to compel the owner or occupier for the time being to provide a sufficient number for each sex, under the penalty of a heavy fine for failure to comply with the order. There was no appeal to the magistrates against this order, but, under sect. 7 of the Public Health Acts Amendment Act 1890, "any person aggrieved by any order, determination, or requirement of a local authority under this Act may appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions." To enforce the penalty, however, the local authority had to apply to the Court of Summary Jurisdiction, which court, however, had, as I have just said, no power to inquire into the merits of the order. By these Acts it will be noted that it was left to the surveyor to the sanitary authority to report to the local authority, and it can well be imagined that the surveyor—an official knowing much, perhaps, of bricks and mortar and of drainage—would know but little of factory requirements; and by the time that the Act of 1878 was passed, it was evident that the Legislature had found that the surveyor of the local authority was not sufficiently alive to the sanitary deficiencies and requirements of factories, for by sect. 4 of the Factory and Workshop Act of 1878 it is expressly provided that it shall be the duty of the (factory) inspector to give notice to the sanitary authority of the neglect or default in the factory. The section reads as follows: "Where it appears to an inspector under this Act that any act, neglect, or default in relation to any drain, water-closet, earth closet, privy, ashpit, water supply, nuisance, or other matter in a factory or workshop is punishable or remediable under the law relating to public health, but not under this Act, that inspector shall give notice in writing of such act, neglect, or default to the sanitary authority; and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice, and take such action thereon as to that authority may seem proper for the purpose of enforcing the law. An inspector under this Act may, for the purpose of this section, take with him into a factory or a workshop a medical officer of health, inspector of nuisances or other officer of the sanitary authority." It was evidently found, therefore, that the local surveyor was remiss in giving notice or in initiating these inquiries, so he was supplanted or at any rate the factory inspector was given equal powers of initiating proceedings. But it being still hoped that the local sanitary authority would see that proper sanitary requirements were provided when their attention was officially drawn by the inspector to the omission, the power to compel the owner to remedy the default was still left with the sanitary authority. It is common knowledge, however, that in many cases the local sanitary authority for various reasons declined to or at any rate did not act. Sometimes no doubt because the influence of the factory owner was paramount in the borough in which his factory was

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situated, and sometimes from ignorance. Hence the Legislature had again to make the law more stringent, and the Factory and Workshop Act 1891 was passed. Sect. 2 is in these words; "(1) Sect. 4 of the principal Act shall apply to workshops conducted on the system of not employing any child, young person, or woman therein, and to laundries. (2) Where notice of an act, neglect, or default is given by an inspector under the said sect. 4 as amended by this Act to a sanitary authority, and proceedings are not taken within a reasonable time for punishing or remedying the act, neglect, or default, the inspector may take the like proceedings for punishing or remedying the same as the sanitary authority might have taken, and shall be entitled to recover from the sanitary authority all such expenses in and about the proceedings as the inspector incurs and are not recoverable from any other person, and have not been incurred in any unsuccessful proceedings." In other words, it having been found that the local authority would not do its duty, the factory inspector was given an overriding authority to get the work done. Power is given, it will be noticed, to the factory inspector to take the like proceedings as the sanitary authority might have taken where the sanitary authority had not taken proceedings within a reasonable time to remedy the default previously notified to him. To find out the powers, therefore, that the factory inspector now possesses you have only to refer back to the previous Acts to see what powers the sanitary authority previously possessed. Now, by the Public Health Act 1875 and the Factory and Workshop Act 1878 the local authority had power to order certain work to be done, and the order being made, the magistrates had no power of inquiring into the reasonableness or not of the order, though the Court of Quarter Sessions had. Yet it is said when the factory inspector gives the order the magistrates have power to inquire into its reasonableness. In other words, it is said that the superior authority is to have less power than the inferior. The increased powers of the inspector do not end here, however, for the sanitary authorities having evidently excused themselves from carrying out the requirements of the inspector on the ground that a reasonable time had not elapsed to enable them to do so, an Act was passed by which they were to take their proceedings within a month instead of within a reasonable time, and in order that they should not keep the inspectors in the dark as to their intentions they were also bound to give notice to the inspector of the proceedings they were taking. The section—sect. 3 of the Factory and Workshop Act 1895—reads thus: "(1) Where notice of an act, neglect, or default is given by an inspector under sect. 4 of the principal Act to a sanitary authority it shall be the duty of the sanitary authority to inform the inspector of the proceedings taken in consequence of the notice. (2) In sect. 2 of the Act of 1891 for the words 'within a reasonable time' shall be substituted the words 'within one month.'" What proceedings? How can it be said that proceedings meant or would include deliberations—deliberations perhaps resulting in determination not to proceed. The proceedings referred to seem to me clearly to be proceedings to remedy the neglect or default, in fact the notice to provide the required accommodation. What better

language could the legislation have adopted if it intended to give the factory inspectors the power it purports to give them, and I think it did give them? Whether rightly gave them or not is no question for us, as we have only to determine whether the power was given or not, but as the learned counsel ventured to suggest that the Legislature could not have intended to give equal powers to the female factory inspectors as it had given to local surveyors and sanitary authorities, I may add that as their experience is gained, like that of male inspectors, from a much wider area—viz., all the factories of England—than that of the local authority whose experience is very likely to be limited to the one factory in his town, their knowledge is in my judgment likely to be much more valuable and reliable than that of any local authority or of the local surveyor of any borough in England. When the case was first argued before my brother Channell and me I stated that I was of opinion that the order of the factory inspector was subject to the appeal to quarter sessions given to any person aggrieved by an order of a local authority, because the factory inspector has to take like proceedings as the local authority. I am of the same opinion now, but that is not the question we have to determine, which is, whether or not the court of summary jurisdiction has power to inquire into the reasonableness of the order of the factory inspector, but as the question whether "like proceedings" included like "liability to appeal to quarter sessions" was not argued out as if it had been the question in dispute, I do not wish to be bound as if I had given judgment on that question. If it was necessary to show the reasonableness of the requirements of the inspector and the ignorance of the magistrates of the usual accommodation provided in factories I might add that by a report I have before me I find that whereas one water-closet for every seventy persons was considered by the magistrates sufficient in this case, yet in London and all the principal towns in England one in twenty to one in thirty is the minimum number provided. With regard to the last part of sub-sect. 2 of sect. 2 of the Factory and Workshop Act 1891 as to the right of recovering expenses incurred by factory inspectors in taking proceedings being limited to expenses not incurred in any unsuccessful proceedings, I do not feel the same difficulty that some of my brothers have felt. The word proceedings is not limited to legal or magisterial proceedings, but includes proceedings taken to remedy defaults (the same that the sanitary authority might have taken) i.e., they include the carrying out of structural alterations or methods adopted to remedy defects under other sections of the Acts. These alterations or methods may be unsuccessful to remedy the particular defect complained of, and therefore it would be unfair to make the owner of the factory pay for them, and to avoid that unfairness these words have been, as it seems to me, inserted, but as I said as to the appeal to quarter sessions, that is not the question we have to determine. For these reasons, in my judgment the case must go back to the magistrates, and their decision quashed on the ground that they had no power to decide as to the suitability or sufficiency of the accommodation.

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BRUCE, J. read the following written judgment:—I am of opinion that the judgment of the court should be for the appellant. I think that the justices had no jurisdiction to hear evidence upon or to decide the question of the suitability or sufficiency of the accommodation existing in the factory. The offence charged is an offence against the provisions of the Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59), s. 22. One difficulty in the case arises from the circumstance that the alleged offence is an offence against the provisions contained in one of the Public Health Acts, while, in order to ascertain the method of procedure to be adopted, reference must be made to the provisions of the Factory Acts. It is a little difficult to fit together the two series of enactments. But the best way of arriving at a right conclusion is to consider the various provisions one by one. The section I have already mentioned—sect. 22 of the Public Health Acts Amendment Act 1890—is the first to be considered, and I think that the ultimate decision in the case must depend to a large extent upon the construction of that section. The section requires by its first sub-section that every building used as a workshop shall be provided with sufficient accommodation in the way of sanitary conveniences. The second sub-section enacts that where it appears to an urban authority on the report of their surveyor that the provisions of the section are not complied with in the case of any building, the urban authority may if they think fit by written notice require the owner or occupier of any such building to make such alterations and additions therein as may be required to give such suitable accommodation as aforesaid. The third sub-section enacts that any person who neglects or refuses to comply with any such notice shall be liable for each default to a penalty not exceeding 20*l.*, and to a daily penalty not exceeding 40*s.* This section is similar in terms with sect. 38 of the Public Health Act 1875, and accordingly it is enacted by sub-sect. 4 of the section we have been considering that where that section is in force (and it is in force in the urban district in which the factory in question is situated) sect. 38 of the Public Health Act 1875 shall be repealed. The construction of sect. 22 demands consideration. I think that the written notice mentioned in the section means a notice to make such alterations and additions as may be required by the notice. The section does not, I think, point to a notice in general terms stating that the provisions of the section are not complied with, but it points to a specific notice stating the particular alterations and additions which the urban authority on the report of their surveyor require. If the notice were not a specific notice, it would be unreasonable to make a person neglecting to comply with it subject to a daily penalty, because if the notice were only a general notice the person to whom it was given might not know what were the requirements of the urban authority. I think that this view of sect. 22 is supported by the decision of this court in *Bogle v. Sherborne Local Board* (46 J. P. 675). That was a decision upon sect. 36 of the Public Health Act 1875. The words of that section are not the same as the words in the section now under consideration, but the general scheme of the two sections is the same. The court held that

the requirements of another notice given under sect. 36 of the Public Health Act 1875 were conclusive upon the justices, and could only be inquired into on appeal to the Local Government Board under sect. 268 of the Public Health Act 1875. The remedy of a person who is aggrieved by any "requirement" of a local authority under the Public Health Acts Amendment Act 1890 is given by sect. 7 of that Act, by way of appeal to a court of quarter sessions, in cases where there is no appeal to the Local Government Board under sect. 268 of the Public Health Act 1875. As a breach of a "requirement" under sect. 22 of the Public Health Acts Amendment Act 1890 involves penalties only and does not involve recovery of expenses incurred by the local authority, such as are mentioned in sect. 268 above referred to, the appeal is, I think, to quarter sessions and not to the Local Government Board. I may observe that the very circumstance that an appeal is given to a person aggrieved by a "requirement" of a local authority seems to me to imply that such requirement is treated by the legislation as an Act in the nature of a judgment order or determination which can only be called in question before the Appellate Tribunal. I have not overlooked the circumstance that sect. 22, which I have been considering, contemplates proceedings initiated by the urban authority on the report of their own surveyor, and not on the report of a factory inspector; and sect. 38 of the Public Health Act 1875, which was in force prior to its qualified repeal above mentioned by sect. 22 of the Public Health Acts Amendment Act 1890, was to the same effect. In the year 1878 the Legislature, I suppose because it found the surveyors of local authorities slow to act under the powers conferred upon them by sect. 38 of the Public Health Act 1875, thought fit to confer upon the inspector of factories a power similar to that which had been conferred upon the surveyor of a local authority; and by sect. 4 of the Factory and Workshop Act 1878 (41 Vict. c. 16) it is provided that where it appears to an inspector under that Act that any act, neglect, or default in relation to any drain, water-closet . . . nuisance, or other matter in a factory is punishable or remediable under the law relating to public health, but not under that Act, the inspector shall give notice in writing of such act, neglect, or default to the sanitary authority in whose district the factory or workshop is situated, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice and take such action thereon as to that authority may seem proper for the purpose of enforcing the law. Under this section the sanitary authority is authorised to take proceedings under the Public Health Act on the report of a factory inspector. What proceedings are they to take? I think sect. 4 of the Act of 1878 points to a proceeding in the nature of a written notice requiring the owner to construct such number of water-closets, earth closets, or privies for the separate use of each sex as might be required in the notice to be given under sect. 38 of the Public Health Act 1875. That section, as I have already pointed out, is now repealed by sect. 22 of the Public Health Acts Amendment Act 1890, and it is only necessary to refer to it in order to ascertain the character of the proceedings contemplated by sect. 4 of the Factory and Work-

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shop Act 1878. I have not critically examined sect. 38, because, so far as relates to the present case, it is repealed, and is superseded by the provisions of sect. 22 of the Public Health Acts Amendment Act 1890. But I may observe in passing that so far as the construction of sect. 38 of the Act of 1875 is concerned the observations that I made upon the construction of sect. 22 of the Public Health Acts Amendment Act 1890 seem to me to apply. I think it is clear that the requirement contained in the written notice mentioned in sect. 38 of the Public Health Act 1875 could not be inquired into by the justices at petty sessions. The person upon whom the requirement was made had, if ordered by the justices to pay a penalty, a right of appeal against the order of the justices under sect. 269 of the Public Health Act 1875. But whether on such appeal the reasonableness of the requirement could be inquired into is, I think, exceedingly doubtful. Probably it could not, but it is not necessary to determine this question, because it is quite clear that the 7th section of the Public Health Acts Amendment Act of 1890 gives a direct appeal from the requirement of a local authority. So far as I have proceeded in examining the Acts of the Legislature, they amount to this. By the Public Health Act 1875, s. 38, a local authority, including an urban authority, was enabled, upon the report of their surveyor by written notice, to require a specified number of water-closets to be constructed in a factory within their jurisdiction. That requirement, if made, was conclusive upon the justices at petty sessions, who in the case of a breach of the requirement has jurisdiction only to adjudicate upon the penalties to be imposed. By the Factory and Workshop Act 1878, s. 4, the local authority might be set in motion by a factory inspector, in which case they were empowered to take the same proceedings as if they had been set in motion by their own surveyor. And by the Public Health Acts Amendment Act 1890 the provisions of sect. 38 of the Public Health Act 1875 are repealed in districts in which the Public Health Acts Amendment Act is in force, and its provisions are re-enacted in slightly different words. Having regard to the difficulty that might arise as to whether an appeal would lie from the order of justices enforcing a penalty for breach of a requirement made by the urban authority to quarter sessions under sect. 269 of the Public Health Act 1875, an express provision was inserted in sect. 7 of the Public Health Acts Amendment Act 1890 that an appeal should lie direct from a requirement of a local authority to a court of quarter sessions. But it is to be observed that in all these cases the local authority or urban authority had a discretion as to whether they would take proceedings or not. They were bound to make inquiry, but they might if they please have refused to act upon the report of their own surveyor or upon the report of the factory inspector. Apparently in the opinion of the Legislature the local authorities had been reluctant to act upon the report of factory inspectors in cases where proceedings ought to have been taken for punishing or remedying acts, neglects, or defaults under the Public Health Acts. Accordingly, by sect. 2 of the Factory and Workshop Act 1891 it is enacted that where notice of an act, neglect, or default is

given by an inspector under sect. 4 of the Factory and Workshop Act 1878 to a sanitary authority and proceedings are not taken within a reasonable time (i.e., within one month, Factory and Workshop Act 1895, s. 3) for punishing or remedying the act, neglect, or default, the inspector may take the like proceeding for punishing or remedying the same, as the sanitary authority might have taken. What steps could the sanitary authority have taken for punishing or remedying the act, neglect, or default, mentioned in the notice given by the sanitary inspector? They could have proceeded only under sect. 22 of the Public Health Acts Amendment Act 1890, by serving a written requirement upon the owner or occupier, and in the event of the requirement not being complied with, proceeding before the justices to enforce penalties. If I am right in the conclusion which I have expressed, that the written requirement of the urban authority was, subject to an appeal to quarter sessions, conclusive as to the requirements contained in it, it seems to me to follow that when the Legislature conferred upon the inspector power to take like proceedings for punishing or remedying the act, neglect, or default that the written requirement of the inspector was intended to have and has the same force and effect as if the written requirement had been made by the urban authority. I can give no other meaning to the words "like proceedings." If the urban authority do not act within one month after notice of an act, neglect or default is given by the inspector, then the inspector shall be armed with their powers; he is put in their place and may take proceedings for punishing and remedying the act, neglect, or default, the same in character as the sanitary authority might have taken. Of course the act, neglect, or default must be a real act, neglect, or default, but the question is who is to determine whether an act, neglect, or default exists, and if it exists how it is to be remedied. I think this power is conferred upon the factory inspector, subject to the right of appeal to quarter sessions against his requirement. I think the appeal must exist from the requirement of the inspector, just as an appeal might be brought from the requirement of the urban authority if they had by written notice made a requirement. When sect. 2 of the Factory and Workshop Act 1891 enables the inspector to take the like proceedings as the sanitary authority might have taken, I think that means proceedings subject to the same conditions and the same right of appeal as proceedings taken by the sanitary authority. To hold otherwise would be to make the proceedings taken by the inspector different in character from proceedings taken by the urban authority, and to confer upon the inspector more absolute powers than those conferred upon the urban authority. The decision of the Court of Appeal in the case of *The Ganges* (43 L. T. Rep. 12; 5 P. Div. 247) is in point. By the County Courts Admiralty Jurisdiction Act 1868, s. 25, it was enacted that the Court of Passage of Liverpool should, upon an Order in Council being made, have in admiralty matters the like jurisdiction, power, and authorities as were conferred upon the County Court. No express provisions were made as to an appeal from the Passage Court. Yet it was held that the words "like jurisdiction" gave the same right of appeal from the Passage Court as existed from a County

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Court in an Admiralty matter, that is an appeal not to the Court of Queen's Bench but to the Court of Admiralty. I see nothing unreasonable in the construction which I think ought to be put upon the statutes. A factory inspector ought to be competent to determine such a question as to the number of water-closets required for the women employed in a particular factory; and having regard to the fact that in many urban districts owners of factories are largely represented on the borough bench, the Legislature may have had good reason for allowing the appeal to be made from the "requirement" of an inspector to the quarter sessions and not to petty sessions.

PHILLIMORE, J. read the following written judgment:—This case has stood for argument three times. On the first occasion it was heard by my brothers Grantham and Channell, and I believe they differed in opinion. The second hearing was before the late Lord Chief Justice and my brothers Grantham, Bruce, Darling, and myself. At the close of this argument I was in favour of the respondents. As to my colleagues I will only say this, that, if I had then stood alone, there would have been no necessity for a third argument. Now, however, after a third hearing, I understand that my Lord and my brothers, who with me formed the third court, are in favour of the appellant; and it is only necessary to state as briefly as I can why I still remain of opinion in favour of the respondents. I agree with some of the contentions put forward on behalf of the appellant. I think that an urban sanitary authority can, "when it appears" to such authority on the report of its surveyor that the sanitary accommodation is insufficient, make a requirement—which is in substance a judgment, and which, subject to appeal to quarter sessions, is conclusive—compelling the factory owner to provide further specified accommodation under penalties; and, which is the same thing, that upon a summons for disobedience to a requirement, the justices have no power to inquire into the reasonableness of the requirement, but only whether it was in fact made, and whether it has or has not been complied with (53 & 54 Vict. c. 59, s. 22). I think, further, that a factory inspector "when it appears" to him or her—the same phrase "when it appears" being again used—may give a notice to the urban sanitary authority complaining of "any act, neglect, or default in relation to any . . . water-closet (41 & 42 Vict. c. 16, s. 4), and that a deficiency of water-closets is a "neglect or default in relation to a water-closet," though the respondents contended otherwise; and that if the urban sanitary authority does not take within a month proceedings "for punishing or remedying the neglect or default," if neglect or default in fact there be, the factory inspector has power to make that formal requirement under a penalty, which the urban sanitary authority ought to have made, and in due time to issue a summons to enforce it. In conceding this last point to the argument of the appellant, I believe I am going further than a weighty authority would go. But I think, upon the whole it is right. There, however, I stop. Primarily it is the function of the judicial tribunal upon a summons for an offence to determine upon all the elements which go to make up the alleged offence. Express words are needed to

withdraw any part of the alleged offence from the determination of the tribunal. In cases under the sanitary Acts it is often the fact that some part of the case is withdrawn from the justices and given to be decided by the sanitary authority. The Legislature has so provided and used apt words for the purpose, saying, not "where so and so is the case," which would leave the point to the tribunal, but "where it appears to the authority that so and so is the case," which leaves the point to the authority. There is, however, no rule of law that, in all sanitary Acts the sanitary requirement must be left to the sanitary authority to determine upon. If the Legislature ceases to use apt words for the purpose, the sanitary authority does not get the power. In this very matter it is conceded that a rural sanitary authority would have no such power (58 & 59 Vict. c. 37, s. 35). Now "when it appears" to the urban sanitary authority, it may make a requirement, and "when it appears" to the inspector he may give a notice; but when he desires to issue a requirement, the condition precedent is that he shall have given notice, not of what appeared to him to be an act, neglect, or default but of what really was an act, neglect, or default (54 & 55 Vict. c. 75, s. 2). Again, what powers to him? The power of punishing or remedying what? An imaginary or constructive act, neglect or default? No, a real act, neglect, or default. If there is no such real act, neglect, or default, there is nothing to punish or remedy. There is no trace of any provision anywhere making the opinion of the inspector conclusive, and direct legislation is required to make it so. In other words the factory inspector can, in certain circumstances, make a requirement which the factory owner will neglect at his peril, but just as an inspector cannot require until he has given notice to the urban sanitary authority and waited a month, so he cannot require unless, in fact, there is a real act, neglect, or default; and just as he must prove his notice and the expiration of a month before the justices, so must he prove the act, neglect, or default. If he does the factory owner will be in peril, for the penalty will begin from the date fixed in the requirement, and not from the date of the conviction by the justices. This is my view upon consideration of the language of the several Acts. I may add that I venture to think this conclusion gives considerable power to the inspector, and if open to some practical objections is not so objectionable as the other. In the first place, it would be monstrous to let a single factory inspector determine such a point without appeal, more especially as he is not apparently bound to hear the factory owners before making the requirements. I understand that the majority of my colleagues agree that that would be monstrous, but think that by implication there must be an appeal from the inspector to quarter sessions. I am glad that they so think, and I do not dissent. But, secondly, what is the use of bringing in the urban sanitary authority if it is merely to be given a chance to comply with the inspector's mandate, with the knowledge that if it does not it will be overruled and brought into contempt? And why interpose a month's delay in what may be an urgent matter? If the inspector is really to determine let him do so at once. Thirdly, I can understand that if the urban sanitary autho-

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ity should be supine it may be desirable to allow some other authority to do that which a member of the public could do—viz., prosecute—and thus submit the decision to a third body, the justices. But why let the single inspector overrule the whole sanitary committee and its surveyor? Again, there may be reasons for giving less power to a rural than to an urban sanitary authority; but the inspector is the same inspector in rural as in urban districts. In rural districts he, even if he acts with the rural sanitary authority, cannot decide; he can only prosecute. In urban sanitary districts he is to be allowed to decide, and to do this by overruling the apparently more important body. Upon the whole I should conclude in favour of the respondents, and say that the justices were right in admitting evidence to show that there was, in fact, no neglect or default on the part of the factory owners. *Appeal allowed.*

Solicitor for the appellant, *The Solicitor to the Treasury.*

Solicitor for the respondents, *Percy Gates, for Bantoft, Ipswich.*

Monday, Oct. 29, 1900.

(Before LAWRENCE and KENNEDY, JJ.)

BULLOCK (app.) v. REEVE (resp.). (a)

Metropolis—Nuisances—Drain or sewer—Draining of groups of houses by combined operation—Deviation from grouping as sanctioned—Liability of owner for defective drain—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 250—Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 112.

In 1855 the Metropolitan Commissioners of Sewers approved of a uniform system of drainage for the houses forming one side of a street, by which the houses were to be drained in groups of four each, the one drain serving for two blocks of two houses each, and they ordered the combined system to be carried out in accordance therewith.

Before the 1st Jan. 1856 the combined system was carried out, but in one of the groups there was an alteration from the grouping as approved, and the group as altered contained five houses instead of four, two having been added from the preceding group, and one originally belonging to the group was drained with the next group.

There was no evidence to show that the alteration or deviation was approved by the commissioners:

Held, that the deviation from the grouping as sanctioned was material, and that as such deviation had not been sanctioned, the pipe draining the group of five houses was a "sewer," and not a "drain" within the meaning of sect. 250 of the Metropolis Management Act 1855, as amended by sect. 112 of the Metropolis Management Amendment Act 1862, and that consequently the owner of the houses was not liable to abate a nuisance on the premises arising from the defective condition of the pipe.

CASE stated by the metropolitan police magistrate sitting at the Thames Police-court.

The respondent was summoned for an offence alleged to have been committed in contravention

of the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), and the summons was heard on the 10th and 17th May 1900.

The appellant, a sanitary inspector, was the complainant acting on behalf of the Board of Works for the Poplar district, and the respondent was the owner of premises known as No. 67, Arcadia-street, within the district.

The charge was that on the 3rd May 1900 at the above premises a nuisance existed—namely, that the drain was defective—and that the nuisance was caused by the act, default, or sufferance of the respondent.

It was proved to the satisfaction of the magistrate: (a) That owing to the defective condition of the pipe which passed under No. 67, Arcadia-street, a nuisance did exist at the premises as alleged; (b) that the pipe was used for the drainage of more than one building and premises not within the same curtilage; (c) that the respondent had been duly served with the necessary statutory notices to abate the nuisance, and had failed to comply with the requirements of the notices; and (d) that if the pipe was in law a drain the nuisance arose from the default and sufferance of the respondent.

It was contended on behalf of the appellant that the pipe was a drain for draining a group or block of houses by a combined operation and laid or constructed before the 1st Jan. 1856 pursuant to the order or direction, or with the sanction or approval of the Metropolitan Commissioners of Sewers within the meaning of sect. 250 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), as amended by sect. 112 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102).

The respondent contended that the existing drainage had not been laid or constructed pursuant to the order of the commissioners, or with their sanction or approval, and that the pipe was a sewer.

Upon this point the following facts were to be taken as proved or admitted: (a) On the 18th July 1855 a letter was sent to the Metropolitan Commissioners of sewers forwarding for their inspection and approval an accompanying plan showing the proposed mode of draining an estate at Poplar, which plan was similar to a plan adopted on the adjoining estate and approved by the commissioners. (b) According to this plan, a copy of which was annexed to the case, there was a uniform system of drainage proposed and the houses were drained in groups of four houses, the one drain serving for two blocks of two houses in each block. The red lines on the plan showed the proposed system of drainage, and the line in black showed the existing system. (c) A formal application for the sanctioning of the plan of combined drainage, dated the 23rd Aug. 1855, was also sent to the commissioners. (d) On the 16th Oct. 1855 the commissioners ordered and directed the combined drainage of the houses shown upon the plan, and referred to in the letter and application to be carried out accordingly, and the combined system of drainage existing upon the premises on the 3rd May 1900—the date when the charge was made—was laid out and constructed before the 1st Jan. 1856. (e) The existing system of drainage differs from that ordered and directed by the commissioners, inasmuch as it drains Nos. 59, 61, 63, 65, and 67 (five houses), instead of Nos.

(a) Reported by W. W. OBE, Esq., Barrister-at-Law.

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63, 65, 67, and 69 (four houses). That is to say, two houses (Nos. 59 and 61) were added, and one house (No. 69) which is now drained with No. 71, was not included. The houses were all continuous houses, the odd numbers being at one side of the street; and as approved of by the commissioners the groups ran thus: Nos. 55, 57, 59, and 61, in one group; Nos. 63, 65, 67, and 69, in the second group; and Nos. 71, 73, 75, and 79, in the third group, and so on. According to the existing system this grouping was changed and the second of these groups then consisted of the Nos. 59, 61 (taken from the first group), 63, 65, and 67, and No. 69 was excluded from this group and was added to the group beginning with No. 71.

There was no evidence to show that the deviations from the plan were sanctioned or approved by the commissioners.

Upon the above facts, and after referring to the cases of *Kershaw v. Taylor* (73 L. T. Rep. 274; (1895) 2 Q. B. 471), *Holland v. Lasarus* (66 L. J. 285, Q. B.), and *Geen v. Newington Vestry* (1898) 2 Q. B. 1, the magistrate was of opinion that the original combination not having been adhered to but altered, the pipe or drain as laid not having been so laid with the sanction or approval of the commissioners, or pursuant to their order or direction was a "sewer" within sect. 250 of the Metropolis Management Act of 1855, as amended by sect. 112 of the Metropolis Management Amendment Act of 1862; and he dismissed the summons subject to this case.

The question for the court was whether upon the facts stated the decision of the magistrate was right in point of law. If the court should find in the affirmative then the decision was to stand, but if in the negative the case was to be remitted to the magistrate.

By sect. 250 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), it is provided:

The word "drain" shall mean and include any drain of and used for the building of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word "sewer" shall mean and include sewers and drains of every description, except drains to which the word "drain," interpreted as aforesaid, applies.

By sect. 112 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), it is provided:

In the construction of the recited Acts and this Act . . . the word "drain" shall be deemed to apply to and include the subject matters specified in the 250th section of the firstly-recited Act, and also any drain for draining a group or block of houses by a combined operation, laid or constructed before the 1st day of January 1856, pursuant to the order or direction or with the sanction or approval of the Metropolitan Commissioners of Sewers.

E. D. Muir for the appellant.—The question which arises under the Metropolis Management Acts is whether the pipe in this case for carrying this sewage is a drain or a sewer. There was a plan sanctioned in 1855 for the draining of 217 houses, in groups of four houses each, but

the group now in question does not comply with the original plan. There was a deviation from the plan as sanctioned, as there is a block of five houses in this group, and the question is whether this deviation from the plan which was sanctioned is such as to make this pipe a sewer. My submission is that the pipe is a "drain" within the meaning of the Acts, and that, under the circumstances, it was not necessary that there should be any evidence as to the approval of the deviation. It ought to be presumed that the deviation was approved in the usual way. There is no case precisely like the present, but there are cases which show that where plans are approved for a combined system and other houses are built to which the combined system does not apply, then the pipe is a sewer from its junction with the drain. There is no case which says that a pipe draining only houses to which an order for drainage by a combined operation applies is a sewer:

Kershaw v. Taylor, 73 L. T. Rep. 274; (1895) 2 Q. B. 471;

Holland v. Lasarus, 66 L. J. 285, Q. B.;

Geen v. Newington Vestry (1895) 2 Q. B. 1.

There was no material deviation in this case. The mere variation of the grouping of the houses—all being covered by the combined system approved of—is not such a deviation as to turn the drain into a sewer. In *Greater London Property Company v. Foot* (1899) 1 Q. B. 972; s.c., *Owner of 238, Old Ford-road v. Foot* (80 L. T. Rep. 390) there was a deviation in the course of a drain from the plan signed by the vestry's surveyor, but there was no evidence that any houses other than those on the plan were drained by the combined operation, and it was held that a mere deviation in the course of the drain was not sufficient to convert it into a sewer. Here there was a mere deviation from the grouping of the houses as approved, and all of the houses were covered by the combined system. The deviation was not material, and the pipe remained a "drain" and did not become a sewer.

Alexander Glen for the respondent.—The magistrate was right in finding that this pipe was a sewer and not a drain within the meaning of the Metropolis Management Acts, and that consequently the respondent was not liable for the defective condition of the sewer. The definition of "drain" is, by sect. 112 of the Act of 1862, to include not only drains as defined in sect. 250 of the Act of 1855, but also "any drain for draining a group or block of houses by a combined operation, laid or constructed before the 1st Jan. 1856, pursuant to the order or direction or with the sanction or approval of the Metropolitan Commissioners of Sewers." The group now in question was constructed before the 1st Jan. 1856, but it had not received the sanction or approval of the commissioners. Therefore it does not come within the definition of a drain in this section. The case of *Greater London Property Company v. Foot* (*ubi sup.*) decides that a mere immaterial deviation does not prevent a case from coming within the definition, or convert a drain into a sewer; but the judgment of Darling, J. in that case clearly shows that if the deviation or alteration be material, then it must be sanctioned, otherwise the drain is converted into a sewer. Here the deviation from the approved plan is most material, and the question is whether this group or block of

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houses drained by this pipe is the group or block which the commissioners intended to be drained by this combined drainage. It clearly is not. The question whether a deviation is material or immaterial is a question of degree for the authority to decide, and the magistrate has found that it was material.

LAWRENCE, J.—I think the learned magistrate was quite right in the conclusion to which he came, on the authority of the cases which he himself mentions and to which our attention has been called. According to the facts as stated in the case, and to the plan which is annexed to the case, the red lines upon the plan show the drains which were approved of by the commissioners, and the plan that is before us is the plan which was before the commissioners. If those drains had been carried out according to the plan, this whole block of houses would all have been drained; but at some time or another before 1856, Nos. 59, 61, 63, 65, and 67 were drained according to a black line shown on the plan, which altered altogether the system of drainage proposed to be carried out by the commissioners, which was to have been laid in blocks of four. That seems to have been the only system of drainage which has existed from that time up to the present. The question now arises whether that drain of the block of five houses shown on the plan is a drain or a sewer. It seems to me, in the absence of evidence, that it was not approved of by the commissioners, and that being so, the whole of the cases that have been cited to us go to show that it became a sewer and was no longer a drain. In order to make it a drain it must have been constructed under a plan originally approved of by the commissioners. No such approval has been proved here, and I find as a fact that there was no such approval, which in this case comes to the same thing as saying that none has been proved. There being no proof of approval forthcoming, the magistrate came to what I think is a right conclusion in holding that this was a sewer.

KENNEDY, J.—I think the learned magistrate was perfectly right. The Metropolitan Management Act of 1862, s. 112, varies the expression "drain" used in the Act of 1855. It speaks of the word "drain" as including "any drain for draining a group or block of houses by a combined operation laid or constructed before the 1st Jan. 1856" under the order and approval of the Commissioners of Sewers. Apart from and except for that provision the thing—the conduit—which drains a number or block of houses would be a sewer. In this case there is a conduit or pipe draining a number of houses. There is a combined operation for the purpose of draining a group of houses. When we look at what was authorised we find that this combination was not authorised. There was authorised a combination of four houses, and not the same houses as are in the present combination; and that combination only was authorised. It may be that the evidence would show that the wrong act, whatever it was, and whether it was on the part of the builder or the building owner, or both, took place very soon after the order of the commissioners and in the original construction. Still, what we have to look at is, whenever the combined operation was carried out, can it be shown to have been done under the order of any vestry or district board or

the other authorities who are brought in by sect. 112 of the amending Act of 1862. There is no such evidence in this case. It is a different combination, and the difference cannot, in my opinion, be treated as immaterial. It is a difference which lays a greater burden upon the pipe, because the pipe drains more of the houses in one pipe than were originally authorised to be drained in one pipe, and if it be a question of fact the magistrate must be taken to have found it was material. I do not think any tribunal could properly hold on such evidence as was before the magistrate that this was a mere immaterial deviation, as my brothers Darling and Channell held in the case before them of *Greater London Property Company v. Foot* (*ubi sup.*), and as, if my memory be right, I held myself in a very similar case at *Nisi Prius*. I think the judgment of the learned magistrate was right, and that this pipe must be treated as a sewer.

Appeal dismissed.

Solicitors for the appellant, C. V. Young and Son.

Solicitor for the respondent, E. J. Marsh.

Tuesday, Jan. 15, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

FULHAM VESTRY v. MINTER. (a)

New street—Paving—Apportionment of expenses—Land dedicated to the use of the public—Open Spaces Acts 1877 (40 & 41 Vict. c. 35), 1881 (44 & 45 Vict. c. 34), and 1887 (50 & 51 Vict. c. 32)—London Open Spaces Act 1893 (56 & 57 Vict. c. lxxi.)—Metropolis Management Acts 1855 (18 & 19 Vict. c. 120), ss. 105, 205, and 1862 (25 & 26 Vict. c. 102), s. 77.

By an indenture, dated the 15th March 1894, certain land in the parish of F. was conveyed to the vestry of F. in fee simple to the end and intent that the same should be at all times thereafter kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation. This land was acquired by the vestry under powers conferred upon them by the Open Spaces Act 1877, by sect. 1 of which land so acquired is held "in trust for the perpetual use thereof by the public for exercise and recreation." By the London Open Spaces Act 1893 the vestry are empowered to erect on land so required (inter alia) convenient and ornamental buildings and such appliances as they may think requisite for purposes of exercise and recreation and for other like purposes.

The vestry had erected on the land a cloak-room, a band stand, and a refreshment-room. The latter had been let to a caterer at 25l. per annum. Charges were made for the use of chairs about the band stand.

The land but not the buildings abutted on a new street which by a resolution of the vestry passed the 17th Jan. 1900 the vestry directed to be paved, and the estimated expenses apportioned among the frontagers.

Held, that the vestry were owners of the land and buildings within the Metropolitan Management Acts 1855 and 1862 and should be assessed towards the estimated expenses.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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Per Phillimore, J.: The vestry took the land under the Open Spaces Acts 1877 and 1887, and the Act of 1881, in so far as it cut down their user of the land to "no other purpose" than the perpetual use thereof by the public, was not applicable.

CASE stated by John Rose, Esq., a metropolitan magistrate.

The respondent was summoned on a complaint by the clerk to the appellants for that he, the respondent, had refused or neglected to pay to the vestry or to their clerk the sum of 223*l.*, although the same had been duly demanded, such sum being charged upon him as owner of certain houses or lands fronting or bounding or abutting upon a certain new street or way known as Bishop's Park-road, section 1, and which houses or lands were set out and marked Nos. 1, 3, and 6 on the plan of the new street in respect of paving works to be carried out in the new street under and by virtue of the provisions of the Metropolis Local Management Act 1855, and the other Acts of Parliament amending the same.

Upon the hearing of the summons the following facts were proved or admitted:—

Bishop's Park-road, section 1, was a new street within the parish of Fulham. On the north-west side thereof it was bounded by a row of houses and on the south-east by an open space called Bishop's Park.

By an indenture dated the 15th March 1894 and made between the Bishop of London of the first part, the Ecclesiastical Commissioners for England of the second part, and the vestry of the parish of Fulham of the third part, the land therein described was conveyed to the appellants in fee simple to the end and intent that the premises should be at all times thereafter kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation. Part of the land thereby conveyed abutted on the south-eastern side of the new street. This land was acquired by the appellants under the powers conferred upon them by the Open Spaces Acts.

By 40 & 41 Vict. c. 35, s. 1, such open space was held "in trust for the perpetual use thereof by the public for exercise and recreation," and by 44 & 45 Vict. c. 34, ss. 3, 4, 5, "for no other purpose." By 56 & 57 Vict. c. 71, the vestry might erect thereon (*inter alia*) convenient and ornamental buildings and such appliances as they might think requisite for purposes of exercise and recreation and for other like purposes.

Upon the open space of land had been erected a band stand at the point marked A on the plan annexed to the indenture, a cloak-room at the point marked B, and a refreshment stall at the point marked C. The appellants let the refreshment stall at a rent of 25*l.* per annum to a caterer. The band stand was not let, but seats for the public were let by the vestry to a contractor at a rental.

On the 17th Jan. 1900 the appellants resolved as follows:

That whereas Bishop's Park-road, section 1, in the parish of Fulham, being a new street, is not paved to the satisfaction of this vestry, and it is deemed by them to be necessary and expedient that the same should be so paved. It is hereby resolved and ordered that the said street be taken and paved under the provisions of

18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102; that the surveyor's plan and estimate be approved and adopted, that the estimated cost of the said paving works be apportioned upon the owners of the houses or land abutting upon or bounding the said street at the proportions and in the amount as set forth in the apportionment hereby made, approved, and sealed with the official seal of the vestry, and the officers instructed to take the necessary steps for collecting the apportioned amounts within fourteen days.

The plan and apportionment in duplicate were sealed accordingly.

The respondent was the owner of certain houses in the new street—viz., Nos. 1, 3, and 6, Bishop's Park-road, section 1—and by the said apportionment the sum of 223*l.* was charged upon him as such. The sum had been demanded of him and was not paid.

The apportionment proceeded upon the basis that the cost of paving the new street should be defrayed by the owners of the houses and lands on the north-west side thereof, and not in any part by the owners of the land on the south-east side thereof.

It was contended upon the part of the respondent that the apportionment was invalid for that a part of the cost of paving ought to have been apportioned upon the appellants as owners of the open space abutting upon the south-east side of the new street.

It was contended upon the part of the appellants that the apportionment was valid, for the open space was *extra commercium* or subject in perpetuity to the burden of a public right which deprived the appellants of the beneficial use of it.

The learned magistrate dismissed the summons.

The judgment of the learned magistrate was annexed to the case, and it set out fully the arguments used before him and before the court above and the grounds of his honour's decision which were approved of by both the judges of the Divisional Court: "The question is whether the apportionment of the estimated expenses of paving a new street under the Metropolis Management Acts is valid inasmuch as it does not include the vestry as the owners of the land bounding or abutting on such new street and held under the Open Spaces Acts. The Metropolis Local Management Act (18 & 19 Vict. c. 120), s. 105, enacts that the expenses of paving a new street must be paid by the owners of the houses forming such street, and under the Amendment Act (25 & 26 Vict. c. 102), s. 77, the owners of the land bounding or abutting on such street shall be liable to contribute. By the interpretation clause, sect. 250, of the principal Act, 'owner' shall mean the 'person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.' Why was this definition which limits the ordinary meaning of the word 'owner' given in the Act? The reason may be this—A new street has to be paved. The first cost of the paving is laid on the frontagers who derive the immediate benefit from the paving. The Legislature did not think fit to impose the first cost, which is considerable, on mere occupiers whose tenancies might be short and means small, or even on mere owners who might have a reversionary interest in the land and get little or

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no present return from it or advantage from the paving, but the Legislature might well have thought that where the owner did or, if he chose, might get substantial profit, rack rent, from the land—perhaps indirectly from the improvement of the street—he ought to bear his part of the expense of paving it, and therefore have given this definition of 'owner.' The vestry are in law owners of land bounding or abutting on the street. They also would receive the rack rent of the land if such land were let at a rack rent, and they are therefore within the literal terms of the interpretation clause. But it is said that they are, nevertheless, not owners within the meaning of the Act, because the land cannot be let at a rack rent. Perhaps if the attention of the Legislature had been called to the fact that this was land from which no profit could possibly be got, out of which the cost of paving could be paid, the owners of such land would have been expressly exempted from contribution. It may not be unreasonable to imply such exemption. That some limitation of the literal terms of sect. 77 and the definition clause, sect. 250, may be implied is evident from *Angell v. Vestry of Paddington* (L. Rep. 3 Q. B. 714), in which a church and its land were held to be neither house nor land within the Act and perhaps also from *Plumstead Board of Works v. British Land Company* (32 L. T. Rep. 94; L. Rep. 10 Q. B. 203), in which the Exchequer Chamber held that the owners of the soil of highways at the end of a street were not owners of land in the street so as to be liable to the cost of paving it. The learned counsel for the vestry in a fair and skilful commentary on the cases mainly relied on the principle stated in *Great Eastern Railway v. Hackney Board of Works* (49 L. T. Rep. 509; 8 App. Cas. 687, 693) by Lord Watson, who said: 'The authorities cited in the course of the argument appear to me to have established this proposition—that the person vested with the property of heritable subjects which have been placed *extra commercium*, or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862.' The principle is there expressed in the terms of the Roman and Scotch rather than in those of English law. But Mr. Macaskie also referred me to the language used by Bowen, L.J., who said in *Wright v. Ingle* (56 L. T. Rep. 511; 16 Q. B. Div. 379): 'Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack rent there ever would be an owner within the meaning of sect. 250 I very much doubt, but I am inclined to think that if this incapacity to let were stamped on the premises they would never have an owner within the meaning of sect. 250.' Let me try to apply to this case before me those authoritative dicta which afford the chief support to the argument for the vestry. This land was acquired and is held in fee simple by the vestry under statutory powers in trust for the perpetual use thereof by the public for exercise and recreation under 40 & 41 Vict. c. 35, s. 1, and for no other purpose by 44 & 45 Vict. c. 34, s. 5. But the vestry may erect and maintain thereon (*inter alia*) convenient and ornamental buildings and such appliances as they may think requisite for purposes of exercise and recreation, and for refreshment-rooms, band stands, conveniences, or for other like purposes (56 & 57

Vict. c. lxxi.). Is the effect of these statutory restrictions to place the land *extra commercium* within the meaning of Lord Watson, or is the incapacity to let stamped on the premises within the meaning of Bowen, L.J.? The open space is by the statutes placed *extra commercium* in the sense that it cannot be alienated or disposed of in any way inconsistent with the perpetual use of it by the public for exercise and recreation. There is, however, no express statutory prohibition against letting the land or buildings lawfully erected thereon on terms which will preserve the rights of the public, and I do not think that such prohibition must necessarily be implied from the Open Spaces Acts; but perhaps it is unnecessary to establish the proposition that the land may be actually let at a rack rent in order to bring the owner within the definition in sect. 77, and I think that the decisions by which I am bound leave me free to adopt the view taken by Collins, J. in *Vestry of St. Giles, Camberwell v. London Cemetery Company* (70 L. T. Rep. 734; (1894) 1 Q. B. 699, at p. 706), who says: 'In order to be exempt, the land must be *extra commercium*, but where the owners are entitled by statute to use it beneficially, receiving as profit a lump sum which is equivalent to a rack rent, the land is not *extra commercium*.' In this case the owners are expressly empowered by the London Open Spaces Act 1893, s. 25, to erect and maintain buildings and appliances for exercise and recreation and for refreshment-rooms, band stands, and conveniences, and for other like purposes. It would be easy to suggest buildings and appliances which might be erected for exercise and recreation from which profit might be derived. It could not be reasonably implied that the refreshments, for example, involved in the use of refreshment-rooms are to be supplied gratis or at cost price to the public, and if charges may lawfully be made for these accessories, they become sources of profit which may be equivalent to a rack rent. If rack rent or its equivalent may lawfully be got, an inquiry whether it is actually got may be superfluous, but some profit is in fact got from the open space. A refreshment stall is let for 25l. a year. Chairs are supplied for the use of which money is paid. Fees are taken with the sanction of the vestry for the use of a cloak-room. The receipts may not, perhaps, at present amount to a rack rent, but it is conceivable that a larger sum might be obtained from these sources, especially for the privilege of selling refreshments at a place of popular resort for exercise and recreation. Mr. Macaskie said that the refreshment stall is not on the land abutting on the section of the 'new street,' which is the subject of the apportionment. I think that the rent for it may be regarded as derived not merely from the refreshment stall, but from the whole area of the open space, including the part abutting on the street which makes the stall valuable. If, however, I am wrong in so thinking, the fact remains that other refreshment-rooms or means of deriving profit may be lawfully set up on the piece of land actually bounding or abutting on the new street. In my opinion the vestry are, within 25 & 26 Vict. c. 102, s. 77, and 18 & 19 Vict. c. 126, s. 250, owners of land bounding or abutting on such street, they are trustees for the public and would receive the rack rent of the land if such land were let at a rack rent as I think it lawfully might be, without

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interfering with the purposes to which the land is devoted by statute. No decided case is on all fours with the present one, and Mr. Macaskie pointed out to me the distinctions between it and those cases which seemed to be against him. But several decisions were cited that were nearly in point, and tend to support the conclusion to which I have come—viz., that the apportionment is invalid because the owners of the open space are not included as contributories to the expense of paving the new street."

Stuart Macaskie for the appellants.

Bray, Q.C. and *B. A. Cohen* for the respondent.

The following cases, besides those referred to by the learned magistrate, were cited in the argument:

Plumstead District Board of Works v. Ecclesiastical Commissioners, 64 L. T. Rep. 830; (1891) 2 Q. B. 361;

Bowditch v. Wakefield Local Board of Health, 25 L. T. Rep. 88; L. Rep. 6 Q. B. 567;

Pound v. Board of Works of Plumstead District, 25 L. T. Rep. 461; L. Rep. 7 Q. B. 183;

Hornsey District Council v. Smith, 75 L. T. Rep. 684; (1896) 2 Ch. 254;

Re Christchurch Inclosure Act; Meyrick v. Attorney-General, 71 L. T. Rep. 122; (1894) 3 Ch. 209;

Lambeth, Overseers of v. London County Council, 76 L. T. Rep. 795; (1897) A. C. 625;

St. Mary, Islington, Vestry of v. Cobbett, 71 L. T. Rep. 573; (1895) 1 Q. B. 369;

Caiger v. Vestry of St Mary, Islington, 50 L. J. 59, M. C.

BRUCE, J.—In this case I think that the decision of the learned magistrate was right, and that we ought to affirm his decision. I have to say that I feel myself very much indebted to the magistrate for the very careful judgment he has delivered. It has been an assistance to me in considering this. I think he has correctly stated the law and correctly applied it to the facts. I do not propose to go through the very numerous cases which have been cited during the argument, but I think the principle of the cases may be said to be this—that where there exist land or houses abutting upon a new street, then the person who receives the rent or who, if rent were payable, would receive the rent, and who is the owner within the definition of owner given in the Act of Parliament, is liable to contribute to the expenses of the new street. This exception has been established—that where the premises held are of such a character that they are struck with a legal incapacity of ever being used, if a house as a house, or if land as land is struck with the legal incapacity of being let at a rack rent, that incapacity being of a permanent character and of such a kind as to affect the nature of the property, then the property is not property of which there can be an owner within the meaning of the statute. That is the substance of the rule as stated by the judges in *Wright v. Ingle (sup.)*. The definition of an owner as stated in the words of Lord Watson in *Great Eastern Railway Company v. Hackney Board of Works (sup.)*, where he held that the company were not owners of the land abutting on houses, is that "the person vested with the property of heritable subjects which have been placed *extra commercium* or are subject in per-

petuity to the burden of a public right which deprives him of their beneficial use is not an owner of land within the meaning of the 77th section of the Act of 1862." So that unless the land or the houses are brought within one of these definitions, unless they are struck with an incapacity to be let, or I should say an incapacity to be used beneficially, they are liable to contribute to the expenses of the new street. Now, in the present case the question we have to consider is this: Whether the land in question is struck with such incapacity. I think not. It is conveyed to be kept and maintained as an open space for the perpetual use thereof to the public for exercise and recreation and for no other purpose. But, although it is subject to that burden, it seems to me that that is not a burden which deprives the vestry altogether of the beneficial use of the property. They possess power to erect and maintain on the open space buildings for the accommodation of keepers, constables, and other persons employed by them in connection with the maintenance of the open space, also such convenient and ornamental buildings and such appliances as they may think requisite for the purpose of exercise and recreation, and for refreshment-room, band stand, conveniences, and other like purposes provided that the consent of the county council be first obtained. So that they have the power here to do many things which are not inconsistent with the enjoyment of the place as an open space for the public. They may build a gardener's cottage, and the gardener who is attending to the open space may live there. It may be said that they are not entitled to charge a rent for his living there. I do not know whether that is so or not. The occupation of the cottage would be a beneficial occupation because it would be taken into account in payment of his wages, and therefore it would be a beneficial occupation for the purpose of their servant. Again, the band stand no doubt is erected for the benefit of the public. But it may be possible, although no charge could be made to the public for listening to the band or for entering the ground, that the bandmaster might solicit contributions from the public and obtain contributions from the public to a considerable amount, and for the privilege of playing there and soliciting contributions from the public he might pay a sum of money to the vestry, and there might then arise beneficial ownership. So with regard to the refreshment-room. That is let, and they do derive a sum of money—I think a sum of 25*l.*—a year for the use of the refreshment-room. There, again, there is a beneficial occupation, and so I think in many ways the vestry might derive, consistently with the terms on which they hold the land, a beneficial occupation, and it cannot be said that this land is *extra commercium*, or that, although it is dedicated to the use of the public, the vestry are prohibited from obtaining any profit from it. Then it was said in the argument that they could not let it at a rack rent. Letting it at a rack rent, I think, means merely that the land is let for the best return that can be obtained for it. But I shall adopt the dictum of Collins, J. in *Vestry of St. Giles, Camberwell v. London Cemetery Company (sup.)*, where, in considering this question, he says: "But where the owners are entitled by statute to use it beneficially, receiving as profit a lump sum which is equivalent to a rack rent, the land is not *extra*

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commercium. It would be too narrow a conclusion that because the rent is not received in the shape of a rack rent the land is *extra commercium*, and the owners are not owners within the meaning of the statute." Therefore, I think, here there is a beneficial occupation, and, there being a beneficial occupation, I think that the vestry are the owners of the land within the meaning of the definition given of owners, and that they are liable to contribute to the expense of the new street.

PHILLIMORE, J.—I am of the same opinion. I wish to express my obligation to the learned magistrate for the way in which he has stated the case and assisted us with his reasons. By the joint effect of the two Metropolis Management Acts the owners of houses and land bounding or abutting upon a new street are bound to pay to the vestry expenses of paving and the other expenses of making up the new street, and the owner means the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if the lands or premises were let at a rack rent. The very large and general words of this enactment have been limited by decisions (and that, I think, is the way in which we should look at it) to this extent, and to this extent only, that if the lands or premises are for all time incapable of being beneficially used, they are not to be treated as lands which are or could be let at a rack rent. At one time I thought perhaps the right thing was to say "if the lands could never be legally let at a rack rent," but the decision in *Vestry of St. Giles, Camberwell v. London Cemetery Company (sup.)* and, I think, the language of Lord Watson in *Great Eastern Railway Company v. Hackney Board of Works (sup.)* point to the fact that that is somewhat too narrow a view. The lands must be, as Bowen, L.J. points out with regard to the buildings—the same thing would be true of the land—physically capable of beneficial enjoyment, of profitable enjoyment. They must be also legally capable of "profitable enjoyment"—apparently on one decision not necessarily capable at the moment, but legally capable at some time or other. If those two conditions are satisfied, then the lands fall into the ordinary category and are lands abutting on the street which have an owner, and, if there is an owner in this case, there is no question it must be the vestry. Now, what one has to consider is, whether this land is capable of any profitable or beneficial enjoyment. I agree it is not capable of much. I agree that some of the suggestions made in the argument—possibly some I made myself—are rather strained and fanciful, but the fact remains, first of all, that actually at this moment a portion of the land is beneficially enjoyed; and, secondly, that beneficial and profitable enjoyment can to some extent be got possibly out of every particle of the land. I quite agree primarily the use for which this land is destined is for the recreation and enjoyment of the public. Nothing must interfere with that, and consistently with that, sometimes really assisting that, there may be uses out of which profit can be derived. Mr. Macaskie in his argument, for which we are very much indebted to him, has tried to point out to us to-day that the vestry must be

restricted by the express provisions of sect. 5 of the Open Spaces Act 1881 (44 & 45 Vict. c. 34). It is not necessary to consider whether, if the section did apply, it would have all the restrictive force for which he contends, because this land is, in my opinion and in the opinion of my learned brother as I understand, not to be deemed to be acquired under that Act, but under the more beneficial Acts of 1877 and 1887, and I repeat again what I said in the course of the argument, that there is in my opinion excellent good sense—as there always was in every expression of the late Sir George Jessel—in the observation made by him, in delivering the opinion of the Court of Appeal in the case which I refer to, that if a public body was enabled to exercise public powers under either of two statutes, they were to be deemed, if there was any difference in respect of the two, to take them under the statute under which they took most beneficially. Therefore I am of opinion that this vestry must be taken to have acquired this land under the Acts of 1877 and 1887. It is very possible that the Act of 1881 and the powers acquired under it remain for the purpose of acquiring churchyards, cemeteries, and burial grounds, and it is very possible that under no other Act can the vestry take such open spaces. It may very well be that when they take such open spaces, sentiment, apart from other reasons, may make it desirable that they should make no money out of those particular open spaces, and therefore with regard to those particular open spaces they may be specially restricted. We have not to consider that here, because they take under the general powers, and, taking under the general powers, they have the powers which all owners have except so far as they are restricted. They are restricted by the trust, and that really is the only restriction we ought to look at. No doubt they are also restricted by the fact that the vestry being a public body can only spend their money upon certain definite public objects, and would be proceeding *ultra vires* if they embarked in trade or similar enterprises. But I do not think we ought to look at that when we look at the land. The question we have to look at is whether the land can be beneficially used, and not whether the particular owner at the moment can beneficially use it. It may be that the vestry could beneficially use it in many ways besides those which my learned brother has indicated. It is certain they could use it in many other ways. Certainly they do use it in some ways at present. Any hardship which might follow from the land being deemed to be contributable to the assessment of the street can be got over; as has already been pointed out, the vestry themselves, acting fairly and reasonably, and not acting unfairly, can make a separate minor assessment upon the land to that which they make upon the houses. It is clear this land of the park is by no means so profitable as the opposite land of the houses, but it does bring in, within the purview of the Act, some profit to its owners, which are the vestry, and therefore to some extent it ought to contribute, in my judgment, to the paving of this street. Therefore the assessment which was made upon the respondent in this case, which did not take into consideration any contribution by the vestry as the owners of the park, was a bad assessment, and the learned magistrate was right in dismissing

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the information, and this appeal must be dismissed.

Appeal dismissed.

Solicitor for the Fulham Vestry, *T. Blanco White*.

Solicitors for the respondent, *Cooper and Bake*.

Jan. 14 and 19, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

LEIGH DISTRICT COUNCIL (apps.) v. KING (resp.) (a)

Highway—Substitution—Formalities under Highway Act 1835—Presumption—Evidence as to highway repairable by the inhabitants at large.

In 1842 R.-grove was, pursuant to a resolution passed at a vestry meeting, substituted for an older highway called C.-lane.

R.-grove ever since 1842 had been open to and used by the general public, and upon one occasion many years back it had been repaired by the surveyor of L., but whether in his capacity as surveyor or not did not appear.

No surveyor's accounts were produced, nor was any evidence given as to any certificate of justices having been enrolled or steps taken under sects. 23 or 84 of the Highway Act 1835.

Held, that the justices were justified in finding that R.-grove was a highway repairable by the inhabitants at large.

CASE stated on an information laid on behalf of the appellants setting forth that the respondent, in pursuance of sect. 7 of the Private Street Works Act 1892, served on the appellants a written notice stating that he objected to the proposals of the appellants in regard to the levelling, paving, metalling, flagging and channelling, and making good of a certain street known as Rectory-grove, on the ground that the street was in whole or in part a highway repairable by the inhabitants at large, and, in consequence of such notice, the appellants were precluded from making up the street until the objection had been heard and determined in pursuance of sect. 6 of the Act.

On the 15th Feb. 1900 the justices, having heard the information, dismissed it, holding, as a matter of fact, that the street was a highway repairable by the inhabitants at large, and they directed the apportionment to be quashed or amended accordingly.

The apportionment having been made and approved and deposited under the authority of sect. 6 of the Private Street Works Act 1892, and the respondent having by his notice of objection as set out in the information taken objection thereto within the time limited by sect. 7 of the statute, the only question at issue and to be determined by the justices under sect. 8 of the statute was whether or no the street called Rectory-grove was in whole or a part a highway repairable by the inhabitants at large.

The evidence adduced showed that after the 20th March 1836—to wit, about the year 1842—the road on the north side of the rectory, now known as Rectory-grove, had been substituted for an older public highway, which was in front

or to the south of the rectory of Leigh, and was known as Chess-lane, and that such substitution was pursuant to a resolution at a vestry meeting held pursuant to notice dated the 8th Jan. 1842 for the parish of Leigh in 1842, whereby the meeting resolved to stop up a road in front of the rectory (being the road called Chess-lane), and open a new road at the back through Sweeting's and Parsonage Fields agreeable to the plan produced in vestry. The road called Rectory-grove leads towards the same spot as that which Chess-lane formerly led. Soon after 1842 trees were planted on the northern hedge of Rectory-grove by the Rev. Eden, then rector of Leigh and the predecessor of the respondent, but there was no evidence of any repairs having been done to Rectory-grove by the Rev. Eden or any of his successors or the respondent.

There was evidence of repairs on one occasion to Rectory-grove many years back by Mr. Webb, the surveyor for Leigh, but whether as surveyor or otherwise did not appear. There was no evidence of repair by the surveyor beyond this, but there was also evidence that the Leigh Parish Council, the immediate predecessors of the appellants, had repaired the footpaths in Rectory-grove. Rectory-grove has ever since 1842 been open to the general public. No surveyor's accounts were produced, nor was any evidence given as to any certificate having been enrolled or steps taken under sect. 23 or sect. 84 of the Highway Act 1835.

On behalf of the appellants it was contended that no highway after the 20th March 1836 (the date of coming into operation of the Highway Act 1835) could be or become a highway repairable by the inhabitants at large until the steps mentioned in sect. 23 or sect. 84 of that Act had been taken. That Rectory-grove had been shown to have been made since the 20th March 1836, and that as there was no evidence of the steps necessary under sects. 23 or 84 of the Highway Act 1835 having been taken, it could not now be a highway repairable by the inhabitants at large.

On behalf of the respondent it was contended that Rectory-grove is a highway within the definition of sect. 4 of the Highway Act 1835. That all highways *prima facie* and at common law are repairable by the inhabitants at large. That such liability was displaced by sect. 23 of the Highway Act 1835 with respect to certain roads only—namely, a road or occupation way made, or hereafter to be made by and at the expense of a private individual or private person, body politic or corporate. That the onus of proving that Rectory-grove was a road so made as to displace the common law liability of the parish to repair it, was on the appellants; that they had given no evidence of Rectory-grove having been so made. That in the absence of such evidence sect. 23 did not apply to Rectory-grove, and the common law liability of the inhabitants to repair same remained unaffected by the Highway Act 1835. That the terms of the resolution of the vestry in 1842 constituted evidence on the other hand that the opening of the new road and its making up was the act of the parish, and not of a private person, body politic or corporate. That there was evidence of repair by the parish surveyor, and clear evidence of repair to the footpath by the parish council.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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The court found as a matter of fact that Rectory-grove was a highway repairable by the inhabitants at large.

The question for the opinion of the court was whether there was evidence to justify such finding.

Macmorran, Q.C. and E. Cunningham Glen for the appellants.—After the coming into operation of the Highway Act 1835—namely, the 20th March 1836, no highway could be or become a highway repairable by the inhabitants at large, unless all the steps and formalities prescribed by either sect. 23 or sect. 84 of that statute had been complied with. The evidence set out in the case does not show that this has ever been done. It is clear that all the formalities must be complied with, for in *Reg. v. Dukinfield* (4 B. & S. 158) where a landowner had obtained and enrolled the certificate of two justices under sect. 23, but it had not been made to the satisfaction of the surveyor, it was held that the road had not become repairable by the inhabitants at large. In *Eyre v. New Forest Highway Board* (56 J. P. 517) it was laid down by Willa, J. and approved by the Court of Appeal that where there was no public right of way prior to the Highway Act 1835, there was no duty to repair or right to repair attached to the highway authority unless the procedure prescribed by the statute had been complied with. The same principle appears as to the strict compliance with the requirements of the statute in *Reg. v. East Hagbourne* (1 Bell C. C. R. 135; 5 Jur. N. S. 346) which was the case of a road marked out by inclosure commissions, which straightened and widened an old highway repairable by the parish, in the year 1849. They also referred to

Cubitt v. Masse, 29 L. T. Rep. 244; L. Rep. 8 C. P. 704.

These decisions all show that where a highway has not been in use as such before 1836, then, unless all these steps are taken, the inhabitants are not liable. In *Rishton v. Haslingden Corporation* (77 L. T. Rep. 620; (1898) 1 Q. B. 294) the place in question was formed before 1816, and had always been open both ends into highways, and it had existed in the same condition for seventy years, and since its formation it had been used by foot passengers without interruption. Neither public nor private repairs had been proved. It was there held that it was a footway repairable by the inhabitants at large. Channell, J. said: "The second question is the one which must decide this part of the case. . . . If it was a highway before 1835, it would be repairable by the inhabitants at large without any formalities having been gone through to take it over." The road in this case has only been a highway since 1842. The parish as such cannot make a highway at all, and the surveyor of highways must be either an individual or body politic within the section. The only powers of the parish council are those contained in sect. 13 (2) of the Local Government Act 1894 (56 & 57 Vict. c. 73). The parish council have no right to repair the road. They are not a highway authority in any case.

Mattinson, Q.C. and Earle for the respondent.—The facts are obscure owing to the lapse of time, but the question which is raised here is, On whom does the burden of proof lie? *Prima facie* all

highways were repairable by the inhabitants at large, and this road undoubtedly was a highway. The onus of proof is on the appellants to show that the road was intended to be made a highway under sect. 23. This road has been a highway since 1842, and there is a presumption that it is repairable by the inhabitants at large. There is no evidence that the formalities required by sect. 23 have not been complied with, and as the road has been used since 1842 by the public, it is only proper to assume that those formalities were complied with. In *Glen on Highways*, 2nd edit., at p. 87, in dealing with the liability of the inhabitants at large he says: "The liability extends to modern as well as ancient highways, subject, however, to sect. 23 of the Highway Act 1835." In *Rees v. Lordsmere* (15 Q. B. 696; 15 Jur. 82) Lord Campbell, C.J. says: "I am of opinion that the rule of law is that the parish is liable to repair all highways, whether new or old. I concur with what is said on that subject by Abbott, C.J. (*Rees v. Netherthong*, 2 B. & Ald. 179)—'By the general rule of law the inhabitants of any district who were liable to the repair of all the roads there, previously to the introduction of a new highway, are also liable to the repair of that highway.'" It is true that there is an exception created by sect. 23 of the Highway Act 1835, but that we are within that must be proved by the appellants. We say that sect. 23 has no application here, but even if it has, there is no evidence in the case to show that the steps necessary were not complied with. In *Williams v. Eylon* (4 H. & N. 357; 5 Jur. N. S. 770) no proof was given that the requisite order of justices had ever been made where a highway was being stopped up, but it was held that from the road not being used for a long period it might be presumed that there was such an order. They also referred to

Phillips v. Halliday, 23 Q. B. Div. 48; (1891) A. C. 228.

We contend that we are not within sect. 23 at all. That section only applies to a road made by a person or body politic or corporate and dedicated to the public, and not to a road of this description at all. It is quite clear that this section does not apply to all roads from the judgment of Coleridge, J. in *Reg. v. Thomas* (7 E. & B. 399; 3 Jur. N. S. 713) when dealing with a road that had been vested in commissioners for twenty-one years, but had ceased to be so vested upon the expiry of a Turnpike Act in 1848. He said: "The owner of the land which had been taken for the turnpike road might decline further to repair it or the public to use it. But the owner might allow the public to continue to use the road; and if the public did use it as a highway, the burden of repair would fall upon the parish, whether they would or not. . . . But it is said that, however that might be at common law, sect. 23 of the Highway Act 1835 interposes a difficulty, for this was a road which it was sought to turn into a highway. But this depends upon whether sect. 23 applies to such a case as the present. It appears that the Legislature contemplated the case of a private person making a road for the purpose of dedicating it, or setting out a private driftway under an Inclosure Act, and not such a case as this. Neither do the words of the section embrace such a case. . . . I

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never heard it laid down that all roads were included in the enactment in sect. 23." They also referred to

Healey v. Corporation of Batley, L. Rep. 19 Eq. 375.

Macmorran, Q.C. in reply.—The road came into existence after 1836, and therefore the presumption is rebutted that it is repairable by the inhabitants at large, and the burden of proof shifts to the respondent. The acts of the vestry showed that they meant to proceed under sect. 84 of the Highway Act 1835, but the respondent cannot show that all the formalities of that section have been complied with. *Cur. adv. vult.*

BRUCE, J.—I agree with my learned brother in the result at which he has arrived. There was, as it seems to me, sufficient evidence to justify the justices in finding that the road in question was repairable by the inhabitants at large. I think it is clear that the old highway, known as Chess-lane, was repairable by the inhabitants at large. I think the reasonable conclusion upon the evidence is, that the new highway, known as Rectory-grove, was in the year 1842, by a resolution of the vestry, substituted for Chess-lane under the provisions of sect. 84 of the General Highway Act. The difficulty arises because there is no direct evidence of a view by two justices of the peace, and of the other formal steps necessary to be taken in order to comply with the provisions of sect. 85, and the following sections of the General Highway Act. But if these provisions were complied with, then it is clear that under sect. 92 of the General Highway Act the new highway became repairable by the inhabitants at large just as the old highway was repairable. The question is whether in the circumstances the justices were justified in finding that the formal steps had been duly taken. It is clear that since 1842 the old highway has been stopped up and has ceased to be used, and the new highway has in fact been substituted for it. It is, I think, a very violent presumption that the public should acquiesce in the stopping up of the old road unless it were done in a regular way, and I think the justices may well have presumed that the certificate of the justices was duly granted, and the formal proceedings duly taken to comply with the provisions of sect. 85. After so long a period a certificate of the justices may have been lost, and although it is difficult to presume that the certificate was enrolled among the records of quarter sessions, yet the provisions as to enrolment are apparently directory only, and the neglect to enrol would not affect the validity of the proceedings: (see *Deponthieu v. Pennyfeather*, 15 E. R. 603; 5 Taunt. at p. 634). It is further difficult to assume that the order of quarter sessions was duly made, but I think that the dictum of Wightman, J. in the case of *Williams v. Eytton* (4 H. & N. 358) that the inclosure of a road for a period of about twenty-eight years is sufficient to warrant the court standing in the place of a jury in presuming that everything was rightly done, and that an order of two justices was obtained, afford a guide to assist us to a conclusion in the present case. Here the period of time was much longer than twenty-eight years—a little short of fifty years—and although the facts are not the same as the facts in *Williams v.*

Eytton, yet the principle laid down in the dictum I have quoted appears to me to apply. There was further the evidence that the new road had been repaired by the surveyor of the district. It did not appear in what capacity the surveyor repaired the road, but in the absence of evidence I think it would be unreasonable to presume that the surveyor had paid for the expenses of repair out of his own pocket. For these reasons I am of opinion that the court cannot disturb the finding of the justices.

PHILLIMORE, J.—In this case the appellant district council seeks to make the respondent liable for a proportion of the expenses of converting Rectory-grove into a paved and made-up street, and the respondent contests his liability upon the ground that Rectory-grove was, before it was so made up, already a highway repairable by the inhabitants at large. There seems little doubt that the road called Rectory-grove was laid out about the year 1842, and has ever since been used as a highway, and that when it was so laid out an older highway on the other side of the rectory ground was closed. This older highway must be taken upon the facts stated in the case to have been one repairable by the inhabitants of the parish. The appellants say, however, that the new highway never became repairable by the inhabitants of the parish, because it was laid out after the passing of the Highway Act (5 & 6 Will. 4, c. 50), and that since that Act a new highway only becomes so repairable if the conditions either of sect. 23 of that Act (applicable to additional highways) or sects. 84-92 (applicable to substituted highways) have been fulfilled, and that there is no proof that these have been fulfilled, or alternatively, that there is proof that they have not been fulfilled. I do not think that it follows that in every case where an additional highway is laid out the conditions of sect. 23 must be fulfilled. I think this is generally the case, but there are exceptions, of which *Reg. v. Thomas* (7 E. & B. 399) gives an instance where the section does not apply. I think it only applies when the road is "made by and at the expense of any individual or private person, body politic or corporate," and it is clear that if the parish itself through its surveyor made a road, it would not come under this section as the later provisions of the section itself show. It may be that a surveyor so employing the parish funds would be acting *ultra vires*, but I can quite conceive that in days when there was less centralisation and no outside audit, the making up of a short piece of road, say to cut off a loop, might be deemed to come within the power of repair which a surveyor acting under the orders of the vestry would possess. I agree, however, with counsel for the appellants that it is more probable that this highway was intended to be a substituted one, to which sects. 84-92 would apply. If sect. 23 applied, a certificate by two justices, which ought to be enrolled at quarter sessions, is a necessary condition before the highway can become repairable by the inhabitants. But I do not think that the actual enrolment is a necessary condition. If it be a substituted highway, the consent of the vestry, a certificate by two justices, an order of quarter sessions, and a further certificate by two justices of the good condition of the new road, which certificate ought also to be enrolled, are necessary conditions before the substitution can

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be accomplished and the old highway stopped. I am, however, not sure that an incomplete substitution made with the assent of the vestry, might not, though no order of quarter sessions was obtained, operate as the making of a new road under sect. 23 though as the substitution were incomplete the old highway would remain unclosed. This being the law, the facts as found by the case are a resolution of the vestry expressed in language which looks as if the parishioners were rather active instead of mere consenting parties to the *de facto* opening and using of the new highway, and the *de facto* closing of the old one, acquiesced in apparently by everybody since 1842, and one act of repair of the new highway by a person who was surveyor and probably acted in his capacity of surveyor. Against this evidence in favour of the new highway being one repairable by the inhabitants is to be set the fact that no certificate of justices or order of quarter sessions is forthcoming. Upon this evidence the justices, who have stated the case have found that Rectory-grove is a highway repairable by the inhabitants at large; and if there is any evidence to support their decision it must stand. I think there is. Indeed, I think I should have found the same way. Assuming that this case must come under either sect. 23 or under sects. 84-92, and I have stated that it may not come under either group of sections, all that is required by sect. 23 is a certificate by two justices, which ought to be enrolled, but which, as I have said, need not be. It is quite possible that such a certificate may be lost; I can conceive it having been handed to the then rector as a sort of title-deed and perhaps not handed on to his successor. If the case necessarily comes under sects. 84-92 no doubt there is much more difficulty in supposing the loss of an order of quarter sessions. But the duty of the judges on matters of ancient possession or of the exercise of public rights, is to presume in favour of long, open, and continuous usage. Many cases referred to in the course of the argument show this; and others could be quoted. The contention of the appellants is far reaching. Not only is the new highway not repairable by the inhabitants, though they have used it since 1842, but the old closed highway ought to be opened and could now be opened. The owner of the soil who has enjoyed undisturbed possession of the soil of the old highway for the same period would have his property seriously injured, and the parishioners or the subsequent highway board (if there was one) and the present appellant district council itself would have been and be now indictable for suffering the old highway to go out of repair. I am of opinion that my judgment should be for the respondent.

Appeal dismissed.

Solicitors: *G. E. Wright-Motion; Kingsford, Dorman, and Co., for Gregson, Southend.*

Monday, Jan. 21, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

SOUTHALL NORWOOD URBAN DISTRICT COUNCIL (apps.) v. MIDDLESEX COUNTY COUNCIL (resps.). (a)

River—Pollution—Agreement—Breach of agreement—Liability of local authority—"Causing or suffering to flow"—Middlesex County Council Act 1898 (61 & 62 Vict. c. cci.), s. 13.

By an agreement made between the predecessors of the appellants, the local board, and the owner of a margarine factory, it was agreed that the owner of the factory, subject to certain conditions, should be entitled to discharge the liquids and effluent from the factory into the sewers of such board.

A sewage farm, owned by the board, became vested in the appellants, and, owing to a breach of the agreement by the factory owner, the soil of the farm became clogged and rendered less capable of filtering the sewage in the appellants' district.

By reason thereof sewage and other offensive matter flowed into the river B. from the appellants' sewage works.

Held, that the appellants "caused or suffered to flow or pass" sewage and other injurious matter into the river B. within sect. 13 (1) of the Middlesex County Council Act 1898.

CASE stated on a summons charging the appellants with having, contrary to the Middlesex County Council Act 1898, caused and suffered sewage and other offensive matter to flow and pass from land and premises known as the Southall Norwood Sewage Farm, and owned and occupied by them, into the Grand Junction Canal, a canalised portion of the river Brent.

1. Prior to 1891 the rural sanitary authority of Hillingdon had acquired for the purposes of a sewage farm seventeen acres of land adjoining and abutting on a canalised portion of the river Brent at the junction of the parishes of Norwood, Isleworth, and Hanwell, and had constructed thereon sewage works upon which the sewage of the precinct of Norwood was treated, the effluent therefrom being discharged into the river.

2. In the year 1891 the precinct was formed into an urban sanitary district and a local board was constituted for such district, and the farm and works were vested in that board, which by virtue of the Local Government Act 1894 became and is now known as the appellants in this case.

3. In 1894 the local board, the predecessors in title of the appellants, was required by the owners of land within its district upon which it was intended to erect a margarine factory to afford facilities for carrying the liquids and effluent proceeding from the factory into the sewers of the board, and an agreement, dated the 23rd Jan. 1894, was entered into between the board and the owner whereby it was agreed that, subject to the conditions therein mentioned, the owner for the time being of the factory should be entitled to discharge the liquids and effluent from the factory into the sewers of the board.

4. One of the conditions mentioned in the agreement was that the owner of the factory should erect or cause to be erected and maintained in good and proper working condition at his own expense to the reasonable satisfaction of the board

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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on part of the land upon which the factory was to be erected a settling tank or settling tanks for the purpose of extracting so far as might be practicable all solid fat or fatty matters in suspension from the liquids and effluent.

5. The factory having been erected and disputes having arisen between the board and the owner of the factory as to his compliance with the above condition of the agreement, on the 14th May 1896 an action was commenced by the board against him in the Chancery Division of the High Court of Justice, wherein the board claimed an injunction restraining the owner of the factory and his servants, agents, and workmen from discharging the effluent from the works at Southall into the sewers of the board until such effluent had been properly purified, and from causing or permitting the liquids and effluents from the works to flow into or remain in the sewers or drains of the board so as to become or cause a nuisance, damage, or annoyance to the board, and from committing a breach of the contract of the 23rd Jan. 1894, and for damages.

6. The action came on for trial on the 1st June 1897, and upon the third day of the trial an order, by consent, was made by Byrne, J., the defendant in the action expressing his intention to execute on or before the 7th Nov. 1897 further works, and in case the board should not be satisfied with what should have been done by such date, it was ordered that it be referred to the arbitrator mentioned in the order to say whether there was a settling tank or settling tanks sufficient when efficiently worked for the purpose of extracting so far as might be practicable all solid fat or fatty matters in suspension from the liquid and effluent discharged from the factory into the sewers of the board, and that if the arbitrator was of opinion that they were not sufficient, then the arbitrator was to say what settling tank or tanks would be sufficient for the purpose aforesaid and that his award should be binding on the parties to the action.

7. The board not being satisfied with the further works executed pursuant to the order of Byrne, J., the question whether or not there was on the factory a settling tank or settling tanks sufficient when efficiently worked for the purpose of extracting so far as was practicable all solid fat or fatty matters in suspension from the liquid and effluent discharged from the factory into the sewers of the board was submitted to the arbitrator specified in the order for his decision, and the arbitrator, after hearing the parties to the reference, on the 25th July 1898 made and published his award whereby he awarded that the settling tank or settling tanks and other alterations in the defendants' plant in his award specified would be sufficient for the purpose of extracting so far as might be practicable all solid fat or fatty matters in suspension from the liquid and effluent referred to in the order of court.

8. Notwithstanding the award the liquid and effluent discharged from the factory into the sewers of the board and of the appellants still contained solid fat or fatty matter in suspension which is in itself objectionable and difficult to treat, and which when mixed with sewage in the appellants' sewers renders it more difficult for the appellants to effectually purify the sewage, and the effect has been to clog the land in the appellants' farm, which is used for filtering the sewage,

and it has become saturated with sewage and is rendered less capable of effectually filtering the sewage of the appellants' district.

9. On the 15th Aug. 1899 the respondents gave the appellants notice under the Middlesex County Council Act 1898 requiring them to discontinue, within three months, the flow or passage into the river Brent of sewage or any other offensive or injurious matter from their sewage works.

10. In Sept. 1899 the appellants discovered that the drain of certain chemical works in their district had without their knowledge or consent been connected with a sewer belonging to them by means of which large quantities of effluent were discharged from the chemical works into the appellants' sewer.

11. The effect of the discharge of the effluent from the chemical works into the appellants' sewers being while it lasted to render it still more difficult to purify the sewage discharge from such sewers upon the appellants' farm, notice was (after negotiations had taken place between the appellants and the owners of the chemical works) served by the appellants upon the owners of these chemical works on the 10th Dec. 1899 requiring them to disconnect from the appellants' sewers the drains by means of which the effluent was discharged from the chemical works into the sewers, and the drains were disconnected in accordance with such notice.

12. It was proved that sewage and other offensive and injurious matters had flowed or passed into the river Brent from the appellants' sewage works subsequently to the expiration of three months from the date of the notice of the 15th Aug. 1899, but the justices were satisfied that such flow or passage would contain sewage and other offensive and injurious matters so long as the reception of effluent from the margarine-factory and from the chemical works and the infusion of such effluent into their system of sewage continued.

13. On behalf of the appellants it was contended that they had not under the circumstances hereinbefore stated caused or suffered sewage or other offensive or injurious matter to flow or pass into the river Brent within the meaning of sect. 13 of the Middlesex County Council Act 1898, and that the justices had therefore no power to require them under sect. 34 of that Act to abstain from carrying or suffering to flow or pass into the river Brent any sewage or any other offensive or injurious matter.

14. On behalf of the respondents it was contended that an offence had been committed by the appellants within the meaning of sect. 13 of the Act, and, further, that the evidence mentioned in pars. 3 to 8 inclusive and pars. 10 and 11 was inadmissible and afforded no defence to the summons.

15. The justices held that such evidence was admissible, but they were of opinion that the appellants were persons causing or suffering sewage or other offensive and injurious matter to flow or pass into the river Brent from the farm and works, and they accordingly ordered them to discontinue such flow or passage, but suspended the operation of their order for a period of six months.

16. The questions for the opinion of the court are: (1) Whether or not the evidence mentioned in pars. 3 to 8 inclusive and in pars. 10 and 11 was

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admissible; (2) whether or not the appellants were, under the circumstances hereinbefore stated, persons causing or suffering sewage or other offensive or injurious matter to flow or pass from their farm and works into the river Brent?

By the Middlesex County Council Act 1898 (61 & 62 Vict. c. cci.), s. 13:

(1) Whenever any sewage or any other offensive or injurious matter is caused or suffered to flow or pass into any stream, then and in every such case, even though such sewage or matter aforesaid had been lawfully so caused or suffered to flow or pass before the passing of this Act, the council may, under the hand of the clerk of the council, give notice in writing to the person causing or suffering the same to so flow or pass requiring him within a time to be specified to discontinue such flow. (2) The council may in like manner if they think fit at any time extend the time specified in such notice by another notice in writing. (3) If any person to whom any such notice is given thinks himself aggrieved by reason of the time allowed either by the original or any subsequent notice not being sufficient he may, not later than one month before the expiration of the time or extended time so allowed, by writing delivered to the clerk of the council demand an extension of such time, and in case the council refuse to comply with such demand, the question of such extension shall be referred to an arbitrator appointed by agreement, or, failing agreement, by the Board of Trade on the application of either party. (4) Any person to whom any notice is under this section given by the council shall notwithstanding anything in any other Act within the time allowed by such notice, subject to any extension of such time as in this section provided, discontinue the flow or passage of the sewage or matter to which the notice refers, and in default of so doing shall for every such offence be liable to a penalty not exceeding one hundred pounds, and to a daily penalty not exceeding fifty pounds.

And by sect. 34:

(1) A court of summary jurisdiction before which any person is summoned under this Act for any act or default causing or contributing to or alleged to cause or contribute to the pollution or obstruction of any stream may (in lieu of inflicting a penalty, or in addition to any penalty it may have inflicted for such offence) by order require such person to abstain from the commission of such offence, and, where such offence consists in default to perform a duty under this Act, may require him to perform such duty in manner in the said order specified. The court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the court seems meet. (2) Any person making default in complying with any requirement of an order of the court under this section shall be liable to such a penalty not exceeding fifty pounds a day for every day during which he is in default as the court may order.

R. Cunningham Glen for the appellants.—Upon the facts set out in the case it is clear that the appellants are not causing or suffering sewage or injurious matter to flow into the river. No offence has been committed under sect. 13 (1) of the Middlesex County Council Act 1898. Sanitary authorities are bound to afford facilities to factories for draining into sewers under sect. 7 of the Rivers Pollution Prevention Act 1876 (39 & 40 Vict. c. 75). He referred to Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 13, 27. Where there are no sufficient sewers, the remedy is given by sect. 299 of that Act. The proper remedy is a prerogative writ of

mandamus, not a penal proceeding as here. *In Reg. v. Staines Local Board* (60 L. T. Rep. 381) it was held that where a local board have not themselves constructed sewers which are a nuisance, but only have permitted them to be used by persons who have a right to use them, they did not "cause or suffer" sewage to flow. Where all that is possible has been done by a local authority to abate a nuisance, it was held that they were not responsible, but that the remedy is against the person causing the nuisance:

Ogilvie v. Blything Union Rural Sanitary Authority, 67 L. T. Rep. 18.

He referred to

Brown v. Dunstable Corporation, 80 L. T. Rep. 650; (1899) 2 Ch. 378.

The local authority here could not have cut off the connection with their sewer. That was decided in *Eastwood Brothers Limited v. Honley Urban Council* (1900) 1 Ch. 781. In that case the discharge of trade effluent prejudicially affected the disposal of sewage matter conveyed through the sewer. He referred to

Peebles v. Oswaldtwistle Urban District Council, 76 L. T. Rep. 315; (1897) 1 Q. B. 384; *sub nom.*

Pasmore v. Oswaldtwistle Urban District Council, 78 L. T. Rep. 569; (1898) A. C. 387.

The margarine and chemical factories could be stopped by the respondents from discharging into the sewers, but we, the appellants, cannot do so.

Lord Robert Cecil, Q.C. and Herbert Smith for the respondents.—On reading the preamble to the Middlesex County Council Act 1898 we see the reason for that statute. It there states that the river Brent becomes so polluted by sewage as to be a nuisance, and that further powers should be given the county council to enable them to improve the condition of the river. The flow of this sewage into the river Brent is admitted, but the appellants contend that they cannot prevent it. The appellants are not bound to receive margarine refuse into their sewers, but even if they do receive it, it can be effectually treated. The powers of the local authorities are dealt with by the Public Health Act 1875 and other statutes. They referred to

Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 15, 17, 19, 21, 91, 94, 95, 96;

Rivers Pollution Prevention Act 1876 (39 & 40 Vict. c. 75), s. 7;

Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59), s. 17;

Peebles v. Oswaldtwistle Urban District Council, 76 L. T. Rep. 315; (1897) 1 Q. B. 384.

The appellants have power to proceed against these works and factory under sect. 94 of the Public Health Act 1875 by serving a notice requiring an abatement of the nuisance. Although to some extent they may have contributed to the existence of this nuisance, they would not be precluded from proceeding against the works or factory:

St. Helens Chemical Company v. Corporation of St. Helens, 34 L. T. Rep. 397; 1 Ex. Div. 196.

They contend they cannot take proceedings because of the agreement of Jan. 1894, but if that is so, then the agreement must be bad, as it would be against public policy. They referred to

Ayr Harbour Trustees v. Oswald, 8 App. Cas. 623.

The case of *Attorney-General v. Dorking Guar-*

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dians (46 L. T. Rep. 573; 20 Ch. Div. 595) is an entirely different case to the present one. The same must be said of *Brown v. Dunstable Corporation* (80 L. T. Rep. 650; (1899) 2 Ch. 378). Here the appellants are not bound to receive trade refuse, but if they do they can treat it. *Ogilvie v. Blything Union Rural Sanitary Authority* (67 L. T. Rep. 18) proceeded entirely upon *Attorney-General v. Dorking Guardians* (*ubi sup.*). They referred to

Wycombe Rural Sanitary Authority v. Parsons, 71 L. T. Rep. 428; (1894) 2 Q. B. 780.

Reg. v. Staines Local Board (*ubi sup.*) is the strongest case against us. Here it is the grease coating that prevents the sewage going into the land. In that case there were no means of stopping the sewage from coming into their sewers, but here the appellants can prevent the margarine and grease from coming. It is said that we should have proceeded against the factory, but if the appellants felt aggrieved they could have proceeded under sect. 13 (3) of the Middlesex County Council Act 1898.

B. C. Glen in reply.

PHILLIMORE, J.—My learned brother has asked me to deliver the first judgment. We both think this conviction should stand. Section 13 of the special Act of Parliament under which the proceedings are taken says: "Whenever any sewage or any other offensive or injurious matter is caused or suffered to flow or pass into any stream, then and in every such case"—I omit the next words—"the council may under the hand of the clerk of the council give notice in writing to the person causing or suffering the same so to flow or pass requiring him within a time to be specified in such notice, but not being less than three months, to discontinue such flow or passage." The person so notified has the power of demanding an extension of time, and, if an extension of time is not assented to, can go to arbitration before an arbitrator appointed by the Board of Trade in order to obtain such extension of time as the arbitrator should think proper. I have omitted the words "Even though such sewage or matter aforesaid had been lawfully so caused or suffered to flow or pass before the passing of this Act" because upon the whole I do not think that those words apply to the particular case, at any rate as regards the district council now convicted. Here there was a sewage farm, constructed by the predecessors in title of the present appellant board, to which the sewage of the district was led, and on which it was treated, and from which it passed out by an effluent. We know what an effluent is. It is a modern word meaning the pure residuum, or as near as possible the pure residuum, after some impure substance has been deposited; and we may take it the effluent from the sewage farm—indeed no suggestion has been made to the contrary—was a pure effluent until the circumstances which I am now going to mention happened. It turns out that latterly the effluent is no longer pure. It carries sewage and other offensive matter into the river Brent, and if there is anybody who causes or suffers sewage or other offensive matter to flow or pass into the stream, then such person or body comes within the purview of sect. 13 of the Act. Now, it is said by the Middlesex County Council that the Southall

Norwood Urban District Council, who are the owners, occupiers, and managers of this sewage farm, are persons who "cause or suffer" this noxious matter to flow into the stream, and they have given them the proper notice provided under the section. The notice does not seem to have been appealed against, and after the lapse of time prescribed by the notice, the offensive matter continuing to pass into the stream, a summons was issued against the body, and the county council obtained a conviction. Now, Mr. Glen has said (and his argument was well worthy of attention, and has given my learned brother and myself a great deal of trouble)—and it is a satisfactory way of putting it on behalf of his clients—that you do not cause or suffer if you are merely acting ministerially; and he cited to us a number of cases of public bodies who had been held not to cause or suffer sewage to reach a river when all they have done has been not to interfere with the user of the pipes which they took over from some prior body, and into which pipes individuals have a right of passing their sewage. They do not use the pipes, but they simply leave them there; they do not make the pipe, and therefore it was suggested they do not "cause or suffer," because they could only stop the sewage passing through the pipes in one of two ways—either by a physical obstruction, which probably in the first instance would be a breach of their statutory duty, and, secondly, would create an intolerable nuisance, or by bringing actions against every individual who drained into their sewers, which would be an intolerable burden upon the local board, and apparently that is a burden which is not cast upon any one of Her Majesty's subjects without express words by the law of England. Those cases I quite understand. The result is, if there are existing sewers, and existing rights of draining into sewers, which communicate with the river, apparently there is no way of stopping that draining except by the provisions of sect. 299 of the Public Health Act 1875 and an order of the Local Government Board making a *mandamus* issue. There may be others, but there is no other way which, for the moment, is suggested to us. That is in cases where there is a passage of impure liquid into the river. But the existing defendant body has nothing to do with it; what is suggested is that the existing defendant body, having a right to pass, or duty to pass, certain filthy liquid into the river, are to be compelled to stop the passage of all filthy liquid into the river, either, as I say, by physical obstruction or by action. The courts have held they are not bound so to do; neither can an action lie, nor can they be indicted for using it. But that does not apply to this case at all. In this case there is a channel sending clean water into the river, and what the board have done, or their predecessors, and they have kept it so, is that they collect all the sewage of the district upon a sewage farm, and have then, when the sewage failed to be properly treated on the farm, issued the filthy effluent from the farm into the river. It seems to me that is a case in which they may well be said to have "caused or suffered" it to pass. I think one might say "caused," but certainly "suffered" if any meaning is to be attached to the word "suffered." I agree that "suffered" reasonably imports some act of

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omission on the part of the person "suffering." It does not mean that a person is entirely passive. Therefore, if Mr. Glen can satisfy us that his clients, the district council, have no option in the matter, and could not prevent the present filthy effluent going into the stream, they might be said not to have "suffered." How does he make that out? There is here a margarine manufacturer who is entitled under the Rivers Pollution Act to require the local board of health, or the district council, or whatever it might be, to take into their sewers the liquid products of his factory. I myself, as at present advised, do not think that that entitles him to send large masses of solid in solution. I think it only entitles him to send liquid products into the sewers. Instead of leaving the man to his ordinary rights, the local board, which I think is the present district council—the actual present people only under a different title—entered into an arrangement, which may or may not have been improvident, with the margarine maker, under which he was given, in addition to his legal rights, certain contractual rights, and they were given certain contractual rights as against him. They say he has not fulfilled his duty, and that he has not behaved according to his contract. They brought an action against him before one of Her Majesty's judges, and by consent judgment was given referring the matter to an arbitrator, and the arbitrator made an award that if he did certain things he then would be discharging his duty, and, what is more important, that he then would be retaining all the solids and sending down nothing except the liquid on to the premises of the district council. The case does not find that that award has been enforced or that there has been any attempt made to enforce it; and with regard to what Mr. Glen said about its not being the duty of somebody to bring an action I agree in general, but I am not quite sure in a case like this there would not be a duty on the district council to attempt to enforce the award. Be that as it may, as things are, the fatty matter from the margarine factory comes upon the soil of the sewage farm. If it was the fatty matter only that passed from the soil of the sewage farm into the effluent, and which would be only the pollution of the effluent, there might be more to be said in favour of the district council; but the effect of the reception of the fatty matter on the farm is that as the council conducts its farm, the farm gets coated with grease, and the sewage does not sink into the soil, but passes down the effluent into the river. Some fatty matter also passes into the river. I do not care about the fatty matter. The point is that the sewage, which possibly would never have come to the effluent or to the farm if it had not been brought there, is now brought there and allowed to pass on down the current into the river. It seems to me the defendant council are suffering the fatty matter to come into the river. I think upon the true construction of the case, although I agree the findings on that point are not as clear as one would wish, it would also appear that even as things are—even if the manufacturer did continue to send without further filtration the whole of his refuse, including the solids, as he does at present into the sewers of the district council—there is nothing to show that the district council could not, by some

form of treatment at the sewage farm, nevertheless prevent the effluent being otherwise than pure. I think that is the true view of the case, and I think the word "system" in par. 12 refers—at any rate, in part—to the scheme or mode in which the council is treating the fatty matter and the other sewage too. Now, that being the case, again for another reason, there is no compulsion on the district council. It may be very expensive, or disagreeable, or very hard on them that they should be put to further expense, but still there is nothing which compels them, first, to receive these solids, and, secondly, so to treat the sewage that the result is that there is an impure instead of a pure effluent. There is another difficulty which possibly may have led, so far as I was concerned, to a restatement of the case, which is that as the case actually stands the condition is caused not only by the existence of the margarine manufacturer and his refuse, but also by the existence of some chemical works which apparently have been stopped. Mr. Glen suggested that if there was weight to be laid on that clause it would be better to restate the case. I do not rest my judgment upon that at all. What I rest my judgment upon is this: having taken over this place from its predecessors in title, the district council collect the sewage on this place, treat it, and discharge it through an effluent, and *prima facie* they have to excuse themselves from discharging a filthy effluent into the river. The excuse they offer is not sufficient. Either they ought not to have made an improvident contract, if it is improvident, or, having got a contract, they should see the contract is properly carried out, and either not receive the stuff they are not bound to receive, or take the trouble of enforcing their right under the award, and have the stuff purified, or, finally, if they must receive the stuff in its present state, they ought to take other steps on the sewage farm to purify the effluent. I therefore think there must be judgment for the respondents.

BRUCE, J.—I agree with my learned brother in the conclusion at which he arrives. I also agree with the reasons he has given, and I have nothing to add.

Appeal dismissed.

Solicitor for the appellants, A. Lawrence Houlder.

Solicitor for the respondents, Sir Richard Nicholson.

Jan. 17 and 21, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

PIGGOTT (app.) v. GOLDSTRAW (resp.). (a)

Highways—Dedication to public use—Obstructions—Embayments—User by public—Cleaning and repairing by highway authority—Evidence of dedication—Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34), s. 69.

A building erected in 1869 upon land leased from the corporation of L., who were the owners of the freehold, was built with recessed windows or embayments on the ground floor, and the main wall of the building on either side projected beyond the embayments and overhung them above the windows, the embayments being some 11 in. deep. In 1899 the tenant of the house recon-

(a) Reported by W. W. OBE, Esq., Barrister-at-Law.

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structed these windows so as to cause them to project 3in. beyond the main wall, and so as to fill up the embayments. During the period from 1869 till the reconstruction in 1899, the paving of the embayments was not distinguishable or marked off from the paving of the footway, and had been cleaned and repaired by the corporation, as the highway authority, at the same time as the paving of the footway, and the public were in the habit, without any objection by any lessee of entering upon and passing in and out of the embayments, the windows of which were used for the exhibition of shop goods.

Upon an information against the tenant for causing an obstruction in the street by building so as to fill up the embayments :

Held, that neither the user by the public nor the fact that the paving of the embayments was not marked off from the paving of the footway and was cleaned and repaired by the corporation as highway authority was any evidence of the dedication of the embayments to the public use as part of the highway, and that therefore no obstruction had been committed.

CASE stated by the deputy stipendiary magistrate for the city of Liverpool.

At a petty sessions held on the 18th May 1900 before the learned magistrate the appellant was charged by the respondent, a surveyor of buildings for the corporation of Liverpool, on an information for that she, being the occupier of a building—to wit, a shop—situate at the junction of Church-street and Church-lane (being 16, Church-street), within the city of Liverpool, and having been served with a notice requiring her to remove the projecting windows or shop fronts erected in front of the building No. 16, Church-street, which windows or shop fronts had been erected in such a manner as to be obstructions to the safe and convenient passage along the streets, did not within fourteen days remove the obstructions.

The summons was taken out under sect. 69 of the Towns Improvement Clauses Act 1847.

The magistrate convicted, and ordered the appellant to pay a fine of 1s. and 4s. 6d. costs.

The following facts were at the hearing proved or admitted before the magistrate: (a) The building in question, of which the windows were alleged to be obstructions to the safe and convenient passage of Church-street and Church-lane, was originally built in the year 1869 upon land leased for a term of seventy-five years from the corporation of Liverpool, who were and are the owners of the freehold. (b) The building was in the year 1869 built by the lessee with recessed windows or embayments on the ground floor in accordance with a plan submitted to and approved by the committee having charge of the leasehold property of the corporation. (c) The lease mentioned in par. (a) was on the 28th July 1888 surrendered to the corporation, and a lease of the land and buildings for seventy-five years from the 7th April 1888 granted to one Gardner. (d) The lease mentioned in the last paragraph was in 1888 assigned to N. Russell and W. Russell. On the 25th March 1900 this lease was surrendered to the corporation, and a lease of the land and buildings for seventy-five years from the 5th April 1899 was granted to the above N. Russell and W. Russell. (e) On the 16th Oct.

1899 N. Russell and W. Russell agreed to underlet the land and buildings to the defendant. (f) In Nov. 1899 the shop windows of the building on the ground floor were reconstructed so as to cause the same to project 3in. beyond the line of the main wall of the building (which is the building line of the streets in which the building is situate) and so as to fill up the embayments. It was admitted by the informant that the projection of 3in. beyond the building line did not contravene the provisions of the Liverpool Improvement Act 1882 (45 & 46 Vict. c. 1v.), and was not material to the informant's case. Sect. 36 of that Act provides (*inter alia*): "(1) It shall not be lawful without the written consent of the corporation to build or to bring forward the main outer face of any external wall beyond the building line in any street, or to construct, build, make, place, or fix any projection beyond the building line in any street or over or upon the surface thereof, except in accordance with the following regulations, that is to say." The section then enumerates the various regulations which it was admitted the windows and projections in this case did not contravene. (g) From the time when the buildings were first erected and up to the date of the reconstruction there were at each end of the embayments pilasters with bases; such bases extended slightly beyond the line of the pilasters, and were in one vertical plane with the main wall of the building which projected over the embayments immediately above the windows. During the same period the paving of the footway extended over the embayments so that the paving of the embayments was not distinguishable from that of the footway. (h) The notice and service thereof as required by sect. 69 of the Towns Improvement Clauses Act 1847 were given, and the projecting windows were not removed within fourteen days after such service, but remained as they were.

No evidence was adduced by the defendant of any measures having been taken by any lessee of the premises to prevent the public from entering upon the embayments, and it was proved by the informant that Church-street is a crowded thoroughfare, and that the public were during the whole period from the erection of the buildings until Nov. 1899 in the habit of entering upon the embayments, and that such user of the embayments contributed materially to the safety and convenience of foot passengers. It was also proved that the paving of the embayments had together with and at the same time as the paving of the footway been cleaned and repaired by the corporation of Liverpool in the capacity of highway authority. The building is and was from 1869 used for the exhibition of shop goods.

Evidence was also tendered by the informant, objected to by the defendant, but admitted by the magistrate, that in certain cases in Liverpool where similar embayments had been constructed, which was treated as private property, the owners thereof had placed thereon some distinguishing mark to indicate that the spaces within such embayments were not dedicated to the public as part of the highway.

Upon the facts it was contended for the informant, that there was evidence upon which the magistrate might and ought to find that the space within the embayments had been dedicated

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to public use as part of the highway, and that the windows erected by the defendant inclosing the embayments were obstructions to the safe and convenient passage along the street within the meaning of sect. 69 of the Towns Improvement Clauses Act 1847, and that there had been a dedication to the public of the embayments as part of the highway.

The defendant contended that evidence of particular acts of other individuals indicating an intention not to dedicate embayments to the public as part of the highway was legally inadmissible as evidence, by reason of their not having acted in the same manner as such other individuals, of a contrary intention on the part of lessees of the premises in question; that under the circumstances of the case the evidence of public user was not evidence of dedication; that the acts of the corporation as highway authority were not evidence of an intention on its part as owner of the freehold; that there was no evidence of a dedication by the corporation as owner of the freehold with the consent of any lessee; that, even if the embayments had been dedicated so as to form in Nov. 1899 a part of the highway, there was no evidence of an offence within sect. 69 of the Towns Improvement Clauses Act 1847; and that the act of the defendant was authorised by sect. 36 of the Liverpool Improvement Act 1882.

On the above facts the magistrate found that the embayments had been dedicated to public use as part of the highway, and that the windows or shop fronts, having been erected in front of the building No. 36, Church-street so as to inclose the embayments, were obstructions to the safe and convenient passage along the street, and he therefore convicted the defendant as above stated.

The question for the opinion of the court was whether there was any evidence before the learned magistrate to justify him in so finding.

Joseph Walton, Q.C. (*Leslie Scott* and *Denis O'Connor* with him) for the appellant.—The question arises under sect. 69 of the Towns Improvement Clauses Act 1847, but it does not turn on the construction of the section. The offence alleged was that the appellant had brought forward a number of windows in front of a house or building so as to create an "obstruction to the safe and convenient passage along the street"; and "street" is defined in sect. 3 as meaning and including "any road, square, court, alley, and thoroughfare within the limits of the special Act." The learned magistrate was wrong in holding that there was a dedication of the embayments to public use as part of the highway. The acts relied upon constituted no evidence of dedication. Under the circumstances of the case the passage of the public over these embayments was no evidence of an intention to dedicate them to public use. The house was a shop and these windows were used for the display of shop goods, and it was merely to enable persons passing along the street to see the goods that these embayments were open to the public. Similarly the other acts relied on to show dedication, such as the cleaning and repairing of the paving of the embayments at the same time as the paving of the footway, do not prove any dedication. In the first place, there was no evidence of any dedication at all; in the second place, there was no evidence of any dedication by the reversioners, the owners

of the fee, and no evidence of any assent of the reversioners to any dedication by any tenant or lessee, but such consent is necessary (*Wood v. Veal*, 5 B. & A. 454; *Baxter v. Taylor*, 4 B. & Ad. 72); in the third place, the projections did not contravene any provisions of the Liverpool Improvement Act 1882; and, finally, evidence was wrongfully admitted by the learned magistrate.

Macmorran, Q.C. and *Horridge* for the respondent.—The magistrate was right in finding that there had been a dedication of the embayments to the public use. The question is one of fact and of degree in each case for the magistrate to deal with on the facts. He has so dealt with this case, and the only question now is whether there was any evidence at all to justify his finding that there was a dedication of these embayments to public use. We submit there was evidence of such dedication. In the first place, the paving of the embayments was not marked off from the paving of the footway. That shows an intention to dedicate. Where there is an intention to keep such places as private property, the paving is in some way distinguishable from that of the footway, or is marked off by some line or other. Here there was no such distinguishing line or mark. The user by the public without objection either by the lessees or the reversioners is also evidence of dedication. We rely also on the cleaning and especially on the repairing of the paving of the embayments at the same time as the paving of the footway and as part of the footway. That being done by the corporation would be evidence of an intention on their part to dedicate these embayments to public use. These acts show that there was abundant evidence on which the magistrate could find that there was a dedication to the public use:

Poole v. Huskinson, 11 M. & W. 827;

Vernon v. Vestry of St. James, Westminster, 44 L. T. Rep. 229; 16 Ch. Div. 449;

Reg. v. Inhabitants of East Mark, 11 L. T. Rep. O. S. 63; 11 Q. B. 877.

Joseph Walton, Q.C. in reply.—At the very utmost the facts here are as consistent with an intention not to dedicate as with an intention to dedicate, and, that being so, it must be taken that there was no dedication (per Byles, J. in *Daves v. Hawkins*, 4 L. T. Rep. 288, at p. 290; 8 C. B. N. S. 848, at p. 860):

Reg. v. Hawkhurst, 7 L. T. Rep. 268;

Grand Junction Canal Company v. Petty, 59 L. T. Rep. 464; 21 Q. B. Div. 273;

Greenwich Board of Works v. Maudslay, 23 L. T. Rep. 121; L. Rep. 5 Q. B. 397.

Cur. adv. vult.

Jan. 21.—BRUCE, J. read the following judgment:—In this case I have felt considerable difficulty, not because I had any doubt about the conclusion which I think ought reasonably to be drawn from the evidence, but because of the nature of the questions stated for the court. We cannot review the decision of the learned magistrate if there was any evidence to justify his finding that the embayments had been dedicated to public use as part of the highway. I was during the argument inclined to think that, slight as the evidence was, it was yet difficult to say that there was no evidence to support the

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finding. But now, having given the case very careful consideration, I have come to the conclusion that the evidence relied upon as evidence of dedication amounts to nothing—that is, it is as consistent with an absence of an intention to dedicate as it is with an intention to dedicate. So far as the user by the public is concerned there is no preponderance of evidence either way, and therefore, according to the judgment of Byles, J. in *Dawes v. Hawkins* (4 L. T. Rep. 288, at p. 290; 8 C. B. N. S. 848, at p. 860), there is no balance of probability in favour of either hypothesis. As regards the acts of the corporation, who are the owners of the freehold, I think that, taken together as a whole, they tend to show that the corporation had no intention to dedicate, and did not dedicate, the embayments to public use as part of the highway, and that they did not acquiesce in any dedication by the tenants. The embayments in question existed over the ground floor of a building which was built in the year 1869. The upper part of the building overhung the embayments, and the main wall of the building on either side of the embayments projected beyond the embayments to what I may call the building line. Within the two embayments to which importance is attached in the case were windows which were used for the exhibition of shop goods. But I gather from the plan annexed to the case that in the same building there was a third embayment in which was the doorway to the premises. These embayments, I gather from the plan, were 10in. or 11in. deep. The public passing along the street were allowed to pass in and out of these embayments. Looking at the plan and taking into consideration that the building was used as a shop, it seems to be obvious that the very object of the embayments occupied by the windows was to invite passers-by to look at the goods exhibited in the windows, and the object of the embayment occupied by the door was to make a convenient entrance into the shop. To prevent the public passing along the street from passing into the embayments would be to defeat the very object for which they were formed. No one has suggested, and no one would suggest, that the passing of the public into and out of the embayment forming the door can be treated as forming any evidence of a dedication. In order to make an easy access to a shop, it is quite common to set back the door a foot or more from the front line of the building, and it would, as it seems to me, be a very startling thing to say that, because passers-by who do not use the shop are free to pass over this space, such passage by the public is to be regarded as forming evidence of dedication. If the user of the embayment forming the door gives rise to no presumption of dedication, why should the embayments forming the windows? If the one embayment was formed and used for the convenience of customers, or of those whom it was hoped to attract as customers, were not the other embayments formed and used for the same purpose? If the owner of a piece of land leaves a portion of it unbuilt upon for the purpose of his own convenience and for the use of his customers, the user of the land by his customers is no evidence of a dedication to the public, and if he is not able to exclude the public without at the same time excluding his customers or those whom he hopes to attract as customers, the user by the public does not

necessarily raise a presumption of dedication. It is said by counsel for the respondent that if the window embayments had been paved with pavement of a kind different from the rest of the footway, or had been marked off by a line or division in the pavement, then that would have indicated that there was no intention to dedicate. It may be so. But why? Because it would, it is said, have made it apparent that the embayments were formed for the advantage of the occupier of the building. But the difference in the kind of pavement would not have restrained in any way the user by the public. The user by the public would have been just the same. The line or division in the pavement would only have made emphatic what I think is sufficiently apparent from the form in which the building was constructed and the manner in which it was used. It is not to be left out of consideration that the embayments were but very small spaces. The two window embayments, I gather from the scale on the plan, are each about 5ft. in length and 10in. or 11in. deep. In deciding whether there is evidence of dedication the circumstances of each case must be considered, and it is not reasonable, as it seems to me, to draw a conclusion that the owner of the house because he did not take active measures to protect his rights over these small spaces therefore intended to abandon his rights and to dedicate the land as part of the public way. In nearly every case of a large building fronting on a street, the door of the building is fixed on the inner side of the stone jamb, the stone jamb is generally some inches in thickness so that when the door is shut there is a space of a few inches between the outside of the door and the building or street line; yet no one would infer any intention on the part of the owner of the building to dedicate this space of a few inches to the public. Now, with reference to the acts of the corporation. It is said that the embayments were cleansed and repaired by the corporation of Liverpool in its capacity of highway authority. It is difficult to understand how it would be possible for the besom of the highway authority to sweep the footway without at the same time sweeping the embayments; and it would, I think, be obviously out of the question to assume that because the corporation as highway authority swept the embayments and the corporation as owner of the property made no objection, therefore there was an intention on the part of the corporation as owner to declare a right of passing over the embayments. Indeed, this point about the cleansing of the embayments was hardly insisted upon by counsel for the respondent. But I think that the paving of the embayments stands upon the same footing. The paving of an inappreciable breadth of 11in. affords no presumption of dedication by the owner. But the important fact which seems to throw light upon the acts of the corporation is that, after the new building was erected and the alleged obstruction created, the corporation granted on the 25th March 1900 a new lease of the premises. The new building was erected in Nov. 1899, and I think it is impossible, if the corporation had intended to dedicate a right of passage over the embayments to the public, that they would have granted a lease of the new premises which were so built as to obstruct the passage of the public over the embayments.

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HOARE (app.) v. RITCHIE AND SONS (resps.).

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PHILLIMORE, J.—I am of the same opinion. I am so entirely in accord with the views which have been so well expressed by my learned brother that it is unnecessary for me to add anything.

Appeal allowed. Conviction quashed.

Solicitors for the appellant, *Preston, Stow, and Preston*, for *Gamon, Farmer, and Co.*, Liverpool.
Solicitors for the respondent, *F. Venn and Co.*, for *E. R. Pickmere*, Liverpool.

Tuesday, Jan. 22, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

HOARE (app.) v. RITCHIE AND SONS (resps.).(a)

Factory and Workshop Acts—Impurity in air—
"Inhaled . . . to an injurious extent"—
Factory and Workshop Acts 1878 (41 Vict. c. 16),
s. 36, and 1895 (58 & 59 Vict. 37), s. 33.

To show that dust, gas, vapour, or other impurity is generated and inhaled by the workers in a factory "to an injurious extent," within the Factory and Workshop Acts 1878, s. 36, and 1895, s. 33, it is sufficient to prove that the impurity is generated and inhaled by the workers to an extent that must be in the long run injurious to the workers, without proving that any of them has suffered actual injury from inhaling the impurity.

CASE stated by the police magistrate for the county borough of West Ham.

An information was laid by the appellant, who was one of Her Majesty's Inspectors of Factories, under sect. 36 of the Factory and Workshop Act 1878, as extended by sect. 33 of the Factory and Workshop Act 1895, and alleged that the respondents being the occupiers of a certain jute mill, the same being a factory within the meaning of the Factory and Workshop Acts 1878 to 1895, wherein on or about the 18th May 1900 an impurity—to wit, dust—was generated and inhaled by the workers to an injurious extent, did fail to provide, use, and maintain a fan or other mechanical means of a proper construction for preventing such inhalation within a reasonable time after due notice had been given by the appellant.

At the hearing before the learned magistrate the following facts were proved:—

The respondents were the occupiers of a jute mill at Carpenters-road, Stratford, in the county borough of West Ham, the same being a factory within the meaning of the Factory and Workshop Acts. In the "preparing" and "batching" rooms of the factory during April 1900 dust in large quantities was generated by the process there carried on. The dust consisted of jute fibre mixed with a small quantity of common dust. There was nothing of a poisonous character in the dust. The use of fans as recommended by the appellant would reduce the dust in the atmosphere inhaled by the workers. On the 17th April notice to provide such fans within one month was duly served on the respondents by the appellant. The respondents failed to comply with the notice.

Some 120 persons were employed in the rooms in question. Of these, several selected by the

appellant were medically examined on his behalf. Several more, also selected by the appellant, were called as witnesses. The evidence, however, failed to prove that any of the workers had suffered any injury to their health from inhaling the dust generated by the process there carried on.

The appellant contended that dust in large quantities in the atmosphere must be injurious to the workers, and that it was not necessary to prove that any of the workers had actually suffered injury to health.

The magistrate dismissed the summons on the ground that it had not been proved that the dust generated by the process had been inhaled by the workers to an injurious extent.

By sect. 36 of the Factory and Workshop Act 1878 (41 Vict. c. 16), as extended by sect. 33 of the Factory and Workshop Act 1895 (58 & 59 Vict. c. 37), it is enacted that if in a factory or workshop where any process is carried on by which dust, gas, vapour, or other impurity is generated and inhaled by the workers to an injurious extent it appears to an inspector that such inhalation could be to a great extent prevented by the use of a fan or other mechanical means, the inspector may direct a fan or other mechanical means of a proper construction for preventing such inhalation to be provided within a reasonable time; and if the same is not provided, maintained, and used, the factory or workshop shall be deemed not to be kept in conformity with the Act.

Daddy (H. Sutton with him).—The case is not satisfactorily stated. The learned magistrate seems to have disagreed with the appellant's contention, and to have held that it was necessary to prove that some of the workers had actually suffered injury to health. If I am right on this point, I can only ask that the case may be sent back to the magistrate to be further dealt with. There is no question here as to whether the dust is dust of a poisonous nature or of any particular nature. The section simply says "by which dust is generated and inhaled by the workers to an injurious extent." It is true that here, though we called a number of workers, we could not get satisfactory proof that any one of them had suffered actual injury in health from the dust; but we had the evidence of a medical man—which was not contradicted—that dust in the quantities in which it existed in the atmosphere of this factory must in the long run bring about phthisis and other lung troubles. That, I submit, is sufficient to prove that the workers inhaled dust to an injurious extent. [BRUCE, J.—We are agreed that the mere fact that it could not be proved that any particular person had suffered injury to health is not conclusive that the air was not injurious.] That is my only point, and the moment one has passed that, both upon the case as it is stated and upon what the learned magistrate said, I submit he ought to have considered this positive evidence of the medical man that the inhalation was to an injurious extent.

The respondents did not appear.

BRUCE, J.—I do not think the learned magistrate has found the right point. The question he had to determine was whether dust was generated and inhaled by the workers to an injurious extent—that is, whether the tendency was to injure the workers. It may be that it is only after some long exposure to the injurious air

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

Div.]

COBB v. COBB—PICKAVANCE v. PICKAVANCE.

[Div.]

that the workers are injured; but if the air is so impure as necessarily to be injurious to health then I think the Act has been infringed, and it is for the magistrate to find the fact which he seems in this case not to have found. It is not necessary that it should be actually proved that the inhalation of the dust has proved injurious to any of the workers. It is enough that the dust in the air is of such a quantity or character that it would in the long run be injurious. The learned magistrate should find, quite apart from the question whether any person has been injured, whether the dust was generated and inhaled by the workers to an injurious extent—that is, to such an extent that its tendency is necessarily to injure their health in the long run. That, I think, is the point.

PHILLIMORE, J.—The case must go back for the magistrate to find whether or not the dust is generated and inhaled to an injurious extent, with an intimation that it is not necessary to prove actual injury to the health of any particular person.

Case remitted to magistrate.

Solicitor for the appellant, *Solicitor of the Treasury.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Tuesday, July 3, 1900.

(Before Sir F. JEUNE, President, and BARNES, J.)

COBB v. COBB. (a)

Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39)—Appeal to High Court—Allowance to be made to wife—Mode of assessment—Earnings of husband—Practice.

There is no fixed rule as to the allowance to be made to a wife under the Summary Jurisdiction (Married Women) Act 1895, s. 5, but courts of summary jurisdiction ought to be guided by the practice of the High Court in making allotments of alimony in suits of judicial separation.

THIS was an appeal from an order of the justices of the Petersfield Division of the county of Hants, made under sect. 5 of the Summary Jurisdiction (Married Women) Act 1895.

In the first instance when this case came before the justices an order had been made by which the husband was to pay an allowance of 11. a week to the wife.

This order was appealed from, and the court sent the case back to the justices for further consideration.

The same order was made again, but after the husband had undergone a second term of imprisonment for nonpayment of arrears, the justices reduced the amount of the allowance from 11. to 12s. a week.

The husband appealed against this reduced order on the ground that it too was excessive.

It appeared that the appellant, who was over sixty years of age, gained a precarious livelihood as an outside porter at Addison-road Station. His income varied from 23s. to 25s. per week. He had twice suffered imprisonment for non-compliance with the order of the justices.

J. Ferguson Walker for the appellant.—Sect. 5, sub-sect. (c) of the Summary Jurisdiction (Married Women) Act 1895 does not lay down any rule to guide courts of summary jurisdiction as to the proportion of his income which a husband should be ordered to pay to his wife. Regard is to be had to the means both of the husband and wife, and the amount fixed should be reasonable. The present order is unreasonable, and 12s. a week too large a sum to pay. In allotting alimony the High Court never exceeds one-half the joint income, whilst one-third is the usual allowance. He cited

Cooke v. Cooke, 2 Phill. 46;

Haigh v. Haigh, 20 L. T. Rep. 281; L. Rep. 1 P. & D. 709.

The PRESIDENT.—Although there is no hard and fast rule as to the proportion of income payable in suits for judicial separation, the court generally acts upon the principle of allowing a third of the joint income to the wife when there are no children of the marriage. I think that courts of summary jurisdiction will also be well advised to act upon the same principle. In the present case the husband has, I think, shown good cause why the amount of the allowance ordered by the justices should be reduced. The reduction made by the justices themselves from 11. to 12s. per week is not sufficient, and I am strongly of opinion that not more than one-third of his income should have been ordered to be paid. The appeal will be allowed, and the order of the justices will be varied by substituting 8s. per week for 12s. The arrears will run at the rate of 8s. per week from the date of the order of the justices.

BARNES, J.—I agree.

Solicitor, *Robert Philip Upton.*

Dec. 4 and 10, 1900.

(Before Sir F. JEUNE, President, and BARNES, J.)

PICKAVANCE v. PICKAVANCE. (a)

Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39)—Appeal to High Court—Summonses—Withdrawal—Out of time—Objection not taken before justices—Revival—Costs—Practice.

When a summons under the Summary Jurisdiction (Married Women) Act 1895 has been withdrawn, the complaint, in respect of which it has been issued, is put an end to, and no fresh summons can be granted upon the same cause of complaint.

The omission to take an objection, though of a technical character, on the hearing of a summons under the Act, does not operate as a waiver of the ground of objection; but if the objection is raised by the appellant for the first time on the hearing of the appeal, and is then allowed, the respondent will be entitled to the costs of the appeal.

THIS was an appeal of the husband, George Pickavance, from an order of the justices of St. Helen's, in the county of Lancashire, dated the 5th Nov. 1900.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

Div.]

Re TAYLOR; GUARDIANS OF EDMONTON UNION v. DEELEY.

[Ct. OF APP.]

On that date the justices, having found that the appellant had been guilty of persistent cruelty to his wife, Ellen Pickavance, whereby she had been compelled to leave and live separate and apart from him, had made an order by which it was adjudged that the respondent should no longer be bound to live with her husband, and that she should be paid an allowance of 15s. a week by the appellant.

It was now sought to set aside this order of the justices.

In the notice of appeal the grounds alleged were as follows: (1) The complaint was out of time, since it had not been made within six months of the time when the subject-matter of the complaint arose, as required by the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11, and referred to in sect. 8 of the Summary Jurisdiction (Married Women) Act 1895; (2) the allowance of 15s. a week was excessive; (3) there was not sufficient information or evidence to justify the order.

Before the order appealed from had been made the wife had sworn two informations against her husband, on the 26th June 1899 and on the 25th Sept. 1899, in which she had alleged that he had been guilty of persistent cruelty towards her, by reason of which she had been compelled to leave him, and to live separate and apart from him.

On the hearing of the first summons the justices had suggested that an effort should be made to effect a reconciliation, and it was accordingly dismissed.

The second summons was withdrawn without having been heard.

Pritchard for the appellant.—The order was wrong. The summons of the respondent was out of time. It should have been taken out within six months of the ground of complaint. The fact of cruelty was not denied; but the parties had been living separate for fourteen months previous to the order of separation made by the justices. There was no evidence of means to support the order for maintenance.

Batson for the respondent.—The objection as to the summons being out of time came too late. It ought to have been taken in the court below. The husband had been guilty of cruelty towards his wife between the first and second summonses. The second summons had been withdrawn, but the justices could have issued a fresh summons in respect of the complaint. The withdrawal did not dispose of the matter. The Summary Jurisdiction Act 1848, s. 11, only requires that the complaint should be made within six months. There is no provision in that Act or in the Summary Jurisdiction (Married Women) Act 1895, s. 8, that the summons should be heard within six months of the time when the ground of complaint arose. The wife had complied with sect. 11 of the former Act by making her complaint. That was sufficient. As the objection had not been taken before the justices the appellant had waived it, and should not be heard on the appeal. He cited

Reg. v. Fletcher, 24 L. T. Rep. 742; L. Rep. 1 C. C. 320.

Pritchard in reply.—It was against all principle that a summons which had been withdrawn should

be revived on the same ground of complaint. As to jurisdiction, he cited

Ellis v. Ellis, 75 L. T. Rep. 390; (1896) P. 251;
Medway v. Medway, 82 L. T. Rep. 627; (1900) P. 141.

Cur. adv. vult.

Dec. 10.—The PRESIDENT.—We have taken time to consider our judgment because it seemed to involve the principle whether the withdrawal of a summons amounted to a withdrawal of the complaint upon which it was based, so that it could no longer be proceeded upon. There is no direct authority upon the point, but we are clearly of opinion that the withdrawal of the summons did put an end to the complaint, and that no fresh summons could be founded upon it. Therefore the summons was out of time. It must be remembered that a summons cannot be withdrawn without the consent of the justices or the magistrate; a complainant cannot put an end to criminal proceedings without the leave of the court. The effect of this is that the complaint upon which the summons was granted necessarily falls to the ground. The court, having once permitted the withdrawal, cannot revive the cause of complaint by issuing a fresh summons on the same ground. As to costs. The husband has succeeded here upon the point of the summons being out of time, which he did not take in the court below. Under the circumstances the wife is entitled to her costs on the appeal.

BAERNES, J. agreed.

Solicitors: for the appellant, *W. Norton Ellen*, for *A. E. Tickle*, St. Helen's; for the respondent, *Charles Russell and Co.*, for *H. L. Riley*, St. Helen's.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Jan. 29, 1901.

(Before RIGBY and STIRLING, L.JJ.)

Re TAYLOR; GUARDIANS OF EDMONTON UNION v. DEELEY. (a)

APPEAL FROM THE CHANCERY DIVISION.

Lunacy—Pauper lunatic—Maintenance—Arrears—Debt—Administration.

Where an order made in lunacy was merely a direction for payment to the guardians of a union in respect of the maintenance of a pauper lunatic for a particular period, the claim of the guardians in respect of arrears for the remainder of the statutory six years, being a valid legal debt, continued and was held to be enforceable after the lunatic's death.

Decision of Kekewich, J. reversed.

ANN TAYLOR, a pauper of unsound mind, was maintained by the guardians of the Edmonton Union from the 1st Nov. 1889 until the date of her death, which occurred on the 22nd June 1899.

On the death of her uncle on the 14th Oct. 1895 she became entitled, as one of his next of kin, to the sum of 261*l.*

On the 24th Feb. 1898 the guardians applied to a master in lunacy for the appointment of a

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

APP.] YSTRADYFODWG, &C., MAIN SEWERAGE BOARD v. ASSESS. COM. OF NEWPORT UNION. [APP.]

receiver of that fund, and for payment thereof of the cost of the lunatic's maintenance for the then preceding six years, there being 169*l.* 3*s.* 10*d.* owing in respect of that period.

On the 31st Jan. 1899 an order was made in lunacy appointing a receiver of the fund and directing him (after payment of costs) to pay "95*l.* 14*s.* due to the guardians for the maintenance" of the lunatic from the 14th Oct. 1895 to the 14th Feb. 1899, and to apply the balance of the money to be received by him in the future maintenance of the lunatic at the rate of 11*s.* per week.

The lunatic was thenceforth maintained by the guardians, and they were paid for such maintenance out of the fund until her death, at which time a balance of over 100*l.* remained out of the fund.

She died intestate on the 22nd June 1899, and the defendant was her administrator.

The guardians issued an originating summons to have an account taken of the amount owing to them for past maintenance from the 24th Feb. 1892 (six years before the application in lunacy) to the 14th Oct. 1895 and payment by the defendant or administration. They claimed the sum of 73*l.* 9*s.* 10*d.* as due to them for past maintenance.

The summons came on to be heard before Kekewich, J. on the 7th May 1900, who dismissed it with costs.

The guardians appealed.

Harry Greenwood for the appellants.—At the date when the order in lunacy was made there was a sum due to the guardians for past maintenance of the lunatic. The only question is whether, in the face of that order, the balance owing remains a debt which can be enforced. I submit that it can. The Statutes of Limitation permitted the guardians to claim arrears for six years. Those arrears constituted a debt, and they did not cease to be a debt because a part was paid to the guardians under the order in lunacy. It is true that the lunacy jurisdiction will not, during a lunatic's life, order creditors to be paid in full if the effect is to leave the lunatic penniless; the lunatic's comfort comes first, and the claims of creditors second. But when the lunatic is dead, the reason for retaining money in hand for his comfort no longer exists, and creditors ought to be paid before the next of kin take anything. In the present case the guardians are creditors, and the debt owing to them is sufficient to sustain a claim for administration:

Re Webster; Guardians of Derby Union v. Sharratt, 51 L. T. Rep. 319; 27 Ch. Div. 710.

Ashton Cross for the respondent.—The question now raised is *res judicata*. The order in lunacy was not made without prejudice to any claim for the balance of the arrears owing to the guardians:

Re Watson; Guardians of Stamford Union v. Bartlett, 79 L. T. Rep. 462; (1899) 1 Ch. 72.

No reply was called for.

RIGBY, L.J.—There is no jurisdiction in lunacy to bind a creditor in any proceedings in the High Court. The lunacy jurisdiction prefers the present and future comfort of the lunatic to the claim of any creditor. The order in the present case clearly directed payment only in respect of maintenance for a particular period, and the

claim of the guardians in respect of the rest of the six years remains and can be enforced after the lunatic's death. The appeal must therefore be allowed.

STIRLING, L.J.—I concur. The claim of the guardians is a valid legal debt, and the lunacy proceedings were not in the nature of an action of debt. The order in lunacy was merely a direction by the lunacy authorities to make certain payments, one of which was for part only of the amount owing for past maintenance.

Appeal allowed.

Solicitors for the appellants, *Howard and Shelton*, agents for *F. Shelton*, Tottenham.

Solicitor for the respondent, *A. Hammond*.

Jan. 14 and 29, 1901.

(Before *SMITH, M.R.*, *COLLINS* and *ROMER, L.JJ.*)

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD (apps.) v. ASSESSMENT COMMITTEE OF NEWPORT UNION (resps.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Sewer—Rateability—Exemption—Underground Sewer—Sewer covered by embankment—Payments made to owners by persons using sewer—Alteration of surface of land.

The rule as to the exemption from liability to poor rate, which in Reg. v. Metropolitan Board of Works (19 L. T. Rep. 348; L. Rep. 4 Q. B. 15) and similar cases has been held to exist in the case of certain underground sewers, is anomalous, and should not be extended in any way; so that it ought not in future to be held applicable to any new sewer unless the owners of such sewer can show (1) that the sewer is quite underground, so that the surface under which it runs is not occupied or in any way affected by it; and (2) that they receive no payment for the use of such sewer by other persons whom they permit to use it.

Therefore a sewage carrier, which in its course through a parish was partly built on arches, partly covered by an artificial embankment, and partly below the natural surface of the ground, and for the use of which payments were made by several public authorities to the public authority which owned it, was held liable to be assessed to poor rate.

Judgment of the Queen's Bench Division (19 Mag. Cas. 453; 82 L. T. Rep. 58; (1900) 1 Q. B. 365) affirmed.

THIS was an appeal by the appellants from a judgment of the Queen's Bench Division (*Channell and Bucknill, JJ.*) upon a case stated by the court of Quarter Sessions for the county of Monmouth, upon an appeal by the Ystradyfodwg and Pontypridd Main Sewerage Board against a certain rate or assessment made for the relief of the poor of the parish of Rumney, in the county of Monmouth.

The appellants are the governing body of a united drainage district consisting of part of the urban district of Ystradyfodwg and the urban district of Pontypridd, constituted by virtue of a provisional order of the Local Government Board,

(a) Reported by *E. MARLEY SMITH, Esq., Barrister-at-Law.*

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dated the 4th June 1885, and duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 7) Act 1885, for the purpose of carrying into effect a system of sewerage for the use of the said urban districts.

Pursuant to the powers vested in them by the order, the appellants designed and constructed, and have since always maintained, a certain sewage carrier for the use of the districts, and have erected, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the district to the sea. The total length of the sewage carrier is about seventeen and a quarter miles, whereof nearly two and a half miles passes through or over land situate in the parish of Rumney, which land (except such part as forms part of the foreshore of the Bristol Channel) was, previously to the construction of the sewage carrier, and still is, rated and assessed for the relief of the poor.

The construction of the sewage carrier within the parish is as follows: 182 yards of iron pipes carried on concrete arches above the surface of the ground, 1021 yards of pipes laid below the surface and ordinary level of the ground, 1890 yards carried below the surface of the ground, but covered by an artificial embankment of varying height which rises above the level of the adjacent land, and 1246 yards of pipes (hereinafter called the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel.

In connection with the outfall certain works have been erected by the appellants.

For the purpose of obtaining money for making and maintaining the sewage carrier and the necessary works appurtenant thereto, the appellants, in accordance with the provisions of the Public Health Act 1875, borrowed the sum of 156,000l from the Public Works Loan Commissioners, to be repaid with interest at the rate of 3½ per cent. per annum by equal annual payments extending over thirty years. The proportion of the annual repayment payable in respect of the portion of the sewage carrier situate in the parish of Rumney amounted to the sum of 1210l. This sum is raised by means of rates. Under the Local Government Board's Provisional Orders Confirmation (No. 8) Act 1896, the appellants obtained powers enabling them with the consent of the Local Government Board to allow the sewers of the council of any county, borough, or district to communicate with the sewage carrier vested in the appellants. In pursuance of these powers, and with the consent of the Local Government Board, agreements had, previously to the date of the making the assessments, now appealed against, been made with the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation, whereby the sewage of the districts under the control of these local bodies was to be received in and carried away by the sewage carrier of the respondents upon payment to the appellants by the local bodies of sums levied upon the respective rateable values of the districts at the rate of 3½d., 4d. and 3½d. in the pound per annum respectively.

In consequence of receiving these sums from the three local bodies, the appellants are enabled to raise sufficient money for the purpose of repaying the annual instalments of the money borrowed to make and maintain the sewage carrier and the

works, machinery, and plant connected therewith in the parish of Rumney by two precepts at the rate of 2½d. in the pound in each year upon the Ystradyfodwg and Pontypridd areas.

The rate in the pound in the last-mentioned area would have to be much increased in order to prevent the appellants incurring loss owing to their yearly expenditure in connection with the sewage carrier if the money received by the rates levied outside the area, being money paid for the use of the sewage carrier, was not available for use by the appellants.

The appellants were assessed by the respondents in respect of that portion of the sewage carrier with the outfall and appurtenances thereof which is situate in the parish of Rumney in the sum of 800l. gross estimated value, and 700l. rateable value.

The appeal was heard and determined by the quarter sessions. It was proved before them that, as far as the parish of Rumney is concerned, the sewage carrier conveys the sewage from distant towns, places, or houses, through the parish, and there is no connection to or with the sewage carrier from any lands, houses or buildings in the parish.

It was also proved that the embankment varied in height from 18in. to 6ft. above the ground through which it passed; that it was covered throughout by a mound of earth which was grazed over except where a footpath ran over the top of the mound and where manholes were placed; that it was not separated by any fence from the adjoining land; and that cattle had full access upon and across it throughout its entire length.

It was also proved that the land upon which the embankment lies was, previously to its formation, assessed and rated to the relief of the poor, and that the land remained so rated and assessed, no change having been made by reason of the making of the embankment in the rating and assessment.

Upon these facts the quarter sessions found that the portions of the sewage carrier which lay under the surface of the ground or in the embankment were not liable to be rated at all, but that the gross estimated value of the other portions of the sewage carrier in the parish of Rumney was 145l. (whereas 40l. was the gross estimated value of the outfall and works in connection therewith), and that the rateable value thereof was 105l., and they accordingly allowed the appeal to this extent, subject to a case for the opinion of the court.

The Queen's Bench Division (Channell and Bucknill, JJ.) held that the whole of the sewer in the parish of Rumney was rateable, and accordingly reversed the order of quarter sessions.

The case is reported in 19 Mag. Cas. 453; 82 L. T. Rep. 58; (1900) 1 Q. B. 365.

The appellants appealed.

Jan. 14.—*Cripps, Q.C. Boyle, Q.C. (Ram, Q.C. with them)* for the appellants.—For a long time it has been held that an underground sewer belonging to a public authority is not assessable to poor rate:

Reg. v. Metropolitan Board of Works, 19 L. T. Rep. 348; L. Rep. 4 Q. B. 15.

The law as laid down in that case has

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been held by the House of Lords to be well settled:

London County Council v. Erith Churchwardens and Assessment Committee of Dartford Union; Churchwardens and Overseers of West Ham v. London County Council; Assessment Committee of St. George's Union v. London County Council, 69 L. T. Rep. 725; (1893) A. C. 562.

In the *West Ham* case (*ubi sup.*) the sewer, which was an outfall sewer as in the present case, was in an embankment made on land which had been purchased for the purpose of making the sewer. The House of Lords held that it was rateable; but the land on which it was made had formerly been rated, and the effect of the decision merely was that the fact of the sewer and embankment being constructed on the land, did not render the land not rateable. In the present case the surface of the soil does not belong to the appellants, and the facts before the court are that the land which was rated before the sewer was made is still rated at exactly the same assessment as before, i.e., the building of the sewer has made no difference whatever in the amount of rates charged on the land. The only exception to the ancient rule that underground sewers owned by public authorities are not rateable is a case where the public authority owns the surface of the soil under which the sewer is made. A sewer in an embankment such as there is in the present case is only rateable in a case where its existence has affected the previous rating of the surface. The *West Ham* case (*ubi sup.*) shows that for the purpose of rating the court will draw a distinction between the parts of a sewer which run underground and the parts which are above ground. In the court below Channell, J. relied on some words used by Collins, J.:

Mayor, &c., of Leicester v. Churchwardens, &c., of Beaumont Leys, 70 L. T. Rep. 659.

In that case some sewage works were held rateable, but the case is distinguishable from the present because the works were part of a sewage farm, as to which there could be no doubt with regard to their rateability. [COLLINS, L.J. referred to *Assessment Committee of Holywell Union and others v. Halkyn District Mines Drainage Company*, 71 L. T. Rep. 818; (1895) A. C. 117.]

A. T. Lawrence, Q.C. and Hugo Young, Q.C. (*L. Morton Brown* with them) for the respondents. —*Prima facie*, the sewer would be rateable. The only ground on which it is possible for the appellants to escape rating is that the case comes within the law laid down in *Reg v. Metropolitan Board of Works* (*ubi sup.*). But the decision in that case is anomalous. The exception of sewers from rateability rests on no logical ground but only on long usage. The exception that has been made ought not to be extended in any way beyond the limits which have been already laid down. In the *West Ham* case (*ubi sup.*) the sewer was held rateable. That case is exactly parallel to the present case so far as the embankment is concerned, though here there is one additional fact, viz., the receipt of money paid to the appellants by persons whom they allow to use the sewer, which makes the present case a stronger one. The provisional order, confirmed by Act of Parliament, under which this sewer was made, permits the appellants to demand payment from

persons whom they allow to use it. Since the appellants receive these payments from persons using the sewer, it seems impossible for them to contend that they have not a beneficial occupation of it. They have not produced a single authority in which a sewer such as this, which brings in money to the owners, has been held not to be rateable. Even if the court should be of opinion that the parts of the sewer wholly underground might, if they were all that is in question, come within the limits laid down in *Reg v. Metropolitan Board of Works* (*ubi sup.*), yet there would be great difficulty in rating the sewer in small bits within the parish. The sewer ought to be treated as a whole.

Cripps, Q.C. in reply. — There would be no real difficulty in rating the sewer, if the parts underground were treated separately from the parts above ground. For rating purposes every railway has to be treated as split up into bits. As to the payments received by the appellants from other local authorities, that fact does not differentiate this case from the case of all other sewers owned by public authorities. Sect. 28 of the Public Health Act 1875 allows such payments to be received for all sewers constructed under that Act. [COLLINS, L.J. referred to *Sheffield United Gas Company v. Sheffield Overseers* (8 L. T. Rep. 692; 4 B. & S. 135) and *Reg v. West Middlesex Waterworks Company* (1 E. & E. 716).

Cur. adv. vult.

Jan. 29.—The judgment of the court (Smith, M.R., Collins and Romer, L.JJ.) was read by

ROMER, L.J.—Since the decision by the House of Lords of the three rating cases reported in 69 L. T. Rep. 725; (1893) A. C. 562, relied on by the appellants, we think it must be taken that the authorities which decided that certain underground sewers of public bodies were not liable to be rated are not based on sound principle and must be regarded as anomalies in rating law. These authorities will certainly not be extended; and to enable new sewers, which would be *prima facie* rateable according to ordinary principles, to escape from liability, it must be shown by their owners that they fall strictly within the narrow limits of the authorities we are referring to. On examination of the case of *Reg v. Metropolitan Board of Works* (*ubi sup.*), which is the leading one of the authorities in question, it will be found that the sewers there held not rateable had the following features: (1) They were quite underground, so that the surface under which they ran was not occupied or in any way affected by them, and (2) no payment was made to the owners of the sewers for the use of them by others. We think that all sewers which on general principles are *prima facie* rateable, and which are not protected by prior decisions, should be held rateable, unless the two features above mentioned are found to exist in relation to them. With regard to the first feature it is true that in the case of the *Metropolitan Board of Works v. West Ham Overseers* (23 L. T. Rep. 490; L. Rep. 6 Q. B. 193), it was ruled that for rating purposes no distinction existed between a sewer carried underground and one carried upon an embankment; but after the decision of the House of Lords above mentioned, and the observations of Lord Herschell, L.C. (69 L. T. Rep. at p. 734; (1893) A. C. at p. 600), we

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think that it can no longer be considered that that ruling is law. With regard to the second feature, it appears to us from the judgment of the court in the case of *Reg. v. Metropolitan Board of Works (ubi sup.)* that that feature was treated as of great importance. In the judgment of the court delivered by Lush, J. he observes significantly that the sewers he was dealing with were not "at present" the subject of a beneficial occupation, and he proceeds to say that "no payment is made to the board for the use of them." We gather that if any such payment had been made the decision would have been the other way. It is true, judging from more recent authorities, that the judgment ought not to have been based on such a distinction as that pointed out; but the appellants here cannot take advantage of that error on the part of the judges who decided the case in order to extend in their favour the ambit of an anomalous case based on no sound principle. And, further, we cannot find in any reported case where sewers have been held not rateable that it has been proved that payments were being made for the use of those sewers by others, and that this fact has been called to the attention of the court. It was suggested by the appellants that by the above-mentioned decision of the House of Lords a principle was laid down that no sewers are rateable when the surface is rated both before and after the sewers are made, and the surface assessment remains unaltered. We cannot find that any such principle was there laid down. Lord Herschell, L.C., whose reasons for the judgment of the House were concurred in by all the members present, stated (69 L. T. Rep. at p. 733; (1893) A. C. at p. 598) why the older cases, which decided that underground sewers were not rateable, were allowed to stand. He, in substance, pointed out that those sewers had for a long period before the decisions in question been deemed free from rateability, and that it would not be just to make them rateable after they had been for so long a period deemed free from rateability. And he further observed that until the sewers in question (which in fact were wholly underground) were made, no rateable subject-matter existed where the sewers were; so that if the sewers were abandoned the rateability of the places where they existed would cease. And we think it is with reference to these observations that he says (69 L. T. Rep. at p. 734; (1893) A. C. at p. 600), that he had already stated the only ground on which the exemption of the sewers generally could, in his judgment, be rested. We can find nothing in his address to justify the assertion that he formulated or stated the principle urged by the appellants. Having regard to what we have already said it follows that the sewage carrier in the case now before us ought to be rated, and that the appeal should be dismissed. This carrier is new, and cannot claim an exemption from rateability for a long period. It is to a great extent above or on the surface, and even as to the part not immediately on the surface we cannot say that it is so far below the surface as in no way to affect it. Moreover, in this case we think that the sewage carrier in the parish of Ramey, being one continuous construction, should be dealt with as a whole, and that it would not be right, as to the part below the surface, to dis sever the sewer, and to say as to that part that it is to be taken as an independent sewer, and be

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separately treated for the purpose of rating. In respect of the above matters this sewage carrier does not fall within the protection of the anomalous authorities we have referred to, and on principle it clearly ought to be rated. Moreover, in respect of another matter, it is not within the last-mentioned authorities, for it is stated in the case that the owners, the appellants, receive substantial yearly payments from other bodies, namely, from the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation, for the use of the sewage carrier by those bodies, and the costs of constructing and maintaining the carrier is to a large extent defrayed out of these payments. The appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitors for the sewerage board, *Wrentmore and Son*, for *Walter Morgan, Bruce, and Nicholas*, Pontypridd.

Solicitors for the assessment committee, *Warriner and Co.*, for *Davis, Lloyds, and Wilson*, Newport, Mon.

Jan. 28 and 29, 1901.

(Before SMITH, M.R., COLLINS and ROMER, L.JJ.)

SION COLLEGE v. CORPORATION OF LONDON. (a)
APPEAL FROM THE QUEEN'S BENCH DIVISION.

Rating—Exemption—Statutory exemption from "all taxes and assessments"—Rates imposed by subsequent statute—New imposition—7 Geo. 3, c. 37, s. 51—11 & 12 Vict. c. clxiii., ss. 168, 169.

It was provided by sect. 51 of Geo. 3, c. 37, that certain lands in the City of London, reclaimed from the Thames, should vest in the adjoining owners "free from all taxes and assessments whatsoever."

The City of London Sewers Act 1848 (11 & 12 Vict. c. clxiii.) provides, by sects. 168 and 169, for the making of "a consolidated rate" for the purposes of the Act.

Held (affirming the judgment of the Queen's Bench Division), that the exemption given by sect. 51 of 7 Geo. 3, c. 37, applied only to then existing taxes and assessments, and did not apply to the "consolidated rate" under 11 & 12 Vict. c. clxiii., which was substantially a new imposition.

THIS was an appeal by the Sion College from the judgment of the Divisional Court (Grantham and Channell, JJ.) upon a special case stated upon an appeal to quarter sessions.

On the 23rd April 1899 the Corporation of London, acting in pursuance of the City of London Sewers Act 1897, the City of London Sewers Acts 1848 and 1851, and the Elementary Education Act 1870, and the Acts amending the same, duly made a consolidated rate for 1899 at 2s. 5d. in the pound (including 1s. 2d. for the school board).

The premises which Sion College occupied, and in respect of which they were assessed, were partly on land which was reclaimed under 7 Geo. 3, c. 37, the same having been previously, until so reclaimed, part of the foreshore of the river Thames.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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The questions arising on the appeal were solely concerned with that part of the land, which was occupied by buildings, which had been so reclaimed.

Since the conveyance to Sion College, and prior to the present rate, the college had not been assessed in respect of the premises in question to the consolidated rate owing, as the corporation alleged, to an error.

The college duly appealed against the rate to the Court of Quarter Sessions for the City of London, on the ground that the portion of land in question reclaimed under 7 Geo. 3, c. 37, was exempt by that statute from all rates, taxes, and assessments whatever.

The land and buildings in question were acquired by the college in 1886 by a conveyance to them dated the 8th April 1886.

The college contended that the land in question, and the buildings thereon, were not rateable to the consolidated rate made under the Acts mentioned, but were exempt by virtue of 7 Geo. 3, c. 37.

The corporation contended that the land was liable to be assessed to the consolidated rate under those Acts, and was not exempt.

The question for the opinion of the court was whether the land was so exempt or not.

The statute 7 Geo. 3, c. 37, provides:

Sect. 51. And be it further enacted that the ground and soil of the said river so to be inclosed and embanked in the front of every such respective wharf or ground (and which shall be bounded on the east and west sides thereof by straight lines, running at right angles, to and upon the said intended front line) shall vest, and the same is hereby vested in the owner or owners, proprietor or proprietors, of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, free from all taxes and assessments whatsoever.

The City of London Sewers Act 1848 (11 & 12 Vict. c. clxiii) provides:

Sect. 168. And in order to raise the money for the carrying the several purposes of this Act into execution, be it enacted that it shall be lawful for the commissioners, once in every year, or oftener if they think it necessary, to direct, by writing under the hand of their clerk, the alderman or his deputy, and the major part of the common councilmen of every ward within the said City within fourteen days after the order of the commissioners, to make one or more rate or rates, not exceeding in the whole the sum of fourpence in the pound in any one year, upon the owners or holders or occupiers of property within the City, in equal proportions, to be called "the Sewer Rate" for the purpose of constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City, and also for the purpose of securing, raising, and paying any moneys and the interest thereof, which may be borrowed on the security of the said sewer rate, in pursuance of the provisions of this Act; and in like manner, once in every year, or oftener, if they shall think it necessary to direct one or more rate or rates, not exceeding in the whole the sum of one shilling and sixpence in the pound in any one year, to be made upon the owners, and holders, or occupiers of property within the City, to be called "the Consolidated Rate," for the purpose of forming, making, maintaining, keeping in repair, paving, lighting, sweeping, cleansing, and watering the streets within the City, and of making and carrying into effect such improvements within the City as the commissioners are or shall or may from time to

time or at any time be authorised to make and carry into effect, and of constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage within the City, and also of defraying the salaries, gratuities, wages, and allowances of all officers acting in the execution of this Act, unless otherwise provided for, and all other incidental costs payments, charges, and expenses attending the execution of the powers, duties, and authorities hereby imposed upon and given to the commissioners, and which are not herein otherwise specially provided for, and for securing, raising, and paying any moneys, and the interest thereof, which may be borrowed on the security of the said consolidated rate, in pursuance of the provisions of this Act; and in case a rate shall not be made by the alderman or his deputy, and the major part of the common councilmen of any ward, within fourteen days after the order of the commissioners, or in case it shall be considered by the commissioners that a fair and just assessment has not been made in any ward, or in any precinct or place, parochial or extra-parochial (if any), it shall be lawful for the commissioners to direct an assessor to make a fair and just assessment on the net annual value, the expense whereof shall be added to the said rate, and shall be paid by the ward, precinct, or place, in which such a rate shall not have been made, or in which the commissioners shall consider that a fair and just assessment shall not have been made.

Sect. 169.—And be it enacted that every such rate as aforesaid shall be made by the alderman or his deputy and the major part of the common councilmen of each ward upon every person who shall inhabit, hold, occupy, possess, or enjoy any house or building within the City, or partly within and partly without the City (whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situated in any precinct or extra-parochial place, or otherwise), according to the full net annual value thereof respectively (except in the several cases hereinafter mentioned), the same to be ascertained in manner hereinafter mentioned; and the said rates shall from time to time be collected and paid yearly, half-yearly, or oftener, if the commissioners shall think proper, and shall commence from such time after this Act shall come into operation as the commissioners shall think fit.

The Divisional Court (Grantham and Channell, JJ.) held that the provisions of the Act of 1848 repealed by implication the exemption from rates conferred by the Act of 7 Geo. 3, and judgment was therefore given in favour of the corporation (19 Mag. Cas. 656; 83 L. T. Rep. 76).

Sion College appealed.

Horace Ivory for the appellants.—The decision of the Divisional Court that the exemption given in respect of the land in question by sect. 51 of 7 Geo. 3, c. 37, was impliedly repealed by sect. 169 of the City of London Sewers Act 1848, was wrong. That exemption has not been repealed, either expressly or impliedly, by sect. 169 of the Act of 1848. The exemption which was taken away by sect. 169 was the exemption which existed in respect of persons living in extra parochial places and in precincts, and the words "or otherwise" must be construed as referring to some exemption *ejusdem generis*. The exemption given in respect of the land in question was not an exemption of that kind, but was given in consideration of the expenses incurred in reclaiming the land. It is a well-established rule that a subsequent Act does not repeal any

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privilege or exemption conferred by a prior local Act unless there is a clear intention to do so expressed in the subsequent Act:

Garnett v. Bradley, 39 L. T. Rep. 261; 3 App. Cas. 944.

There is not in the Act of 1848 any such clear expression of an intention to repeal the exemption given by the earlier Act. The general words of the Act of 1848, by which this consolidated rate is imposed, cannot take away the express exemption which previously existed by statute:

Liverpool Library v. Mayor, &c., of Liverpool, 2 L. T. Rep. 325; 5 H. & N. 526.

This consolidated rate is not a new imposition or tax at all, and therefore the exemption applies thereto even if the exemption is to be construed as relating only to taxes and assessments in existence when 7 Geo. 3, c. 37, was passed. In 1767 there was taxation for sewerage of the City, and for other matters included in this "consolidated rate." Even if there are under the Act of 1848 new subject-matters in respect of which the rate is levied, yet the previous exemption cannot be destroyed merely by adding new subject-matters to those which previously existed, and making one consolidated rate for the whole. The mere changing of the name of the imposition cannot affect the exemption.

Danckwerts, K.C. for the respondents. — The exemption given by sect. 51 of 7 Geo. 3, c. 37, was only in respect of then existing taxes and assessments, and was not given in respect of any new impositions which might come into existence in the future. It has been decided long ago, in several cases, that this exemption does not apply to any substantially new imposition created after the passing of the Act of 7 Geo. 3:

Williams v. Pritchard, 4 T. R. 2; 2 R. E. 310;
Perchard v. Heywood, 8 T. B. 468;
Rees v. London Gas Light Company, 8 B. & C. 54;
Eddington v. Borman, 4 T. R. 4.

The "consolidated rate" brought into existence by the City of London Sewers Act 1848 was a substantially new imposition; a large number of new matters of expenditure are authorised by that Act, and especially a large increase of expenditure upon sanitary matters. This exemption is repealed by the provisions of sect. 169 of the Act of 1848. The general words of that section, which provide that the rate is to be levied upon "every person," are of themselves sufficient; but the further words, taking away all exemptions arising from residence in a precinct or extra-parochial place "or otherwise," show an express intention to take away every previously existing exemption. The general rule that a subsequent Act does not impliedly take away a privilege or exemption given by an earlier Act does not therefore apply. The Act of 1848 was a local and not a general Act:

Garnett v. Bradley, 39 L. T. Rep. 261; 3 App. Cas. 944;

London and Blackwall Railway Company v. Limehouse Board of Works, 3 K. & J. 123.

Avory in reply. — This consolidated rate was not a new imposition at all, within the meaning of the cases which have been cited. In *Perchard v. Heywood* (*ubi sup.*) there were express words amounting to a repeal of the previous exemption. There is also the further distinction that the

subsequent imposition was an imperial and not a local tax.

SMITH, M.R. — This is an appeal from a divisional court, consisting of Grantham and Channell, JJ., and the question arises whether the president and fellows of Sion College are liable to be assessed and rated to a rate, which is called the "consolidated rate." There are two Acts of Parliament upon which the answer to this question depends. It is plain and beyond dispute that, at the time when 7 Geo. 3 was passed, 1767, the piece of land in question, upon which the college now stands, was part of the bed of the river Thames and was on the north bank of the river. It appears from the Act that it was desired to embank the river in some way, not in the way in which it is now done, upon the north bank. The purview of the Act was this, that if the frontagers upon the north side of the river Thames would embank the lands there situated at their own expense, then the land so embanked should become "vested in the owner or owners, proprietor or proprietors of such adjoining wharf or ground according to his, her, or their respective estates, trusts, or interests therein, free from all taxes and assessments whatsoever." I now pass on to what took place in 1848. In the year 1848 an Act was passed, which is called the City of London Sewers Act (11 & 12 Vict. c. 143) by which a body of commissioners was brought into existence. The commissioners had large powers conferred upon them; they had large powers of improving the City; they had large powers of borrowing money upon the security of the rates, for the purpose of carrying out those improvements, and of making rates to provide money for those purposes; and they were empowered, by sect. 168, to make the rate, which was called the "consolidated rate," and is the rate in question in this case. Now, sect. 168 enacts that "it shall be lawful for the commissioners . . . once in every year, or oftener if they shall think it necessary, to direct one or more rate or rates, not exceeding in the whole the sum of one shilling and sixpence in the pound in any one year, to be made upon the owners and holders or occupiers of property within the City to be called 'the consolidated rate,' for the purpose of forming, making, maintaining, keeping in repair, paving, lighting, sweeping, cleaning, and watering the streets within the City, and of making and carrying into effect such improvements within the City as the commissioners are or shall or may from time to time or at any time be authorised to make and carry into effect, and of constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City, and also of defraying the salaries, gratuities, wages, and allowances of all officers acting in the execution of this Act, unless otherwise provided for, and all other incidental costs, payments, charges, and expenses attending the execution of the powers, duties, and authorities hereby imposed upon and given to the commissioners, and which are not herein otherwise specially provided for, and for securing, raising, and paying any moneys, and the interest thereof, which may be borrowed on the security of the said consolidated rate." The commissioners may do all those things, and may borrow money on the security of this consolidated rate, which they

were under this Act entitled to bring into existence for the first time. Then sect. 169 provides that, "Every such rate as aforesaid shall be made by the alderman or his deputy and the major part of the common councilmen of each ward upon every person who shall inhabit, hold, occupy, possess, or enjoy any house or building within the City, or partly within and partly without the City (whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situated in any precinct or extra-parochial place or otherwise)." Pausing there, can it be doubted for a moment that, if this section of the Act of 1848 stood alone, the owners of Sion College would be liable to be assessed to this "consolidated rate"? That was not and could not be disputed. The question arises in this way: It is contended that, although by this Act of Parliament, passed in 1848, the "consolidated rate" was brought into existence, and the proper persons were empowered to levy it, and although by that Act Sion College would undoubtedly be liable to the rate, yet by reason of sect. 51 of the Act of 1767 (7 Geo. 3, c. 37) Sion College is exempt from paying this "consolidated rate." It is said that Sion College is exempt from this rate because sect. 51 of the Act 1767 provided that this land should vest in the owners "free from all taxes and assessments whatsoever." Therefore it is contended that by this Act which was passed in 1767 there is an exemption from this "consolidated rate" which was first brought into existence in the year 1848. Now, in this case we have to consider what is the meaning of the words "free from all taxes and assessments whatsoever," for it seems to me that this is the first and governing point in this appeal. Do those words mean that the land was to be free only from all taxes and assessments which were then in existence in the year 1767? Now this court in this case is not left without authority upon the question because, as it seems to me from the cases to which our attention has been called—*Williams v. Pritchard* (4 T. R. 2; 2 R. R. 310), *Perchard v. Heywood* (8 T. R. 468), and *Rez v. London Gas Light Company* (8 B. & C. 54)—the one judicial interpretation of sect. 51 of 7 Geo. 3, c. 37, has been that it only exempts the land from taxes and assessments which were then existing in 1767, and not from new or substantially new taxes or assessments which came into existence after 1767. During the argument Collins, L.J. read a passage from the judgment of Bayley, J. in *Rez v. London Gas Light Company* (*ubi sup.*), which is very apposite to the matter which we now have in hand, but I need not read it again. The substance of all those cases is this, as it seems to me: That if the tax, the subject-matter of the inquiry, is a substantially new tax which has come into being and is first levied after the passing of the exempting Act of 1767, then that new tax, as I will call it, does not come within the exemption, and that only those matters which were existing at the time of the passing of the Act 1767 come within the words "free from all taxes and assessments whatsoever." In my opinion, looking at what the present tax is, it is substantially a new tax which came into existence under the Act of 1848. I agree that it has some

elements which would appertain to some of the old taxes which were levied prior to the creation of the "consolidated rate," but I cannot look at what this consolidated rate is, and when it was brought into existence, and the circumstances under which it was brought into existence, and the persons who were to administer it, without coming to the conclusion that it was substantially a new tax or assessment brought into existence under the Act of 1848. It seems to me, following the authorities upon the point to which I have called attention, that the Sion College does not come within the exemption, given by sect. 51 of the Act 1767, with regard to this consolidated rate, and that therefore the judgment of the Divisional Court was right. There was another point taken, upon which I am not going to deliver judgment. That point was whether, assuming this rate did come within the exemption, that exemption has not been repealed by sect. 169 of the Act of 1848. The inclination of my opinion is that it has not been repealed, but I give no judgment upon that point, for it is not necessary to do so in the view which I have expressed. For the reasons which I have stated I think that this appeal fails and must be dismissed.

COLLINS, L.J.—I am of the same opinion. I confess that I felt a great deal of sympathy for the very clear and able argument of Mr. Avory in support of the appeal, but I think his real difficulty lies in the series of early decisions—*Williams v. Pritchard* (*ubi sup.*), *Perchard v. Heywood* (*ubi sup.*), and *Rez v. London Gas Light Company* (*ubi sup.*), to which I need not refer again. Those cases seem unquestionably to have established that, with respect to this particular exemption, it was intended to be an exemption only from existing taxes and assessments, with this possible degree of expansion—namely, that named by Bayley, J. in the case of *Rez v. London Gas Light Company* (*ubi sup.*), where he says: "The house and window tax was a new one imposed after the exemption was given; and the exemption may be considered analogous to a covenant to pay taxes, which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation." That being so, we have got to deal now with the question whether this exemption extends to this consolidated rate. It seems to me that when the numerous subject-matters of that rate, which were not contemplated or known of at the time when this exemption was given, are considered, the inference is that the consolidated rate is an entirely new tax, and it is none the less an entirely new tax, because undoubtedly it does embrace certain elements of the old tax. I think that is the test, and, though I feel that there is an injustice done in this case to the extent to which the area of the two taxes coincides, still I think that, as a question of fact, having regard to the numberless matters to which Mr. Dankwerts has called attention, and others which are to be found distributed through the Act, the inference of fact is strong that this is so substantially a new tax that it is outside the limits laid down by the old cases as defining the area of the exemption. I do not think it is necessary to go into the other question—that is, assuming this was a rate or assessment which

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would have fallen within the exemption—whether the words of the subsequent Act are sufficient to take it out of the exemption. I desire to give no opinion whatever that they have that effect. I am not at all satisfied that they have; but it is not necessary for our decision to say anything about it.

BOMBE, L.J.—I agree. The point may be put, as far as I am concerned, very shortly. Having regard to the decisions to which our attention has been called, and which are of such long standing, that it would not be becoming of us to review them now, it is clear that the Act of 1767 has had an interpretation put upon it, and that the operation of the Act does not extend to any tax or assessment which was not substantially in existence at the time when the Act was passed, that is to say, it does not extend to any taxes or rates which are substantially new, viewing the matter as one of substance. Then one has to consider whether this consolidated rate, established by the Act of 1848, is or is not a substantially new rate. In my opinion, upon the facts of the case, we cannot avoid coming to the conclusion that it is, looking at the variety of purposes for which it is to be raised, and not the less because some of the purposes are purposes for which a rate was made in 1767. It is to be borne in mind that this consolidated rate is indivisible; it is a separate and indivisible rate, and cannot be split up; and it is for so many purposes, differing substantially from the purposes for which rates were made in 1767, that we are bound to hold, as it appears to me, that the consolidated rate is, for the purposes of the Act of 1767, substantially a distinct rate. It is said, and I have no doubt truly, that this is somewhat hard upon the appellants, but the Act of Parliament has created that hardship, and it is not for us, as it appears to me, to question its wisdom. That this Act did intend, in some respects, to do away with immunities from rating is clear, although whether it intended to do away with the general immunity of *Siou College* under the Act of 1767 is a question about which I express no opinion. Upon the grounds which I have stated, which are the grounds given by the Master of the Rolls and the Lord Justice, I think this appeal must fail, and, like them, I express no opinion upon the other points which have been raised.

Appeal dismissed.

Solicitors for the appellants, *Clark, Rawlins, and Co.*

Solicitor for the respondents, *Sir H. H. Crawford.*

Feb. 15 and 18, 1901.

(Before RIGBY, WILLIAMS, and STIRLING, L.J.J.)

EASTWOOD BROTHERS LIMITED v. HONLEY URBAN DISTRICT COUNCIL. (a)

APPEAL FROM THE CHANCERY DIVISION.

Local government—Sewers—Right to discharge liquids from manufactories—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 21—Public Health Acts Amendment Act 1890 (53 & 54 Vict. c. 59), s. 17—Rivers Pollution Prevention Act 1876 (39 & 40 Vict. c. 75), s. 7.

The plaintiffs were the owners of certain manufactories, and since 1885, with the consent of the

local authority, had caused a drain which received the liquids proceeding from their mills and the manufacturing processes carried on there to empty into the sewer of the local authority.

The present local authority threatened to disconnect the drain from the sewer.

Held, that under sect. 21 of the Public Health Act 1875 the plaintiffs had an absolute right to discharge their effluent into the sewer; and if that right had been qualified by sect. 7 of the Rivers Pollution Prevention Act 1876, the facilities which had been given by the local board for dealing with the effluent ought not to be withdrawn unless the case came within one of the provisions to sect. 7, which had not been proved, and the plaintiffs were entitled to an injunction restraining the defendants from severing the connection between the drain and the sewer.

Decision of Byrne, J. (19 Mag. Cas. 628; 83 L. T. Rep. 22) affirmed.

THIS was an appeal from a decision of Byrne, J. granting an injunction restraining the defendants from cutting off the connection between the plaintiffs' drain and their sewer.

The facts and sections of the various Acts of Parliament are fully set out in the report of the case in the court below.

Asquith, K.C. and Clayton for the appellants.—Sect. 21 of the Public Health Act 1875 does not apply to trade effluents, and the decision of Charles, J. in *Peebles v. Oswaldtwistle Urban District Council* (75 L. T. Rep. 689; (1897) 1 Q. B. 384, 392) on this point was wrong. His decision was reversed on appeal (76 L. T. Rep. 315; (1897) 1 Q. B. 625; 78 L. T. Rep. 569; (1898) A. C. 387), but this point was not considered. The plaintiffs have no statutory right. They also referred to

Attorney-General v. Clerkenwell Vestry, 65 L. T. Rep. 312; (1891) 3 Ch. 527;

Vestry of St. Mary, Islington v. Hornsey Urban District Council, 19 Mag. Cas. 577; 82 L. T. Rep. 580; (1900) 1 Ch. 695;

Charles v. Finchley Local Board, 48 L. T. Rep. 569; 23 Ch. Div. 767, 774.

Danckwerts, K.C. and Waggett for the plaintiffs.—The plaintiffs had sent this trade effluent into the dyke since 1853; therefore in 1885 they had acquired a prescriptive right to do so, and the change made by the then local authority did not affect it. The plaintiffs have an absolute right to discharge their trade effluent into this sewer. Sect. 21 of the Public Health Act 1875 applies to trade effluents, and the decision of Charles, J. in *Peebles v. Oswaldtwistle Urban District Council* (*ubi sup.*) is correct. His decision is corroborated by sects. 16 and 17 of the Public Health Acts Amendment Act 1890. The plaintiffs also have a right under sect. 7 of the Rivers Pollution Prevention Act 1876. There is no evidence to bring the case within either of the provisions in that section. They also referred to

Attorney-General v. Colney Hatch Lunatic Asylum, 19 L. T. Rep. 708; L. Rep. 4 Ch. App. 146, 153;

Ogilvie v. Blything Union Rural Sanitary Authority, 65 L. T. Rep. 338.

Asquith, K.C. in reply.

RIGBY, L.J.—I have found some difficulty in dealing with this case on account of the rather vague way in which it has been brought forward. But it is obvious that the local authority of their

own free will did some years ago allow the effluent water from the plaintiffs' manufactory to be introduced into their sewers, and I can find no allegation that the sewers of the district are insufficient for carrying off that trade effluent as well as all other sewage which has to be carried away by them. With reference to the first proviso of sect. 7 of the Act of 1876, Byrne, J. upon the evidence before him has found that there is nothing to bring the case within that section, and I do not see any reason for overruling that finding. Under the circumstances, the local board come before us and say: "We object because we find that the land for the purposes of irrigation to dispose of the sewage is small in area in our district, and our engineers think that the nature of the trade effluent is such that it will render the processes of irrigation and filtration somewhat less efficient, and therefore it will be objectionable"; but there is no objection that I can find on the ground that there will be pollution within any ordinary meaning of the word, or any applicable meaning, by the sewage matter so as to prevent it being proper for conveyance into the sewer. I can find no grounds on which we ought to differ from Byrne, J., and therefore think the appeal ought to be disallowed.

WILLIAMS, L.J.—I entirely agree.

STIERLING, L.J.—Whether we look at sect. 21 of the Public Health Act 1875 or sect. 7 of the Rivers Pollution Prevention Act 1876, I think no sufficient ground is shown for reversing the decision of Byrne, J. If sect. 21 applies, then, according to the authorities, the plaintiffs have an absolute right to discharge their effluent into the sewer. If, on the other hand, that right is qualified by sect. 7 of the Act of 1876, it seems to me that the facilities which have been given by the local board for dealing with the effluent ought not to be withdrawn unless the case is brought within one or other of the provisos in the two sub-sections which follow the first part of sect. 7. I agree that the local authority have not brought the case within either of the provisos, and consequently that the appeal ought to be dismissed.

Solicitors: *Jaques and Co.*, agents for *Armistage, Sykes, and Hinchcliffe*, Huddersfield; *Van Sandau and Co.*, agents for *Mills and Co.*, Huddersfield.

Feb. 26 and 28, 1901.

(Before RIGBY, WILLIAMS, and STIERLING, L.JJ.)

ATTORNEY-GENERAL v. LONDON COUNTY COUNCIL. (a)

APPEAL FROM THE CHANCERY DIVISION.

London County Council—Statutory powers—Working tramways—Running omnibuses in connection therewith—Trading—County fund—Ultra vires—Local Government Act 1888 (51 & 52 Vict. c. 41), ss. 2, 68, 79—London County Tramway Act 1896 (59 & 60 Vict. c. li.), s. 2.

By sect. 2 of the London County Tramway Act 1896 the London County Council were authorised to purchase and work tramways. Accordingly they purchased certain tramways from a limited company which had, under its memorandum of association, power to run omnibuses in connection with its undertaking. The county

council on taking over the undertaking continued to run omnibuses, and extended the route over which they travelled.

Held, that sect. 2 did not enable the London County Council to exercise any powers other than those which had been conferred upon them by the Local Government Act 1888; that, although sect. 2 clearly enabled them to work tramways, they had no statutory power to purchase and run omnibuses, nor to apply the county fund in that way; that the running of the omnibuses was an entirely separate undertaking; that it was not so closely connected with the powers which were expressly conferred upon them that it might be impliedly understood as included in those powers; and that it could not be included merely because it might be convenient.

Decision of Cozens-Hardy, J. (19 Mag. Cas. 586; 82 L. T. Rep. 671) affirmed.

The discretion exercised by the Attorney-General to interfere, and to allow his name to be used in actions brought at the relation of private individuals, ought not in any way to be fettered by the court.

UNDER the powers conferred upon them by the London County Tramway Act 1896, the London County Council purchased from the London Tramways Company Limited certain tramways south of the River Thames, with termini south of Westminster Bridge, Waterloo Bridge, and Blackfriars Bridge, respectively.

The London Tramways Company Limited had under its memorandum of association, as altered pursuant to the Companies (Memorandum of Association) Act 1890, power to run omnibuses in connection with its undertaking.

At the time of the purchase the tramway company, while working the tramways, ran three sets of omnibuses in connection with and as feeders to the tramway business—viz., a set of omnibuses from the tramway terminus at Westminster Bridge, across the bridge up to Charing Cross and back; a set of omnibuses from the tramway terminus near Waterloo Bridge, across the bridge to the Strand, and back; and a set of omnibuses from the tramway terminus near Blackfriars Bridge, across the bridge to a point near Farringdon-street Station, and back.

After the purchase the London County Council ran the last set of omnibuses in the same way. Instead of the first two sets, they ran one set of omnibuses from the Westminster Bridge terminus over the bridge, past Charing Cross, through the Strand, and over Waterloo Bridge to the tramway terminus ending there, and back.

An action was brought by the Attorney-General, at the relation of a large number of the omnibus proprietors of London, and the omnibus proprietors themselves, suing as ratepayers, seeking a declaration that the London County Council had no power to carry on the business of omnibus proprietors in connection with their tramways, nor to apply the county fund for the purpose of maintaining and working the omnibuses; and consequential relief.

The London County Tramway Act 1896 (59 & 60 Vict. c. li.) recites that

There are in force within the county of London other local Acts authorising tramway undertakings (all or some of which are mentioned in the schedule to this Act), under and by virtue of which Acts the council have

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

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or claim to have powers to purchase at the expiration of certain periods the several tramways and undertakings thereby respectively authorised so far as they are within the county of London, but some of the said Acts confer no powers on the council for the working of the said tramways after they have been purchased.

And that

It is expedient that powers such as are in this Act contained should be conferred on the council for the working of the tramways authorised by the local Acts mentioned in the schedule to this Act as and when such tramways are acquired by the council.

Sect. 2 provides that

It shall be lawful for the council to exercise with respect to any tramways authorised by the local Acts mentioned in the schedule to this Act, which have been or shall be purchased or acquired by them under their statutory powers, the same powers of working such tramways respectively as were possessed by the company or companies respectively owning such tramways, and the council may provide, place, and run carriages thereon, and provide such horses, cars, fixed and movable plant, harness, and apparatus as may be requisite or convenient for enabling the council to exercise such powers, and they may employ such persons as may be requisite or convenient for working the tramways for the time being worked by them.

The action came on for trial before Cozens-Hardy, J. on the 22nd March 1900, when his Lordship reserved judgment.

On the 6th April 1900 his Lordship decided (82 L. T. Rep. 671) that the London County Council were carrying on a separate and distinct business as omnibus proprietors, which was not authorised, either expressly or by implication, by the Act of 1896.

From that decision the London County Council now appealed.

Haldane, K.O. and Vernon Smith, K.O. (with them *Methold*) for the appellants.—We submit that, upon the authority of the decision in *Attorney-General v. Great Eastern Railway Company* (42 L. T. Rep. 810; 5 App. Cas. 478), and especially on the observations of James, L.J. in that case, the tramway omnibuses are works and property connected with the tramways, and were properly purchased under the London County Tramway Act 1896. They are ancillary to the tramways; they are for use in connection therewith. Applying the same principle as in that case, the purchase of the omnibuses was within the express power of the London County Council to "provide and run carriages" upon the tramways. Moreover, the words of sect. 2 of the Act of 1896, the words conferring the power to "provide horses, cars, fixed and movable plant, harness, and apparatus," are sufficient to permit of the carrying on of the omnibus business. "Cars" would include omnibuses. Sect. 21 of the London County Council (Vauxhall Bridge Tramways) Act 1896 (59 & 60 Vict. c. cxxi.), which relates to receipts and expenditure in connection with tramways and set-off, applies to all the tramways acquired by the London County Council, not to the Vauxhall line only. The principles laid down for the construction of statutes appear from *Attorney-General v. Great Eastern Railway Company* (*ubi sup.*) and *Mayor, &c., of London v. Galloway* (14 L. T. Rep. 865; L. Rep. 1 E. & I. App. 34). The court ought not to apply the doctrine of *ultra vires* to a public body such as the London

County Council. A more liberal construction should be given to powers conferred upon a public body for the public benefit than where powers are conferred upon a company trading for gain. The case, therefore, is not like *Ashbury Railway Carriage and Iron Company Limited v. Riche* (33 L. T. Rep. 450; L. Rep. 7 E. & I. App. 653) and *Baroness Wenlock v. River Dee Company* (53 L. T. Rep. 62; 10 App. Cas. 354). Assuming, however, that it is *ultra vires* of the London County Council to run these omnibuses, *non constat* that the rates are being interfered with. Even if there is no statutory authority to do what has been done here, still the London County Council, although a statutory corporation, is in a position analogous to that of a municipal corporation, not to that of a commercial company where every thing which is not strictly authorised is to be treated as *ultra vires*. It has, therefore, as part of its business, power to do all that a municipal corporation could do subject to the rates being unaffected, and it is for the plaintiffs to establish that the rates will be raised. There is no evidence to show that the running of the omnibuses will affect the rates. Sect. 2 of the Local Government Act 1888 defines the constitution of county councils, and shows that they resemble municipal corporations in their functions. The scheme of that Act was to establish a council for every county, and there was a certain transfer of powers; but there is no section of that Act which says that those are to be the powers exclusively. Instead of a charter which is granted to municipal corporations, there is sect. 79 relating to the incorporation of county councils; but nowhere is there an exhaustive definition of the powers possessed by county councils. As to the effect of the Municipal Corporations Acts 1835 and 1882 upon municipal corporations, see

Grant on Corporations, p. 16;

Rutter v. Chapman, 8 M. & W. 1;

Mayor, &c., of Newcastle v. Attorney-General, 67

L. T. Rep. 728; (1892) A. C. 568;

Sutton's Hospital, 10 Co. 1.

Further, in this action the Attorney-General is suing at the relation of rival traders who do not approve of the competition of the London County Council. There is, however, no sufficient public benefit shown to arise from the action which is brought in his name to justify it. The Attorney-General ought not to have allowed his name to be used at all. There is no sufficient ground for his interfering and bringing the action to prevent what is complained of.

Hon. *E. C. Macnaghten, K.O. and Blaklock* for the respondents.—It lies upon the London County Council to show that they have statutory authority or a common law right to do what they claim that they have the right to do—that is to say, to carry on this separate business of omnibus proprietors. In this, they have entirely failed. It is said, however, that assuming that they are wrong as to their statutory authority, nevertheless they are not in the position of a corporation founded by statute, but in the position of one of the old municipal corporations and can carry out what they require provided that they avoid coming upon the rates, and that they say they are not doing. But we submit first that they are not like an old municipal corporation, but are a mere creation of statute for a particular purpose,

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and have only those powers which the statute confers. What is not expressly or impliedly authorised must be taken to be prohibited. They have no charter from the Crown like municipal corporations. The constitution of the London County Council entirely depends upon the Local Government Act 1888. Sect. 2 is the section relied upon by the London County Council. It is said that that puts them in the position of the old municipal corporations. The establishment of a "county fund" by the carrying thereto of all receipts of a county council, whether for general or special county purposes, is expressly directed by sect. 68 of the Act of 1888. It is said, however, that sect. 21 of the London County Council (Vauxhall Bridge Tramways) Act 1896 determines the rights as to the receipts and expenditure in connection with tramways. That section, we admit, applies to all the tramways acquired by the London County Council. But unless they can establish that omnibuses can be run in connection with the tramways, sect. 21 cannot assist them in any way. The London County Council can only run these omnibuses out of the fund which it holds. But they have not and never had any fund out of which to run omnibuses, and the expense must come out of the rates. Upon that ground also the plaintiffs are entitled to an injunction. This is not a case like *Mayor, &c., of Newcastle v. Attorney-General (ubi sup.)*. Apart from the London County Tramway Act 1896 the London County Council have no power to work tramways. All that the London County Council were authorised by the Act of 1896 to acquire was the tramways. They have no power at all to work omnibuses. There is nothing in the Act to give them such a power by implication. Omnibuses are not connected with the tramways nor have they any relation to the working of the tramways. Again, there is no reason why the London County Council should stop the omnibuses at any particular place. It was the London County Council who thought that it would be more convenient to run the omnibuses along the Strand instead of stopping at the original termini. The fact that it is for the benefit of the public is quite immaterial. If it goes forth that the London County Council have power to run these omnibuses why not from other parts of London to the tramway termini? Their object is to carry on a commercial undertaking. They might just as well run a system of omnibuses all over London. Anything reasonably connected with the tramways they might do. But when it comes to running omnibuses because advantageous to the public that is no ground for permitting it. That was the point put forward in *Colman v. Eastern Counties Railway Company* (10 Beav. 1) and negatived by the court. It cannot be done unless shown to be really ancillary to that which the London County Council are expressly authorised to do. Then it is said that this is not a case in which the Attorney-General should interfere. As to an action being brought by the Attorney-General at the relation of other plaintiffs there is very little authority. There is the view of James, L.J. in *Attorney-General v. Great Eastern Railway Company* (40 L. T. Rep. 265; 11 Ch. Div. 449, at p. 483) on the one side, and the view of Baggallay, L.J. in the same case on the other. There is also the statement of Lord Blackburn in the House of Lords in that

case. There is no decision on the point, but only the divergent opinions of James and Baggallay, L.J.J. This, however, is a case of considerable public importance, and the Attorney-General has very properly allowed the action to be brought in his name. Moreover the matter does not quite rest there because the relators are not rival traders laying hold of the Attorney-General's name, but are ratepayers of the county of London, and they are entitled as individuals to say that the rates are employed in paying for the carrying on the business of omnibus proprietors in which business the London County Council have no power to engage. On that ground the relators are entitled to move in the matter. They referred also to

Reg. v. Reed, 42 L. T. Rep. 835; 5 Q. B. Div. 483.

Haldane, K.C. replied.

RIGBY, L.J.—The question raised in this case is as to the power of the London County Council to act as omnibus proprietors, not in general, but in respect to a particular line of omnibuses which in great part was used by the London Tramways Company Limited, who were the predecessors in title of certain tramways which, under an Act of Parliament (the London County Tramway Act 1896) the London County Council were authorised to purchase and use. The first point—or, at any rate, one that it will be convenient for us first to deal with—is as to the legal situation of the London County Council. Now, there is no doubt whatever that the London County Council are constituted by statute. They are, in fact, incorporated by sect. 79 of the Local Government Act of 1888. Sect. 79 says that "The council of each county"—and here it is the county of London—"shall be a body corporate by the name of the county council, with the addition of the name of the administrative county, and shall have perpetual succession," and so on. Undoubtedly, therefore, so far the London County Council is a statutory body, and is not a common law corporate body at all. But counsel for the London County Council have referred to sect. 2 of the same Act, which provides that "The council of a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject, nevertheless, to the provisions of this Act." Then the section goes on to deal with other special matters. Now, the argument submitted to us is that the council of a municipal corporation has, by the Municipal Corporations Act 1882, power to perform the duties of a corporation; and that whatever a corporation can do is to be done by them. Then it is said that municipal corporations are really creations not of an Act of Parliament, but of Royal Charter in each individual case; that, although their proceedings are regulated by an Act of Parliament, that does not prevent them from being in effect, corporations by Royal Charter which otherwise may be called corporations at common law; and that such corporations are not within the doctrine which is laid down—and was first indicated in modern times perhaps—in *Ashbury Railway Carriage and Iron Company v. Riche* (33 L. T. Rep. 450; L. Rep. 7 E. & I. App. 653), but subsequently in several cases, including that of *Baroness Wenlock v. River Dee Company*

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(63 L. T. Rep. 62; 10 App. Cas. 354)—namely, that you must find within the four corners of the Act of Parliament something to justify the assumption of the power which they claim to exercise. If there be nothing in the Act to justify the assumption of such power, then the power does not exist. Counsel for the London County Council say—and no doubt it is to a considerable extent true—that that doctrine does not apply to a corporation not created by Act of Parliament, because it existed by the grant of a Royal Charter, and that, inasmuch as a municipal corporation is not within that doctrine, the council of a municipal corporation is able to do in the name, and on behalf of, the corporation many acts which are not included in any statute and which are the general powers of a common law corporation. Granted that that is the case, how does sect. 2 of the Local Government Act of 1888 make a county council capable of exercising the same powers? The provision is not that they shall have the same powers and authorities that the council of a municipal corporation has, but that the county council shall be constituted and elected and carry on their proceedings in the same manner and be in the same position in all respects. It is clearly those last words, if any, that could be construed as giving powers outside any statute. But are they intended to have so wide an effect? "In the same position in all respects" means subject, of course, to this statute—that is to say, subject to sect. 79 of it—subject, therefore, to the creation of the county council as a statutory corporation under sect. 79. That leaves the county council in a different position from the council of a borough, and is sufficient, in my opinion, to dispose of the argument that they are to be in all respects in the same position. They are not to be in all respects in the same position, but they are to be subject to this Act with this reservation (I am paraphrasing the words) that wherever you find a provision in this Act dealing with the County Council you must give effect to it, and make the position different from that of a council of a borough. That, I think, is quite sufficient to dispose of the suggestion that they can exercise common law powers of corporations created by Royal Charter, although the council of a borough may do so. I hold, therefore, that that section does not enable the London County Council to exercise any other powers than are contained in and conferred upon them by statute, excluding what their counsel seek to derive from sect. 2, which I hold has no such effect as that attempted to be attributed to it. Now, the next point is this: Have the London County Council, by any statute whatsoever, the power to deal with omnibuses and the power to run omnibuses? We are referred to the London County Tramway Act of 1896, which was an Act to enable the London County Council to work tramways, and for other purposes. Sect. 2 provides that "It shall be lawful for the council"—meaning the London County Council—"to exercise with respect to any tramways authorised by the local Acts mentioned in the schedule to this Act which have been or shall be purchased or acquired by them under their statutory powers the same powers of working such tramways respectively as were possessed by the company or companies respectively owning

such tramways, and the council may provide, place, and run carriages thereon, and provide such horses, cars, fixed and movable plant, harness and apparatus, as may be requisite or convenient for enabling the council to exercise such powers, and they may employ such persons as may be requisite or convenient for working the tramways for the time being worked by them." Now that section quite clearly enables, and was intended to enable, the London County Council to work the tramways which were transferred to them under statutory powers. But it is said that at the time when the transfer took place—the transfer authorised by Act of Parliament—the London Tramways Company Limited were possessed of omnibuses and horses and other matters which were run in three directions, one being over Blackfriars Bridge to somewhere in Farringdon-street; one from Waterloo Railway Station, over Waterloo Bridge, to somewhere near Somerset House; and a third over Westminster Bridge to somewhere near Charing Cross. It was argued that, by virtue of this section the London County Council acquired the right of running, in the first place, the same tramways that were run by their predecessors. Now, those very predecessors commenced their existence as a tramways company only. Then it occurred to them that it would be convenient to run omnibuses as feeders to their main tramways. They got—I do not precisely know whether it was in the historical order of events before they began to use omnibuses or whether it was soon afterwards, but at any rate they did get, under the Companies (Memorandum of Association) Act of 1890—power to amend their memorandum of association so as to entitle them to run omnibuses. So they were in effect possessed, as one undertaking, no doubt, of two separate and distinct lines, one being the tramway line and the other the omnibus line. They had the power to use both, it is perfectly true. It would have been easy to say in this clause 2, which I am now dealing with, that the London County Council should have the right to take the whole undertaking of the tramways company, including the omnibus line as well as the tramway line. When I say "easy," I mean easy as a mere matter of drafting; that could have been made quite plain. But whether as a matter of Parliamentary policy it would have been easy, or even possible, I cannot say. I know nothing about that. But if the intention was, and Parliament were inclined to authorise, that the County Council should exercise the whole of the undertaking, including both branches—namely, the tramway branch and the omnibus branch—it would have been easy to have said so. Nothing of the sort, however, is said. And it is a very notorious circumstance that there is nothing which clearly refers to that sort of transfer, the transfer of the whole undertaking and power to run both tramcars and omnibuses. It is said that the words conferring the power to "provide such horses, cars, fixed and movable plant, harness, and apparatus as may be requisite or convenient for enabling the work of the tramways to be carried on" are sufficient. I am of opinion that they are not. The suggestion was made that "cars" would include omnibuses as well as tramcars. I think that a little investigation leads to the conclusion that "cars" was used in the Tramway

Acts in reference to tramcars, and with the meaning of tramcars. When the word "cars" is used with regard to omnibuses, it is coupled with the word "road." There is a large omnibus concern which is called the Metropolitan Road Car Company or some such name. But "road car" would seem to be used as distinct from "tramcar." Therefore, I find no power under these general words to take and use the omnibus line. Then there is the word "works." There are no works about the omnibus line at all. The works there may be said to be about the tram line, because the proprietors have to lay down a special line in the roadway over which the cars have to travel. But the omnibuses move over the street like any other vehicles, and there are no works at all. If the London County Council have power, it is a power to buy the omnibuses under this clause; and I do not find any power or any words that can reasonably be held to signify the power to run the omnibuses over the line. But there is something more, if it is necessary at all to deal further with the matter. The London County Council in what they have done—I am by no means prepared to say that it is not very reasonable, very proper, and very beneficial to the public, if only it was within their power under the statutes—have extended what I may call the subsidiary lines beyond where the London Tramways Company Limited, who were their predecessors, ever carried them; for whereas one line went over Westminster Bridge to Charing Cross and back, and another went over Waterloo Bridge and back, the London County Council have joined the two together. They now run what one would think is a much better and more convenient and more beneficial line altogether—a line, that is to say, beginning at Waterloo Station, going over Waterloo Bridge, along a portion of the Strand to Charing Cross, and then over Westminster Bridge, it is not necessary to say how far, and then back again. It is not, therefore, what the London Tramways Company Limited did, but something different—altogether an improvement, I agree, so far as I can see—but it is not the same thing. Now, one difficulty that the London County Council had to deal with was that by sect. 68 of the Local Government Act of 1888 provision was made for payment of all receipts connected with any of their business into a fund which was entitled the "County Fund," or some such appellation, and for paying out everything that they had to expend from that same fund. So that unless they are authorised as trustees and administrators of that fund to spend the money on the running of omnibuses they have no title to do what they have been doing. Their counsel sought to get over that difficulty by a reference to clause 21 of the London County Council (Vauxhall Bridge Tramways) Act 1896 (59 & 60 Vict. c. cxxi.), which enables the London County Council to make a tramway over Vauxhall Bridge. In general, that is alien to the questions now before us, although sect. 21 seems to be admitted to be quite a comprehensive enactment. It is an enactment as regards receipts and expenditure. The council may cause accounts to be kept of their receipts and expenditure in connection with tramways. Then provision is made, in effect, for a set-off of one over the other and there is no necessity under that section for payment into the General County Fund

under sect. 68 of the Act of 1888. But it is all governed by those words "in connection with tramways," and if you do not make out that this running of a line of omnibuses is, within the meaning of the statute, part of the tramways scheme, then this sect. 21 does not help you in any way. Now, I think that really those are the important questions which have been raised. Of course I have not called attention to it, but it must be assumed that I have intended to deal with clause 31 of the London County Tramway Act of 1896. The company on the one hand, and the London County Council on the other, may, from time to time carry out arrangements with reference to the purchase by the London County Council of all the tramways for the time being belonging to the company, including any works and property, and so on. I thought for the moment that that phrase "works and property" was comprised in the other section; but now I see that that is in sect. 31 of the Act of 1896. But what I have said applies equally to sect. 31, namely, that there are no works to be bought, and the works and property dealt with there clearly would not have entitled them to any works in connection with the omnibus line, and if it entitled them to purchase property, it would only be the omnibuses, and would not give any power of running the omnibuses. Now, it is said that although the London County Council may not be expressly authorised to run the omnibuses, yet that is an undertaking so intimately connected with the powers that are expressly given to them of running the tramway that under the doctrine mainly depending on the judgment of James, L.J. which was given in the case of the *Attorney-General v. Great Eastern Railway Company* (42 L. T. Rep. 810; 5 App. Cas. 473) it may be treated as tacitly understood to be something belonging to, and so connected with, the other powers which are expressly given, as to be really within the statute. Now, it is not to be denied, and I do not think anyone ever has denied, that there are certain things which a statutory corporation may do which are not absolutely mentioned in their Act. But they must be things of a very different degree of importance from the present thing. This is specified to be the running of omnibuses as a separate undertaking, and I cannot read in the observations of Lord Justice James anything to authorise the notion that a separate undertaking might be entered upon, merely because it was thought to be convenient for the purposes of the main undertaking. I find no authority for that at all. Indeed, in the case of *Colman v. Eastern Counties Railway Company* (10 Beav. 1) it might well have been argued, if it were enough really, that to run a steamboat from Harwich to the Continent or somewhere else was most advantageous for the Eastern Counties Railway Company, and therefore ought to have been taken as impliedly granted to them for the purposes of the undertaking which they undoubtedly had. It appears to me that that argument might have been used there; but Lord Hatherley would not have it at all. He said that it was outside the powers given to the railway company by the Act of Parliament, and however advantageous it might be—and I dare say it was very advantageous—there was no authority to do it. In the present case this line of omnibuses run

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by the London County Council may be—and I am willing to assume that it is—very advantageous for themselves and for the public. But if they have no power, and no authority by their statutes to run the omnibuses, all that avails nothing. They must show authority to run the omnibuses before they can be allowed to do it. Then it was said that in this case the Attorney-General is suing at the relation of rival traders or companies, and that there is not sufficient public benefit shown to arise from the action which is brought in his name to justify it. For my part, I must say that, if there be any case in which a public body is going beyond its powers, I do not see any reason why the Attorney-General should not interfere. He, of course, has to consider whether in his discretion it is worth while to interfere before he allows his name to be used. But any attempt to tie him down to rules which I do not know to exist anywhere—or to tie him down for the first time by rules—should not, I think, be allowed. But in this case it really is not necessary to go into that question, for the fact is that the relators are also plaintiffs. They are plaintiffs and they are ratepayers in the county of London. I think, therefore, that there is no doubt whatever that, in the combination of information and bill, the suit is properly constituted, and the case made against the London County Council properly raised. I do not at all accede to the suggestion which was made by Mr. Macnaghten that they must necessarily be ratepayers, and that you cannot have, at any rate as a rule, an information without the relators being plaintiffs, because that is not a rule and never was. Consider, for example, all the cases of charities where an individual may not be plaintiff; but there are constant cases of individuals interested in a charity appearing as relators to an information by the Attorney-General. However, in the present case these relators are as a matter of fact also plaintiffs, and we are therefore absolved really from any minute inquiry as to the degree of public benefit that may be concerned in the information so as to justify the Attorney-General in bringing this action. I think that upon all the grounds that have been stated the case for the London County Council fails, and that it must be held that they have no power to run these omnibuses. The result, therefore, will be that the appeal fails and must be dismissed.

WILLIAMS, L.J.—I entirely agree with all that has been said by the Lord Justice. I feel that I ought to say a word or two, because the case is a case of some importance; but I do so with some hesitation, partly because my Lord has so fully and forcibly expressed the law upon the subject, and secondly, because, if I tried to express my view in a few words, I do not know that I could do so in better words than those which have been already used by Cozens-Hardy, J. in the court below. There is one short passage in his judgment which seems to me to express the whole case. "It seems to me," says Cozens-Hardy, J., "that the London County Council are really carrying on a separate and distinct business as omnibus proprietors. They do not, and they cannot lawfully, convey in their omnibuses only passengers from and to their tramways. By the Act of 1843 for regulating hackney and stage-carriages in and near London, they are bound

to take any passenger who desires a ride, and is willing to pay a halfpenny, provided there is a vacant seat. The running of omnibuses in the streets of London is certainly not expressly authorised by the Act of 1896, and, in my opinion, it is not impliedly authorised." I will, however, say a word or two about the points which have been made here. These points seem to me to be as follows—I mean the points made on behalf of the London County Council. First of all, it is said that the London County Council, by reason of the powers granted to them by the London County Tramway Act of 1896 of acquiring the tramways, and the property of the tramways company, and running the tram-cars, had, in the events which happened, the power by express words, or reasonable implication therefrom, of running these omnibuses. Secondly, it is said that the London County Council is, by virtue of the Local Government Act of 1888, in the position of a municipal corporation created by charter. It is said that it has the same power of action and of contracting that a private individual would have, even although the running of these omnibuses should be outside the statutory power of the London County Council, expressed or implied, unless, indeed, the London County Council for the purpose of maintaining and running the omnibuses had to come upon the rates, or some other fund, which is appropriated to statutory purposes. Now, as to the first point, I think that the express statutory powers do not extend to the running of these omnibuses. The express powers relied on are those contained in sect. 2 of the London County Tramway Act of 1896, which was an Act to enable the London County Council to work their tramways, and for other purposes. The other power relied on is that which is contained in the 31st section of the London County Tramway Act of 1896. My Lord has already pointed out that the express words which are contained in these two sections do not cover the running of these omnibuses. Of course, when I say this, I am taking the same view of the facts which Cozens-Hardy, J. did. These omnibuses are not run, and could not be run, even if it were necessary so to do, solely as ancillary to the tramway business. They, necessarily, coming from the south side of the Thames at the terminus of the tramway lines near Westminster Bridge, and from the terminus of the tramway lines on the south side of the Thames near Waterloo Bridge, by a route over the two bridges and along the northern side of the Thames, must carry passengers who wished to be carried in that direction, and along that not inconsiderable distance, although such passengers may have no intention to travel by the tramways at all, and have no intention to go to, or come from, the tramways at all. Then it is said that the power to run these omnibuses is really, although not within the express words that I have been dealing with, yet expressly or impliedly given by the terms of one or other, or both of those sections. Now, I do not propose to go any further into this question. In the case of *Attorney-General v. Great Eastern Railway Company* (*ubi sup.*), Lord Blackburn in his speech on page 481 of the report in 5 App. Cas., and Lord Watson in his speech on page 486 of the same report, both it will be observed say that where you have got a body exercising statutory

powers of this sort, you are not limited to the express powers, but that you may treat the powers as extending to matters which are expressly or by implication included in the express powers. They go on, however, to point out that if you cannot bring the matter within the expressed or implied powers, the Legislature must be held to have prohibited everything which you cannot bring within those expressed or implied powers. I mention that now because it is a convenient moment to do so. That observation, which is made both by Lord Blackburn and Lord Watson, seems to me to have a considerable bearing upon the order, which it was right, in my judgment, that the court should have made in this particular case. I ought to add this, however: When one is dealing with the question whether the power of running these omnibuses is fairly to be implied from the expressed power to run the tramways—because, as it is said, it is found very convenient for the tramway business to have such omnibuses—one has not only to take into consideration that those omnibuses going the distance and the route which they do must necessarily take passengers who have nothing to do with the tramway lines or the trams at all, but also that the powers of the tramway companies are very strictly defined by the General Act—the Tramways Act 1870 (33 & 34 Vict. c. 78). That Act deals amongst other things with the power to make bye-laws, with the fixing of the fares and tolls, and with various offences which may be committed upon the tram lines. And it seems to me that it would be a very strong thing to say that you must include the power to run omnibuses among the powers implied from the grant to the London County Council of the power to run tramways. The power to run omnibuses is not in any respect governed by the elaborate provisions of the Act of 1870. On the contrary, it is governed by a statute which in many respects is entirely different in its provisions—that is to say, the Metropolitan Stage Carriage Act of 1843. That is all I propose to say as to the first point. Now I will deal with the second point. That point is that the corporation here are to be treated really as if it were a common law corporation created by charter, and having all those powers which are defined by the case of *Sutton's Hospital* (10 Co. 1), which was cited by Mr. Haldane; and that therefore the London County Council should not be restrained here, even although the running of these omnibuses should be outside their statutory powers. Now, that argument is based upon sect. 2 of the Local Government Act of 1888. That section says: "The council of a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of this Act, and in particular to the following provisions," and then follow some provisions relating to qualification, to periods of election, and to other matters of detail of that sort. Now I read that section as if it had said: the council of a county created by this statute shall be constituted, elected, and so on, in like position in all respects as the council of a borough, subject, nevertheless, to the provisions of this Act. It seems to me that, under those circumstances, it is impossible to hold that whereas one of the pro-

visions of this Act is the creation of this corporation—the London County Council—those words enable you to say that this corporation is to be treated as if it were not created by a statute at all, but had been created by a common law charter, because municipal corporations under the Act of 1882 were common law corporations so created. It seems to me that so to read sect. 2 would give no effect to the words "subject, nevertheless, to the provisions of this Act." Further than that it seems to me that this is a mere machinery section. The reason why I call attention to the sort of provisions which are contained in sect. 2 of the Local Government Act of 1888 under letters (a) to (e) is that if one looks at the part of the Municipal Corporations Act of 1882—beginning at sect. 10 and going on to sect. 16—one will find that the matters that are provided for in those sections are matters of machinery and detail just of the same character as those which are provided for in the provisions of sect. 2 of the Local Government Act of 1888. I therefore should read sect. 2 as a mere machinery section, dealing with the constitution, election and conduct of proceedings, and not as a section making a radical alteration in the origin and incorporation of the county council, changing it, in effect, from a corporation incorporated by a statute for the particular purposes mentioned in the statute to a corporation created by charter outside the statute altogether. I will just add on that point that if it had been intended to make any such provision one would not have expected to find it in this machinery section at all, but in the 79th section of the Act of 1888. Now, another matter that I wish to deal with is that it is suggested or argued to a certain extent that the London County Council could not be restrained because they can maintain and run their omnibuses without coming upon the rates. Well, so far as that point is concerned, it seems to me that there is absolutely nothing in it because that point admittedly depends on sect. 21 of the "Vauxhall Act," as I will call it for shortness. It is plain that that section has no application at all unless the London County Council are able to satisfy the court that that which they are doing in running these omnibuses is something which they are doing in connection with the tramways under the statutory powers which they have to run tramways. Lastly, there has been an argument put forward that the court ought not to grant an injunction in this case, because it is a case in which the Attorney-General should not have allowed his name to have been used at all, it being really an application by some omnibus proprietors, who do not like the competition of the London County Council for the purpose of preventing if they can that competition. There is no doubt that if there was anything at all in the argument in this particular case, the relators are at all events rate-payers, and as such would have a right to ask the Attorney-General to allow his name to be used to test the question of whether the running of these omnibuses can be justified.

STIRLING, L.J.—I am of the same opinion. There are two main points which have been argued before us in this case. The first is as to the construction of sect. 2 of the London County Tramway Act of 1896, and that seems to have been the point that was mainly argued before the learned judge in the court below—Cozens-

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Hardy, J. As regards that, I do not propose to say anything, because I entirely agree with the conclusions of fact and of law at which the learned judge arrived, and for the same reasons. But out of respect to the arguments which have been addressed to us, I should like to say a few words with reference to the second point, which, so far as I gather, has been brought out for the first time before ourselves—that is, that the London County Council has got all the powers of a common law corporation. Now, unquestionably the London County Council is a creation of statute, for it was created by the Local Government Act of 1888. That does not end the question, because it may be that the statute has conferred upon the London County Council all the powers of a common law corporation. The incorporation is effected by sect. 79 of the Act of 1888, which says: "The council of each county shall be a body corporate by the name of the county council with the addition of the name of the administrative county, and shall have perpetual succession and a common seal," and so forth. Now, the first observation that one would make there is that that section at any rate does not confer on this statutory corporation the powers of a common law corporation. Again there is another observation that I may make, which is this: There is a group of clauses in the Act of 1888 beginning with sect. 3, which is headed, "Powers of County Councils," and we do not find any such express power conferred there. It is not there expressly enacted anywhere that the powers of the county councils are to be those of the common law corporations. What is relied upon are the words which are found in sect. 2, sub-sect. 1 of the Act, the first two sections being grouped together under the head of "Constitution of County Council." What is said there is this, "The council of a county and the members thereof shall be constituted and elected and conduct their proceedings in like manner, and be in the like position in all respects, as the council of a borough divided into wards, subject nevertheless to the provisions of this Act." Now the way in which it is proposed that we should hold that the powers of the London County Council are those of a common law corporation is this: We are referred to the Municipal Corporations Act of 1882 to find the position of a council of a borough, and sect. 10, sub-sect. 1, is relied upon. It enacts that: "The municipal corporation of a borough shall be capable of acting by the council of the borough, and the council shall exercise all powers vested in the corporation by this Act or otherwise." Now, the first observation that occurs to me upon that is that the council of the county is not to be in a like position in all respects as the council of a borough, but only of a particular class of borough—namely, the council of a borough divided into wards. I apprehend that that qualification points to something which is peculiar to the position of the council of a borough divided into wards, and which distinguishes it from a council of a borough which is not divided into wards. And if the sections which follow sect. 10 of the Municipal Corporations Act of 1882 are looked at it is found that there are peculiarities which distinguish a council of a borough divided into wards from those which are not. But in the second place

there is this remarkable difference: The council of a borough is not a municipal corporation. The municipal corporation is, generally speaking at any rate, a common law corporation created by charter; and the way in which the Legislature has thought fit to confer powers upon the municipal corporation of a borough is this: "Shall exercise all powers vested in the corporation by this Act or otherwise." So that the council of a borough is to exercise all the powers of a common law corporation and the municipal corporation of a borough. Now, if the words "in a like position in all respects," were intended to refer to powers it seems to me that we should arrive at this extraordinary conclusion, because there is no separate corporation here whose powers the council are to exercise. The council, by sect. 79, is itself the corporation; and it seems to me that this would be a very elaborate way of really saying nothing at all about the powers, because we should be still driven back to sect. 79 or the subsequent sections, namely, sect. 3 and the following sections which do confer powers on the county councils. I come to the same conclusion, therefore, as my learned brothers, that really sect. 2 in this portion of it does not relate to the powers of county councils at all, but is simply dealing with matters which relate to their constitution, or in other words, as Williams, L.J. described it, it is a "machinery section." Now, that being so, the London County Council is left simply in the position of a statutory corporation and anything which is beyond the powers conferred upon it by statute must be taken according to the decision to be in terms prohibited. That brings me to the last point which has been argued before us—namely, that there is not sufficient ground for the Attorney-General interfering and bringing the action in this case to prevent the exercise and abuse of the powers. Now, that argument is based upon the opinion expressed by James, L.J. in the case of *Attorney-General v. Great Eastern Railway Company* (40 L. T. Rep. 265; 11 Ch. Div. 449; on appeal, 42 L. T. Rep. 810; 5 App. Cas. 473), which, at the time, was dissented from by Baggallay, L.J. in the same case. It does not seem to me necessary on this occasion to say anything or decide anything as to the point upon which those two learned judges differed, because James, L.J. himself, at page 483 of the report in 11 Ch. Div., says this: "Where a company intrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the Legislature, it is really committing a misdemeanour, and ought to be at once stopped." Now, it seems to me that here the London County Council is violating an express enactment upon the facts which have been found by the learned judge in the court below, and with which finding we agree, because by sect. 68 of the Local Government Act of 1888, it is provided that: "All receipts of the county council, whether for general or special county purposes, shall be carried to the County Fund, and all payments for general or special county purposes shall be made in the first instance out of the fund." That is a section which was introduced for important purposes. The London County Council (*Vauxhall Bridge Tramways*) Act, 1896, creates an exception from that general rule, but it only authorises the exception in the case of receipts and expenditure

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in connection with tramways. And the moment you arrive at the conclusion at which Cozens-Hardy, J. arrived, and with which we agree, that the London County Council are really carrying on an independent business of omnibus proprietors, the exception created by sect. 21 of that Act no longer applies. Therefore in respect of that the London County Council must obey the injunction which is contained in sect. 68 of the Local Government Act of 1888. It seems to me, therefore, that the case is brought within the very rule laid down in *Attorney-General v. Great Eastern Railway Company* (ubi sup.) by James, L.J. himself, and that the declaration in this case has been properly made, and the injunction properly granted. The appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitor for the appellants, *W. A. Blasland.*

Solicitors for the respondents, *Hicks, Davis, and Hunt.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Jan. 17 and 18, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

JONES (app.) v. ROBSON (resp.). (a)

Coal mines—Explosives—Statutory rule—“Notice shall be given” as Secretary of State “may direct”—Prevention of contravention of rules—Coal Mines Regulation Acts 1887 (50 & 51 Vict. c. 58), s. 50, and 1896 (59 & 60 Vict. c. 43), s. 6.

By sect. 6 of the Coal Mines Regulation Act 1896 (which is to be read with the Coal Mines Regulation Act 1887) a Secretary of State is empowered on being satisfied that any explosive is or is likely to become dangerous by order “of which notice shall be given in such manner as he may direct” to prohibit the use thereof in any mine, &c. And by sect. 50 of the Coal Mines Regulation Act 1887 the owner, agent, and manager of a mine in the event of any contravention of or non-compliance with any such rule “by any person whomsoever” are each to be guilty of an offence against the Act unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing such rule to prevent such contravention or non-compliance.

Held, that a rule made by a Secretary of State under sect. 6 of the Coal Mines Regulation Act 1896 is valid and binding though there is no evidence, except the fact that he had made the order, to show that the Secretary of State was satisfied that the explosive referred to in the order was or was likely to become dangerous, and no evidence, except the publication of such rule under the Rules Publication Act 1893, of notice of such rule being given.

Held, further, that a manager of a mine may be guilty of an offence under sect. 50 of the Coal Mines Regulation Act 1887 where the explosive improperly used was brought into the mine by one of the workmen without his knowledge or authority.

CASE stated by the justices of the county of Glamorgan sitting at Aberdare.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

On the 6th June 1900 an information was laid by the respondent that the appellant on or about the 7th May 1900, being the certified manager of a certain coal mine, situate in the parish of Aberdare in the said county, known as the Aberdare Merthyr Colliery, unlawfully did contravene and did not comply with rule 4 of the Explosives in Coal Mines Order of the 24th May 1899, made under sect. 6 of the Coal Mines Regulation Act 1896 (59 & 60 Vict. c. 43), to be observed in the said mine by him as such manager thereof—to wit, by allowing detonators to be used in the mine, in respect of which detonators the following conditions required by such rule had not been observed—namely, that detonators shall be under the control of the owner, agent, or manager of the mine or some person specially appointed in writing by the owner, agent, or manager for the purpose, and shall be issued only to shot firers or other persons specially authorised by the owner, agent, or manager in writing.

This information came on for hearing on the 12th June 1900, and the justices convicted the appellant and fined him 10*l.* and costs.

The proceedings were taken under rule 4 of the Explosives in Coal Mines Order, the 24th July 1899, which is as follows:

On and after the 1st day of October 1899 no detonator shall be used in any mine unless the following conditions are observed: (a) Detonators shall be under the control of the owner, agent, or manager of the mine or some person specially appointed in writing by the owner, agent, or manager for the purpose, and shall be issued only to shot firers or other persons specially authorised by the owner, agent, or manager in writing; (b) Shot firers and other authorised persons shall keep all detonators issued to them until about to be used in a securely locked case or box separate from any other explosive.

This order was issued under the powers given by sect. 6 of the Coal Mines Regulation Act 1896 (59 & 60 Vict. c. 43), which is as follows:

A Secretary of State, on being satisfied that any explosive is or is likely to become dangerous, may, by order of which notice shall be given in such manner as he may direct, prohibit the use thereof in any mine or any class of mines, either absolutely or subject to conditions, and the provisions of the principal Act as to contraventions of general rules shall apply to contraventions of such prohibition.

At the hearing the solicitor for the respondent handed in to the court a Government printers' copy of the order purporting to have been made by a Secretary of State under sect. 6 of the Coal Mines Regulation Act 1896; and it was proved and the justices found as facts as follows: That the appellant was the certificated manager of the Aberdare Merthyr Colliery; that detonators were used in the colliery; that the appellant as such manager of the colliery received from Alfred Phillips Jones, the agent of the colliery, a copy of the order of the 24th July 1899, with instructions from him to see the provisions of such order carried out; that thereupon the appellant gave detonators to the under-manager, Daniel Davies, with verbal instructions to issue them to the workmen as required at the face of the workings—that is, the workmen's working-place—and that the appellant appointed one John A. Lewis to be the shot firer by an entry made in the journal of the colliery; that the appellant did not make any appointment in writing placing detonators under the control of any person, and no such

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person was appointed in writing by the owner or agent; that Daniel Davies, the under-manager, did not issue detonators as verbally directed by the appellant to the workmen at their working-places; that the workmen applied at the office of the colliery to Daniel Davies for detonators, and he supplied them; that shortly before the 7th May 1900 one John Lewis, a collier in the colliery, applied to Daniel Davies for detonators and was told there were none at the colliery; that John Lewis thereupon bought seven detonators at an ironmonger's shop and took them into the mine without the knowledge of the appellant; that John Lewis charged a blasting hole and applied one of the detonators so bought by him and sent for John A. Lewis, the appointed shot firer, to fire the charge; that blasting charges in the colliery were exploded by electricity applied by John A. Lewis, the shot firer; that upon this particular occasion the charge missed fire, and the said John Lewis withdrew the detonator, and whilst he was handling it it exploded and blew his hand off.

At the hearing before the justices it was argued on behalf of the appellant: (a) That notice of the order of the 24th July 1899 was necessary, and had not been proved; (b) that no proof had been given on the part of the respondent of the making by a Secretary of State of the alleged order of the 24th July 1899 set forth in the information; (c) that no proof had been given of any direction by a Secretary of State as to the manner in which notice should be given of the making of such order; and (d) that there was no proof of any such notice having been given of the making of such order as required by sect. 6 of the Coal Mines Regulation Act 1896.

It was also contended that upon the evidence it was clear that no detonators were issued by the under manager on the 7th May 1900, the date mentioned in the information, and that there were no detonators then under his control, and that the detonators used by the man John Lewis having been taken by him into the mine surreptitiously never got into the possession of the owner, agent, or manager, and could not therefore be under their control within the meaning of the said order.

The justices were of opinion as to contentions (a), (b), (c), and (d) (*sup.*) that the printed document was in itself sufficient evidence of the alleged order of the 24th July 1899, having been made by a Secretary of State, and the printing of such document was in itself sufficient evidence of a direction of a Secretary of State as to the manner in which notice should be given of the making of such order. They were of opinion that the sending of the order by A. P. Jones to the appellant was also sufficient evidence of such notice having been given within the meaning of sect. 6 of the Coal Mines Regulation Act 1896.

As to the other contention the justices found that although no detonators were issued by the under manager on the 7th May 1900, yet it was the practice at the mine to allow Daniel Davies the under manager to have the control of the detonators he not being a person specially appointed in writing for the purpose, and it was the practice for him to issue detonators to persons other than shot firers or other persons specially authorised in writing.

The questions of law for the opinion of the court were: Was the printed document produced

sufficient proof of the making of the order of the 24th July 1899 by the Secretary of State; and was the printing of such document sufficient evidence of a direction by the Secretary of State as to the manner in which notice should be given of the making of the order; and was the sending of the order by the agent of the colliery to the appellant sufficient evidence of such notice having been given as required by sect. 6 of the Act of 1896; and were the justices right in convicting the appellant on the ground that although no detonators were issued by the under-manager on the 7th May 1900, yet the practice of the mine was to place detonators under the control of the under-manager who was not specially appointed for the purpose in writing, and for him to issue detonators to persons other than shot firers or other persons specially authorised in writing?

Francis-Williams, Q.C. (Trevor Lewis with him) for the appellant.—We rely upon three points. In the first place there is no evidence that the Secretary of State was satisfied that this explosive was dangerous; and in the second place there is no evidence that he has given notice of the new rule as required by sect. 6 of the Coal Mines Regulation Act 1896. These two points go to the validity of the order itself. In the third place we say there is no evidence of any breach of the order on the day on which the explosion took place. The offence alleged in the information is that we allowed detonators to be used on that day—7th May 1899. The whole evidence shows that we did nothing of the kind. There were as a matter of fact no detonators in the mine on that day at all belonging to us. The man who used this detonator did not receive it from us, but bought it himself, and, as the case expressly finds, brought it into the mine without our knowledge.

H. Sutton for the respondent.—It cannot now be contended that the Secretary of State was not satisfied that this explosive was dangerous. The making of the order by him is sufficient evidence of this. Nor can it be contended that it is necessary to show he gave notice of the rule to the appellant. The words of sect. 6 as to giving notice are simply directory, and the notice is perfectly valid even though no notice is given. It has been published in the manner set out in the Rules Publication Act 1893, ss. 1, 3, and see *Re Miller* (8 E. & B. 321, at p. 332). Besides, this maxim applies to both these objections that official acts are presumed to have been done regularly until the contrary is shown. There is no evidence here that the acts were done irregularly. As a matter of fact the appellant had notice of the rule though it may not have been from the Secretary of State himself. As to the objection of substance no doubt the summons is not well drawn, but there are two answers to the objection. In the first place under *Jervis' Act* (11 & 12 Vict. c. 43, s. 1) the time at which an offence is alleged to have been committed is immaterial, and in the second place by sect. 50 of the Coal Mines Regulation Act 1887 the burden is thrown on the appellant to show that he took all the care possible to prevent the contravention of the rule.

Francis-Williams, Q.C. in reply.—The fact that no detonators were on that day in the manager's hand is surely the best possible evidence that the

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manager took all possible means to prevent the misuse of them.

BRUCE, J.—Two points have been taken in this case. The first relates to the question whether the order of the Secretary of State is valid and binding. The provision for making the rule is contained in sect. 6 of the Coal Mines Regulation Act 1896. The first point was that it did not appear that the Secretary of State had been satisfied or that any evidence had been laid before him that this explosive was or was likely to become dangerous. I think that the fact that the secretary has undoubtedly made an order is sufficient evidence that he was satisfied that it was likely to become dangerous. The main point relied upon for the appellant was that there was no evidence that any notice had been given by the Secretary of State of the order or that any direction had been given as to the manner in which the notice should be published. I am not satisfied, after considering the evidence given on behalf of the respondent, that any notice was in fact given by the Secretary of State or that he did direct in what manner the notice should be published, and therefore I am driven to consider whether the giving of the notice by the Secretary of State is a condition precedent to the order coming into force. I think it is not. It seems to me that the directions contained in the section about notice are directory only; that the order comes into force when it is made by the Secretary of State; and although power is given to him to give notice and to direct how notice shall be given of the order, yet that is not essential to the order coming into force, but is merely directory, and the fact that no notice is given does not prevent the order from operating. Therefore I think the order was good and valid, although there is no evidence of any notice having been given by the Secretary of State or of any direction as to how the notice should be given. The next point is whether there was any evidence of the commission of the offence on the 7th May, the day mentioned in the information. I have some difficulty in finding that there was evidence that the appellant allowed the detonators to be used; but I think it was undoubtedly proved that on that day detonators were used in the mine. It has also been proved that the appellant was at the time the manager of the mine. Now, sect. 50 of the Act of 1887 provides that "Every person who contravenes or does not comply with any of the general rules in this Act shall be guilty of an offence against this Act, and in the event of any contravention of or non-compliance with any of the said general rules in the case of any mine to which this Act applies, by any person whomsoever, the owner, agent, and manager shall each be guilty of an offence against this Act unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance." The respondent has satisfied us that the rule in question is a rule coming within the meaning of this section. We therefore have it proved that there was undoubtedly a contravention by some person of the rule on the 7th May. We also have it proved that the appellant was the manager of the mine without finding whether he had allowed the particular act to be committed on the 7th May. The act was com-

mitted; he was the manager at the time; and therefore he must be taken to be responsible for it unless he satisfies the justices that he has taken all reasonable means to enforce the rules and regulations in the mine and to prevent any contravention of them. It does not appear to me that the justices have considered that, and therefore if the appellant's counsel had wished it we should have sent the case back to them in order that they might consider the point. But as we are not asked to do this, I think we must come to the conclusion that the justices have acted simply upon the fact that there was a non-compliance on the 7th May, and have found that the appellant was manager of the mine at the time. Therefore he becomes responsible under this section for the act which was committed on that day by another person. The justices have not found that he allowed the detonators to be used. It was not necessary that they should have found that; but we must take it that they would probably have found that he had not taken the best means in his power to prevent them from being used. Therefore I have come to the conclusion that we must hold that the justices acted rightly, and that the appellant had committed the offence with which he was charged.

PHILLIMORE, J.—I am of the same opinion. I will only say as to the last point touched upon by my learned brother that when the prosecution had proved that there had been an illegal use of detonators, and that the appellant was manager of the mine, they had proved all that was requisite. The burden of proving the further point lay on the appellant. I agree that the form of the summons was confusing, and that it would have been fair to the appellant if there had been any chance of his being acquitted, to send down that point for reconsideration, and if the appellant's counsel had pressed us, we should have done so: but I think he was wise in not pressing us, for it seems clear upon the evidence that no magistrate could have found that the appellant had taken all reasonable means to prevent contravention of the rule. The summons is puzzling because it is misconceived. It is no offence *per se* to allow an illegal act to be done; it is an offence to cause such an act to be done, or possibly to direct it to be done. The offence here arises out of the statutory provisions, and upon the principle *Omne majus continet in se minus* adopted by the court for the consideration of Crown Cases Reserved in *Reg. v. West* (77 L. T. Rep. 536; (1893) 1 Q. B. 174). I am of opinion that the conviction was good and must be affirmed.

Appeal dismissed.

Solicitors for the appellant, *Bell, Brodrick, and Gray*, for *Linton and C. and W. Kenshole*, *Aberdare*.

Solicitor for the respondent, *Solicitor of the Treasury*.

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KING'S BENCH DIVISION.

Friday, Jan. 25, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

MAYOR, &C., OF SOUTHEND-ON-SEA (apps.) v. ARCHER. (resp.)

MAYOR, &C., OF SOUTHEND-ON-SEA (apps.) v. ROMANIS. (resp.). (a)

Local government—Buildings—Bye-laws—Temporary wooden structures—“New building” within meaning of bye-law—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 157.

Under the powers given by sect. 157 of the Public Health Act 1875 to make bye-laws with respect to the structure of new buildings, an urban sanitary authority made a bye-law that every person who should erect a “new building” should cause such building to be constructed of good bricks, stone, or other hard and incombustible materials properly put together.

A wooden structure, measuring about 10ft. by 7ft. with a height of 10ft., was erected as a cover for a large weighing-machine on an esplanade where the public stopped for the purpose of using the weighing-machine. It had a wooden framing on all four sides, a wooden roof, and a wooden floor resting on joists, but was not fixed to the soil, and had no foundations. It was used only during the summer season, when it was open daily, but was closed at night, and no person remained therein at night. It had no sanitary arrangements or provision for lighting or heating.

A similar wooden structure, measuring about 9ft. by 7ft. with a height of 7ft., was erected and used during the summer months for the sale of light refreshments. It was put up at the beginning of each season, and at the end of the season was taken down and removed. It was made of wood with a roof of canvas on wooden cross pieces. It had no sanitary arrangements or provision for lighting or heating, and it rested on the ground without being fixed to the soil, and had no foundations. It was daily used as a shop for the sale of light refreshments from an opening in front for that purpose, and was locked up at night and no person remained therein.

Held, that neither of these wooden structures was a “new building” within the meaning of the Act of Parliament or the bye-law.

MAYOR, &C., OF SOUTHEND-ON-SEA (apps.) v. ARCHER (resp.).

CASE stated by justices of the peace for the borough of Southend-on-Sea sitting as a court of summary jurisdiction.

The respondent was summoned on the information of the appellants, acting as the sanitary authority for the borough of Southend-on-Sea, for that he (the respondent) did within six months prior to the date of the information unlawfully erect a new building—namely, a weighing-machine house, without causing such building to be inclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together, contrary to No. 11 of the bye-laws in force in the borough with respect to new streets and buildings.

At the hearing the following facts were proved:—

That the structure was erected by the defendant within six months of the information as, and was used for, a house or shelter for a large weighing-machine on the esplanade on the sea front where the public passing along could and did stop for the purpose of using the weighing-machine; that the erection was used only during the summer months, and could readily be moved, being made in sections for that purpose.

That the structure measured 10ft. 4in. by 7ft., with a height of 10ft. in front and 8½ft. at the rear; that it consisted of wood framing closely boarded with match-boarding on all four sides, and had an opening 7ft. wide in front which was open during business hours but closed at night with wooden shutters and secured by bolts inside, and there was also a door which was locked at night.

It had a wooden floor close-boarded and placed on joists, and the roof was constructed of wood covered with felt. Inside there was a large weighing-machine, a small table, two chairs, and some hat-pegs.

There were no sanitary arrangements, and no provision for artificial lighting or for heating. It was not fixed to the soil, and had no foundation other than the wooden floor joists resting on the ground.

During the summer season the structure was open daily from 8 a.m. to 8 p.m. and was visited by persons using the weighing-machine, the defendant being in charge thereof. It was securely closed up at night, the weighing-machine and other articles being inside, but no person remaining on the premises.

*The appellants contended that the object of the power of making bye-laws, conferred by sect. 157 of the Public Health Act 1875, was to prevent the erection of wooden buildings or buildings of combustible materials in unfit situations; that the bye-laws in effect prohibited the erection of new buildings of wood, except such as were exempted therefrom; that the structure was not an exempted building, and that it was a new building within the scope and meaning of the bye-laws, and they cited *Stevens v. Gourley* (1 L. T. Rep. 33), *Richardson v. Brown* (49 J. P. 661), and *Brown v. Corporation of Leicester* (67 L. T. Rep. 686; 57 J. P. 70) in support of their contentions.*

*The respondent contended that the structure was not a building or a new building within the bye-laws; that the terms and requirements of the bye-laws as to new buildings showed that they could not be intended to apply to such an erection; that it had none of the features or uses with respect to which the corporation had power, under sect. 157 of the Public Health Act 1875, to make bye-laws; that in the ordinary sense of the words it had no foundation, roof, or chimney, and furnished no element of danger with regard to stability or fire, nor did its use render any provision for health necessary; that it was distinguishable in size, construction, permanency, and use from the structures (fitted for use as human habitations) which were the subject of the decisions in *Stevens v. Gourley* (*ubi sup.*) and *Richardson v. Brown* (*ubi sup.*); and that sects. 12 and 13 of the Southend-on-Sea Corporation Act 1895 (58 & 59 Vict. c. clviii.) defines “new build-*

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ings" for the purposes of these bye-laws as an erection of a permanent character.

The justices adjourned their decision and on the 2nd July 1900 they delivered a written judgment. They found the above facts proved and upon such facts they were of opinion that the erection was one of an entirely different character to those dealt with in *Stevens v. Gourley* (*ubi sup.*) and *Richardson v. Brown* (*ubi sup.*), and they were also of opinion that the power given by sect. 157 of the Public Health Act 1875 to make bye-laws, and the bye-laws made thereunder, did not purport to deal with erections of such a temporary nature and use, and they held, as a matter of law, that the erection was not a new building within the meaning of the bye-laws in force within the borough with respect to new streets and buildings, and they dismissed the information.

The question for the opinion of the court was: Whether upon the above facts the justices were right in holding in point of law that the structure was not a new building within the meaning of the bye-laws.

MAYOR, &C., OF SOUTHEEND-ON-SEA (apps.) v. ROMANIS (resp.)

A similar information was taken out against the respondent as in the previous case.

The structure in question was erected by the defendant within six months of the information for the purpose of being used during the summer months for the sale of tea, mineral waters, and light refreshments, on land on the sea front, and the public passing along stopped and made purchases from the erection. The defendant was in the habit of erecting the structure at the beginning of each season (in April) for the sale therefrom of mineral waters and light refreshments until the end of the season (in September), when it was taken down and removed, being built in sections for that purpose.

The structure measured 9ft. 3in. by 6ft. 11in. with a height of 7ft. 5in. It consisted of wood framing closely boarded with matchboarding on all sides. The front was movable and was taken down during business hours and closed and locked up at night. It had a wooden floor close boarded and fastened to its sides, and a roof of canvas or calico securely fixed on wooden cross pieces and fastened down all round.

Inside it had shelving, and a counter and goods were placed on the shelves. There were no sanitary or drainage arrangements and no provision for artificial lighting or for heating other than an urn for making hot water. It simply rested on the ground by its weight without being fixed to the soil and had no foundation or chimney.

During the summer season the structure was daily used and occupied as a shop for the sale of tea, mineral waters, and light refreshments, the defendant's tenant or a person employed by the tenant being in charge thereof and serving customers therefrom, and at night it was securely fastened up, the goods and articles remaining inside, but no one remaining on the premises.

The same contentions were urged as in the previous case, and the justices, having adjourned their decision, gave a written judgment on the same day and in the same terms as in the previous case, holding that, as a matter of law, the erection was not a new building within the meaning of the bye-law.

The question for the opinion of the court was the same as in the previous case.

The bye-laws were bye-laws made under sect. 157 of the Public Health Act 1875 by the Local Board for the District of Southend, acting as the urban sanitary authority, with respect to new streets and buildings in the urban sanitary district of Southend.

Bye-law No. 11 provided:

Every person who shall erect a new building shall cause such building to be inclosed within walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together: (a) With good mortar compounded of good lime and clean sharp sand, or other suitable material; or (b) with good cement; or (c) with good cement-mixed with clean sharp sand.

No. 98 (as to penalties):

Every person who shall offend against any of the foregoing bye-laws shall be liable for every such offence to a penalty of five pounds, and in the case of a continuing offence to a further penalty of forty shillings for each day after written notice of the offence from the sanitary authority: Provided, nevertheless, that the justices or court before whom any complaint may be made or any proceedings may be taken in respect of any such offence may, if they think fit, adjudge the payment as a penalty of any sum less than the full amount of the penalty imposed by this bye-law.

Sect. 157 of the Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Every urban authority may make bye-laws with respect to the following matters; that is to say (3) with respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires and for purposes of health.

Sect. 12 of the Southend-on-Sea Corporation Act 1895 provides:

For the purposes of this Act the expression "building" (including "new building" as defined by the next following section, shall include any erection or construction of a permanent character whether of masonry, brickwork, wood, iron, or other materials, and whether under or above the natural ground level and whether intended for human habitation or for trade or any other purpose whatever.

Macmorran, K.C. (Herbert Smith with him) for the appellants.—The question is whether these structures are "new buildings" within the meaning of the bye-law. To see whether a structure is a building or not, we have to look at the purpose for which it was erected. In *Stevens v. Gourley* (1 L. T. Rep. 33) a wooden structure intended to be used as a shop was held to be a building within the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122). In that case Erle, C.J. said that he was of opinion that a house constructed of wood, although it be not resting on masonry, let into the ground by way of foundation, is, when one considers the combustible material of which it is formed, within the mischief provided against by the Act. The case on which the justices seem to have gone wrong is the case of *Fielding v. Rhyl Improvement Commissioners* (38 L. T. Rep. 223; 3 O. P. Div. 272), in which it was held that a certain structure was not a new building within a similar bye-law; but the reason of that decision, as clearly appears from the judgments of Denman and Lindley, J.J., was that the structure was only of a temporary character, and was intended to be taken down again. If the structure in this case were put up for a merely temporary purpose,

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that case would be an authority for the proposition that this bye-law would not apply to it. That, however, is not so. The structure was not put up for a temporary purpose, and the danger arising from it is exactly the same as in larger buildings. In *Slaughter v. Mayor, &c., of Sunderland* (65 L. T. Rep. 250), although the structure was held not to be a "new building" within the meaning of a similar bye-law, the judgments show that the bye-law would have applied if the structure had been roofed in and had been capable of affording shelter, as in the present case. In *Richardson v. Brown* (49 J. P. 661) it was held that a wooden structure which was brought along the street on wheels and placed on the defendant's ground abutting on the street, and was used by him as a butcher's shop, was a "new building." It is not necessary to cite cases on other Acts, as a structure may be a building for the purposes of some Acts, and yet not be a building for the purposes of this Act. But, to illustrate the proposition that buildings erected for a temporary purpose are not "buildings" within a bye-law of this kind, reference may be made to

London County Council v. Pearce, 66 L. T. Rep. 685; (1893) 2 Q. B. 109;

London County Council v. Humphreys Limited, 71 L. T. Rep. 201; (1894) 2 Q. B. 755.

Brown v. Corporation of Leicester (67 L. T. Rep. 686; 57 J. P. 70), which was referred to before the justices, was decided on a different Act altogether. The structure in *Archer's* case is clearly a "building" within this bye-law. With regard to the second case, that against the respondent Romanis, the point of difference is that in this case the structure was taken down at the end of each season and put up again at the beginning of the next season. There is no such finding in *Archer's* case, as all the justices there say is that the structure is capable of being taken down. That is the sole difference between the two cases. The corporation contend that if it is lawful to erect one of these buildings in this way, then it would be equally lawful to make a whole street of them. These structures were not put up merely for a temporary purpose; in every way they are constructions within the bye-laws, which were made for the very purpose of making it impossible to put up buildings of this kind in urban districts without the supervision of the proper authority. The bye-law in question applies in each case, and the respondents ought to have been convicted. He also referred to

Watson v. Cotton, 5 C. B. 51.

The respondent did not appear in either case.

BRUCE, J.—In both cases I am of opinion that the erections in question are not "buildings." I will deal with the first case which was argued. First, having regard to the size of the building—10ft. 4in. by 7ft. and height of 10ft.—the smallness of the size of the building, coupled with the fact that it contained a large weighing machine, a small table, two chairs, and some hat pegs, indicates to my mind that the structure was not a building adapted for human habitation, and could not be treated as a building, but was rather in the nature of a mere cover for the weighing machine. The magistrates have gone very near to finding as a fact that it was not a building. They have not found it as a matter of fact, yet they have almost expressed the opinion that it

was not a building and they have found that in law it does not come within the meaning of the bye-laws. I think, as a matter of fact, we cannot hold that this erection covering the weighing machine was a building within the meaning of the Act, or within the meaning of the bye-laws. The cases that have been cited to us are, in my opinion, distinguishable from the present case. The first case, *Stevens v. Gourley (ubi sup.)*, is a case in which the parties themselves in their contract described the building as a house, and it was considered not the less a house because, although it was originally intended to be constructed of brick, it was in fact constructed of wood, and because the foundations were not embedded in the soil. The court came to the conclusion that it was not the less a house than it otherwise would have been if it had been constructed as originally intended; and that a building does not cease to be a house because it is constructed of wood and is merely laid on the soil and not let into the soil. Therefore that case seems to me to be distinguishable from the present. In the other case of *Richardson v. Brown (ubi sup.)* there was a wooden structure which was in all respects a building, except that it was brought in on wheels and fitted with down spouts and gas, and the court there came to the conclusion that the mere fact that it was brought in on wheels did not prevent it being a building, because in other respects it was constructed as a building. In the case of the *London County Council v. Pearce (ubi sup.)* the case of the pay-box which was not capable of being used for human habitation, but which was a mere structure much like the structure in the present case, the erection was held not to be a building, and not even a wooden structure, within the meaning of the bye-laws. That is the view I come to with reference to the first case, and I hold a still stronger opinion in regard to the second, because in the first case if the structure which was used to cover the weighing machine, was not a building, certainly in the second case the structure to cover the refreshments cannot be spoken of as a building, but was a mere cover or shelter or pavilion for refreshment. That certainly cannot be spoken of as a building. I therefore think the magistrates were right in their opinion when they held that these structures were not buildings within the meaning of the bye-laws, and that there was no infringement of the bye-laws.

PHILLIMORE, J.—I am of the same opinion. I attach considerable weight in these cases to the view which the magistrates took. Whereas in *Richardson v. Brown (ubi sup.)* the magistrates took the view that the structure was a building, it is obvious that in these cases the magistrates strongly took the view that the structures were not buildings, and they have gone as nearly as they can to finding that they were not buildings. They have left that matter to us, but it is obvious what conclusion they came to, and from their local knowledge they would know a good deal about these things. With regard to the second case I have no difficulty at all. One might as well call a pavilion or a kiosk, a building within the meaning of the Act of Parliament, and the bye-laws, as call the structure in this case a building. With regard to *Archer's* case I see more difficulty, and as at present advised I agree with the contention for the appellants that an

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ordinary lock-up shop could be a building. It may be found that there are distinctions, and the cases must sometimes run very fine, but I think on the whole that this structure was not in that respect a lock-up shop. It certainly was a shelter for the weighing machine, and there was just room where a man could sit and possibly have his customers sit by him, where he wrote out the weights or sat while waiting for customers, but certainly there was not a place where he could move about unless he came outside. It was fitted up in that way with no accommodation for artificial heating, and there was no connection with the permanent supplies from the town, such as gas or water. I therefore come to the conclusion, although with more doubt than in the other case, that the erection in *Archer's* case was not a building, and I agree that both these appeals should be dismissed.

Appeals dismissed.

Solicitors for the appellants, *J. E. and H. Scott*, for *William H. Snow*, Town Clerk, Southend-on-Sea.

Monday, Jan. 28, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

STOKES (app.) v. HILL (resp.). (a)

Mine—Abandonment—Notice—Limitation—Coal Mines Regulation Act 1887 (50 & 51 Vict. c. 58), s. 38—Coal Mines Regulation Act 1896 (59 & 60 Vict. c. 43), s. 4.

By the Coal Mines Regulations Act 1887, s. 38 (5), "A complaint or information of an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid of a notice to comply with the requirements of this section, whichever last happens."

By the Coal Mines Regulation Act 1896, s. 4, certain requirements were to be fulfilled by the owner of the abandoned mine or seam, and these were substituted for those contained in sect. 38 of the Act of 1887.

Held, that the six months' limit applied equally to the date of the abandonment of the mine or seam, and the giving of the notice to comply with the requirements of the Act.

On the 25th Jan. 1900 the appellant, an inspector of mines, sent to the respondent a letter as follows: "I beg to point out to you that no plan of the abandoned workings in the Seven Feet Coal Seam has yet been forwarded as required by sect. 38 of the Mines Act. Will you please give the matter your early attention." This was received by the respondent on the 26th Jan.

Held, that the time limited by sect. 38 (5)—viz., six months—within which the information might be laid for a breach of sect. 4 of the Coal Mines Regulation Act 1896 commenced to run from that date.

CASE stated upon an information laid on the 27th July 1900 by the appellant against the respondent charging him that, he being the owner of the Pooley Hall mine, unlawfully failed to comply with sect. 38 of the Coal Mines Regulation Act 1887, as amended by sect. 4 of the Coal Mines Regulation Act 1896, which requires him within three months after the abandonment of the Seven

Feet Coal Seam in such mine to send to the Secretary of State an accurate plan of such seam, with certain particulars.

Upon the opening of the case for the prosecution the respondents' counsel took a preliminary objection that the justices had no jurisdiction to hear and determine the case.

He read the following letter, which, it was admitted, had been written and been sent by post by the appellant to the respondent on the 25th Jan. 1900.

Green Hill, Derby, 25th Jan. 1900.—Gentlemen,—I beg to point out to you that no plan of the abandoned workings in the Seven Feet Coal has yet been forwarded as required by sect. 38 of the Mines Act. Will you please give the matter your earliest attention.—Yours faithfully, A. H. STOKES.—To the Pooley Hall Colliery Company.

It was admitted that the alleged abandonment of the mine was anterior to the sending or receipt of the letter, and also that no plan has been sent in by the respondent.

It was thereupon contended by the respondent's counsel that the letter constituted a notice, under sect. 38 (5) of the Coal Mines Regulation Act 1887, to the owner to comply with the requirements of that section, and that the six months within which the information is required to be laid by that section and sub-section commenced, to run from the date of service thereof, namely, the 26th Jan. 1900; that it was not open to the appellant to extend the period of six months therefrom by giving one or more subsequent notices; and that the information having been laid on the 27th July 1900 the same was out of time, and the justices had no jurisdiction to hear the case.

The appellant's solicitor read the following letter, which, it was admitted, was written and sent by post by the appellant to the respondent on the 25th May, and was received in due course of post on the following day:

Green Hill, Derby, 25th May 1900.—Gentlemen.—Pooley Hall Colliery.—I beg to point out to you that no plan of the workings of the abandoned Seven Feet Coal Seam at this colliery has been sent as required by sect. 38 of the Coal Mines Regulation Act 1887, and I hereby give you notice in accordance with sect. 38 (5) of the Coal Mines Regulation Act 1887 to comply with the requirements of the above-named section of the Mines Act.—I am, gentlemen, your obedient servant, A. H. STOKES, H.M. Inspector of Mines.—The Pooley Hall Colliery Company.

On the part of the appellant it was contended that the above last-mentioned notice was the only notice given in accordance with sect. 38 (5) of the Act of 1887, and that, even assuming (which was not admitted) the letter of the 25th Jan. was a sufficient notice within sect. 38 (5) of the Act of 1887, the respondent having still failed to send in the plan, the appellant was not precluded from giving the notice of the 25th May, and that the information was properly laid within six months after the service of the last-mentioned notice.

It was further contended that, assuming the letter of the 25th Jan. constituted "notice to comply" within sect. 38 (5) of the Act of 1887, the information was laid within six months after service of such notice, on the ground that the letter having been sent by post it was deemed to have been served when it was delivered on the

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following day, the 26th Jan. (sect. 73 of the Act of 1887), and that the 27th July was within six months after (that is, exclusive of) the 26th Jan.

The justices were of opinion that the respondent's contention was correct, on the ground that the appellant's letter of the 25th Jan. 1900 constituted in law a notice within sect. 38 (5) of the Act of 1887 to the respondent to comply with the requirements of that section, and that the statutory period of six months within which the information should be laid must be calculated from the date of service of that notice, and that the appellant was not entitled, by giving the subsequent notice of the 25th May, to extend such period, and that the information which was laid on the 27th July 1900 was therefore out of time, and they accordingly dismissed the information.

H. Sutton for the appellant.—The letter of the 25th Jan. was not such a notice as is contemplated by the Act. It was merely a reminder, and the time began to run only after the second notice of the 25th May. But here I contend that the limitation contained in sect. 38 (5) of the Coal Mines Regulation Act 1887 only applies to the abandonment of the mine or seam, and does not limit the time where a notice is given to comply with the requirements of the section. If that were not so, the words "whichever last happens" could have no meaning. The offence created by non-compliance with sect. 38 of the Coal Mines Regulation Act 1887, as amended by sect. 4 of the Coal Mines Regulation Act 1896 is a continuing one. He also referred to the Coal Mines Regulation Act 1887 (50 & 51 Vict. c. 58), s. 59.

Simsy for the respondent. The justices were right in holding that the letter of the 25th Jan. was a notice within the Act, and that the limitation contained in sect. 38 (5) commenced to run from that date. The limitation applies equally to the abandonment of the mine or seam and the giving of a notice.

BRUCE, J.—I think that the justices in this case have come to a right conclusion, and that we cannot interfere with their decision. The question turns in the first instance on the construction we ought to put upon sect. 38 (5) of the Coal Mines Regulation Act 1887. I think there can be no doubt that that clause is a clause for limitations, limiting the time within which a complaint or information, if there is an offence under the Act, may be laid. Now, it is clear that it first of all limits the complaint or limits the information to a period six months after the abandonment of the mine or seam, and if counted from that period, the information I understand is too late. But there is a further provision in the same subsection: "Or after service on the owner aforesaid of a notice to comply with the requirements of this section." A question has been raised as to the meaning of the words "after service." I think that read in conjunction with the former words it means "written six months after service." The words are "A complaint or information of an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid of a notice to comply with the requirements of this section." I think the whole of the section must be read together, and regarding it as a limiting section I think it must mean six months after service on the owner aforesaid.

It is quite true that there are some difficulties of interpretation occasioned by the last words in the section "whichever last happens"; and if those words could be so construed as to favour either the one construction or the other they might afford us some guidance. But they are inconsistent with either construction, and those words afford us no guidance at all. We must regard the section independently altogether of those words, because neither counsel can give any sensible construction to them. Then we have this last question: Was there a notice given within a period of six months from the information or complaint? That depends upon whether the notice of the 25th Jan. 1900 was a good notice under the Act. I felt some doubt on this question because the notice required under the statute is a notice to comply with the requirements of this section, and the notice does not in express terms use those words. It does not require compliance with the provisions of the section, but it does refer to the section; it does call attention to the plans required by the section and finishes up by saying, "Will you please give the matter your early attention." I do not think that in a matter of this kind we ought to be too strict, and, giving the matter my best attention, I have come to the conclusion that I cannot say that the justices were wrong in coming to the conclusion that this was a notice within the meaning of the section requiring compliance with the provisions of the section. If so six months had expired before the proceedings were taken, and therefore it was too late. I have only one other word to say, and that is as to sect. 59, to which our attention has been called by Mr. Sutton. I am quite satisfied that that section does not apply to this case. The whole section, or the second part of it at any rate, applies only to the case where a person is guilty of an offence against this Act for which a penalty is not prescribed. In this case a penalty is expressly prescribed, and I think we cannot regard this section as applying here.

PHILLIMORE, J.—I am of the same opinion, and for the same reasons.

Appeal dismissed.

Solicitor: The Solicitor to the Treasury.

Jan. 24, 25, and 29, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

DICKINS (app.) v. RANDERSON (resp.). (a)

Food and drugs—Adulteration—Drug named in British Pharmacopæia—Mercury ointment—Sale—Drug not according to standard in British Pharmacopæia—Drug not of the nature, substance, and quality demanded—Pharmacy Act 1868 (31 & 32 Vict. c. 121), s. 15—Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6, 7.

If a chemist is asked to supply a drug which is named in the British Pharmacopæia he is bound to supply the drug made up according to the formulæ in the British Pharmacopæia, unless he is supplying it upon the prescription of a medical practitioner; and if without such prescription he supplies it compounded otherwise than as prescribed in the Pharmacopæia he commits the offence under sect. 6 of the Sale of

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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Food and Drugs Act 1875 of selling to the prejudice of the purchaser a drug "which is not of the nature, substance, and quality of the article demanded."

The appellant, a chemist, was asked to supply "mercury ointment," an article named in the British Pharmacopœia. He supplied mercury ointment which was not in accordance with the prescription in the Pharmacopœia, as the mercury was only about one-quarter strength, and he stated that the ointment supplied was a dilute preparation of mercury ointment which was generally supplied to persons asking for "mercury ointment." The purchaser asked for "mercury ointment" merely, and did not state that he required the same to be according to the directions of the Pharmacopœia.

Held, that the appellant was properly convicted under sect. 6 of the Sale of Food and Drugs Act 1875, as, in the absence of a prescription by a medical practitioner, he ought to have sold the article according to the standard in the Pharmacopœia; and that he might probably have been also convicted under sect. 7 of selling "a compounded drug which is not composed of ingredients in accordance with the demand of the purchaser."

CASE stated by justices of the peace for the West Riding of the county of York, sitting as a court of summary jurisdiction at Skipton.

An information was laid by A. Randerson, the complainant and respondent, and an inspector of food and drugs, against Frederick Dickins of Skipton, chemist, under sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) for having at Skipton unlawfully sold to the prejudice of the complainant (the purchaser) a certain drug, namely, 2oz. of mercury ointment, which on analysis was found to be deficient in mercury and contained the parts as follows: mercury 12.5 per cent., and lard 87.5 per cent., and was not of the nature, substance, and quality demanded by the purchaser.

The information was heard by the justices sitting at Skipton on the 20th June 1900, when the defendant was convicted of the offence and was fined in the sum of 60s. and was ordered to pay the costs.

The following facts were proved or admitted:—

On the 14th May 1900 the complainant went to premises known as "Taylor's Drug Stores" at Skipton, where the defendant, who is a duly certified chemist, was at that time employed, and asked to be supplied with 2oz. of "mercury ointment." Ointment was supplied to him by the defendant in a small wooden box, the lid of which was labelled—"Taylor's Drug Company Limited—The Ointment. Mercurial—Poison—London, Leeds, &c." The words "The Ointment" were in print, and the words "Mercurial—Poison" were in writing. He also handed to the complainant a bill in which he charged "Mercurial ointment, 4d.," which sum the complainant handed to the defendant. The complainant then informed the defendant that the ointment had been purchased by him for the purposes of analysis.

A portion of the ointment was analysed by the public analyst who certified that it contained mercury 12.5 per cent., lard and suet 87.5 per cent., and the analyst stated that "mercury ointment," according to the directions of the

British Pharmacopœia contains 48.5 per cent. of mercury, and hence the medicinal activity of the sample would only be one-fourth that of an ointment prepared according to the British Pharmacopœia.

The complainant admitted that he had asked for "mercury ointment" merely, and that he did not state that he required the same to be according to the directions of the British Pharmacopœia, and that the ointment sold to him by the defendant contained the ingredients mentioned in the British Pharmacopœia for mercury ointment, but not in the proportions therein prescribed. He did not allege that the preparation was injurious to the purchaser, or that there was any imposition on the part of the defendant, but he contended that as the ointment supplied was not according to the standard of the British Pharmacopœia it was not of the "nature, substance, and quality demanded" within the meaning of the statute, and he relied upon the case of *White v. Bywater* (19 Q. B. Div. 582), and that "mercury ointment" was not a compounded drug within the meaning of the Act.

It was contended on behalf of the defendant that the proceedings would not lie under sect. 6 of the Act, but ought to have been commenced under sect. 7 thereof, the article in question being a compounded drug.

The justices being of opinion that the proceedings were properly brought under sect. 6, overruled this objection.

The defendant gave evidence that the ointment supplied was a dilute preparation of mercury ointment well known to, and supplied by all retail chemists and such as would be usually supplied to a person inquiring for "mercury ointment." He stated that out of hundreds of sales of that commodity which he had made he had never supplied it according to the standard of the British Pharmacopœia for human application, except when making up the prescription of a medical practitioner, for the reason that he considered the frequent use thereof by a person of a delicate constitution might probably set up mercurial poisoning from which death might ensue. Both the dilute and the standard preparation were kept in stock by the defendant's employers at the premises. The dilute preparation was known to the public by a variety of names, and it was usually asked for under the name of "blue ointment." Two other chemists of thirty-five and twenty-seven years standing respectively were called as witnesses for the defendant, and gave similar evidence as to the practice of chemists in supplying mercury ointment.

Upon this evidence it was contended on behalf of the defendant: (a) That he was not in law required to sell "mercury ointment" to a purchaser in accordance with the standard quality prescribed by the British Pharmacopœia except when specially asked by the purchaser to do so, or when making up the prescription of a medical practitioner; and that accordingly it was within the discretion of the defendant to supply the dilute preparation in all cases in which he thought fit to do so; (b) That the complainant had failed to establish that the commodity was not of the nature, substance, and quality of the article demanded by the purchaser, as provided by the Act, or that he had been prejudiced by the sale thereof, and that therefore no offence had been

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committed, and he relied upon *Lane v. Collins* (52 L. T. Rep. 257; 14 Q. B. Div. 193).

The justices, being of opinion that the commodity sold was not of the nature, substance, and quality of the article demanded by the purchaser, and that the defendant was bound to supply the commodity according to the formulary prescribed in the British Pharmacopœia, whether expressly asked to do so or not, convicted the defendant.

The questions for the opinion of the court were :

(1) Whether the defendant was in law so bound as last aforesaid, or not; (2) whether under the circumstances herein stated there was evidence upon which the justices might properly find that the commodity sold was not of the nature, substance, and quality of the article demanded by the purchaser, or that he had been prejudiced by such sale; (3) whether the information was properly laid under sect. 6 of the Sale of Food and Drugs Act 1875; and (4) whether the conviction was good in law.

If the court should be of opinion that the conviction was legally and properly made then the conviction was to stand; otherwise it was to be reversed.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) provides:

Sect. 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say, (1) where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof; (3) where the food or drug is compounded as in this Act mentioned.

Sect. 7. No person shall sell any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser under a penalty not exceeding twenty pounds.

C. A. Russell, K.O. (J. A. Compston with him) for the appellant.—The question is whether when a chemist is asked to supply an article which is one of the numerous articles named in the British Pharmacopœia, he is bound to supply it under all circumstances according to the prescription in the British Pharmacopœia so that he commits an offence if he does not do so. Our submission is that he is not so bound; at all events for the purpose of determining whether the article is of the nature, substance, and quality of the article demanded, within the meaning of sect. 6, and whether the seller has committed an offence under that section. There is nothing in the Act to say so, as only general terms, such as "food" and "drug," are defined by the Act. The question under sect. 6 is always this: When a purchaser has asked for an article it has to be ascertained whether it is an article the nature, substance, and quality of which can be fixed by reference to some natural standard (such as milk), or whether it is an article the nature and quality of which is ascertainable by reason of there being some known meaning attached to the article. Neither of these considerations would apply here. As to the article itself, what the inspector asked for was "mercury ointment" simply, and no evidence was given by

him to show what "mercury ointment" was. To show what it was he simply relied on the description as given in the Pharmacopœia. The British Pharmacopœia is not mentioned or referred to in the Act, so that the case is not the same as if there was to be found in the Act itself a provision that in the case of a particular drug it was to be made up according to the standard in the British Pharmacopœia. If the prescription of a medical practitioner relating to a drug named in the Pharmacopœia were taken to a chemist, then he might be bound to make up that prescription and sell that article according to the formulary in the Pharmacopœia. There is a wide range as to the meaning of "mercury ointment." It may mean one thing in a medical prescription, and a totally different thing when asked for as it was asked for in this case. The British Pharmacopœia was introduced that chemists might know what ingredients to put in when making up prescriptions. The statutes relating to it are set out in Chitty's Statutes, vol. 7 (Medical Acts). By the Medical Act 1858 (21 & 22 Vict. c. 90), s. 3, the general medical council was established, and by sect. 54 they were required to publish "a book containing a list of medicines and compounds, &c. . . . to be called the British Pharmacopœia." That was its origin, and it so remained until the Pharmacy Act 1868 (31 & 32 Vict. c. 121); s. 15 of which Act provided that "any person who shall compound any medicines of the British Pharmacopœia except according to the formularies of the said Pharmacopœia" should be liable to a penalty. In *White v. Bywater* (19 Q. B. Div. 582), where the defendant was convicted, evidence was given by three witnesses to show that the article was not of the nature, &c., of the article demanded. There was no such evidence in this case. The prosecutor designedly rested his case upon the certificate of the analyst, and upon the fact that by that certificate the article was not up to the standard of the Pharmacopœia. The defendant and two chemists gave evidence that the article sold was one commonly dealt with; that it was the one usually supplied to persons asking for "mercury ointment," that, in fact, it was the "mercury ointment" of commerce and the article known in commerce and in that neighbourhood as such. That distinguishes the case from *White v. Bywater* (*ubi sup.*), where the fact was that the tincture of opium supplied was not the tincture of opium of commerce. It is a strong proposition to say that if a person asks for an article in the Pharmacopœia it cannot be supplied unless it contains the exact ingredients in the Pharmacopœia, and that the seller commits an offence if it is not so supplied. The question in each case must be this, What would an ordinary purchaser mean by the article. As to the second point that the proceedings ought to have been under sect 7 instead of sect. 6, the article was "a drug compounded as in this Act mentioned," within sub-sect. 3 of sect. 6, and therefore there was no offence under sect. 6. The offence, if any, was under sect 7:

Houghton v. Taplin, 13 Times L. Rep 386;

Beardsley v. Walton and Co., 19 Mag. Cas. 471; 82 L. T. Rep. 119; (1900) 2 Q B 1.

Danckwerts, K.C. (Roskill with him) for the respondent.—The case is really concluded by *Beardsley v. Walton and Co. (ubi sup.)*. The

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question is important, because if it be permissible when an article is mentioned in the Pharmacopœia, to supply something different from what is there prescribed, the consequences may be serious whether an article much weaker or much stronger is supplied. To avoid that inconvenience we have the British Pharmacopœia introduced as a standard with regard to the articles mentioned therein; and certainly after the Pharmacy Act of 1868 any person going into a chemist's shop to buy a drug, mentioned in the British Pharmacopœia, would be warranted in believing that the drug sold to him would be made up according to the standard of the Pharmacopœia. Sect. 15 of that Act expressly says that "any person who shall compound any medicines of the British Pharmacopœia except according to the formularies of the Pharmacopœia" commits an offence and is liable to a penalty. Any person who asks for a drug is entitled to assume, and must be taken to assume, that the drug is a lawfully compounded drug, and therefore when he goes to the vendor and asks for a specified drug the vendor ought to understand clearly what is asked for. When the inspector went to the defendant's shop and asked for mercury ointment, he must be taken to have asked for something which was lawfully compounded, and not for something which was illegally compounded; and the defendant must be taken to be asked to supply something lawfully, and not illegally, compounded. The seller cannot sell otherwise, unless he is selling either according to the British Pharmacopœia, or according to a medical prescription, or is asked for and is selling something different to what is in the Pharmacopœia. Here the defendant says he kept both articles in his shop, one according to the Pharmacopœia, and the other according to that usually sold; but the Act enjoins the exact opposite to this. Sect. 16 of the Act of 1868 reserves the right of certain persons such as apothecaries, but it does not reserve the right of chemists or druggists, so that these latter in conducting their business come within the Act. The section was evidently intended to enable medical practitioners, but not chemists, to vary the prescriptions in the Pharmacopœia. *Beardsley v. Walton and Co. (ubi sup.)*, is a clear authority for the proposition that where a person goes to a shop and asks for an article named in the Pharmacopœia he is entitled to get it according to the standard of the Pharmacopœia, and if a different article is supplied to him, an offence is committed. *White v. Bywater (ubi sup.)* is to the same effect. *Houghton v. Taplin (ubi sup.)* is a different case. The defence there was that the "arsenical soap" asked for and sold was not a drug at all, and it was held that no offence had been committed under sect. 6, by Hawkins, J., on the ground that it was not a drug at all, and by Wright, J. on the ground that it was a compounded drug within sub-sect. 3 of sect. 6. The intention of the Pharmacy Act was to compel everybody to conform to the Pharmacopœia in compounding drugs. After that Act everybody asking for a drug named in the Pharmacopœia would be entitled to suppose that he was getting something compounded according to the Pharmacopœia; and in the case of articles named in the Pharmacopœia if something different from the Pharmacopœia is asked for, the seller ought not to sell it without having the prescription of a

medical practitioner; that is, he commits an offence if, without a proper prescription, he sells articles mentioned in the Pharmacopœia but compounded differently, and that is the present case.

J. A. Compston, in reply, referred to

White v. Bywater (ubi sup.);

Lane v. Collins, 52 L. T. Rep. 257; 14 Q. B. Div. 193.

Cur. adv. vult.

Jan. 29.—The judgment of the court (Bruce and Phillimore, JJ.) was read by

PHILLIMORE, J.—We think that this conviction must stand. The appellant professed to sell mercurial or mercury ointment. Mercury ointment is a drug in the British Pharmacopœia, known by that name and having a certain fixed ratio of mercury to unguent. The appellant was asked for mercury ointment, and should have sold the drug in the Pharmacopœia, or, if he was going to do what he in fact did—namely, sell an ointment in which the mercury was about one-quarter strength—he should, if he may lawfully sell such a drug (see sect. 15 of the Pharmacy Act 1868), have explained that he was selling a weaker or diluted drug, and have so named it. He acted under no sordid motive, but none the less was he in the habit of selling to his customers something which was not of the nature, substance, and quality which they must be taken to have demanded and which certainly the purchaser in this case demanded. It is said that the appellant sold the mercury ointment of commerce, and that for commercial purposes there is a standard different from that of the Pharmacopœia. Having regard to sect. 15 of the Pharmacy Act 1868 (31 & 32 Vict. c. 121), that is unlikely, though perhaps possible. But he failed altogether to prove that there was any commercial standard for this article different from that of the Pharmacopœia. He did not even attempt to prove it. What he attempted to prove was that there were two commercial standards of wide difference, a thing in itself unreasonable, while he stated that he kept both standards in his shop, and sold according to one standard or the other according as the customer brought or did not bring a prescription from a medical man. He might almost as well have kept two weights and two measures. The mischief of such a practice was pointed out in the argument. If there be any danger on the other side, it would be avoided by the simple expedient of having (if he lawfully may) two drugs, calling them as in fact they are, the strong one "mercury ointment," and the weak one "dilute mercury ointment," and recommending the latter to any customer whom he might think unskilled and likely to use the proper drug in a dangerous manner. The cases of *White v. Bywater (ubi sup.)* and *Beardsley v. Walton (ubi sup.)* almost if not quite, conclude the matter. But without them we should have arrived at the same result upon the construction of sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63). They establish, and we should have thought without their assistance, that if a drug is to be found in the Pharmacopœia and is asked for, this drug must be supplied, and that if it is not sold with the ingredients and in the proportions prescribed by the Pharmacopœia there is at least *prima facie* evidence that what is sold is not of the nature, substance, and quality which was demanded. It was argued that, as the drug in question was a compounded drug, proceedings

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ought not to have been taken under sect. 6 of the Sale of Food and Drugs Act, but under sect. 7; and for this purpose some observations of Wright, J. in *Houghton v. Taplin* (*ubi sup.*) were invoked. We think that those observations have been misunderstood. In any case it is quite clear from the definition clause that a compounded drug is none the less a drug, which shows that proceedings can be taken under sect. 6, though it may be that in the case of a compounded drug they can also be taken under sect. 7. We wish to add a few words with reference to the exception contained in sub-sect. 3 of sect. 6. We entertain no doubt that the appellant sold to the prejudice of the purchaser a drug which was not of the quality of the article demanded by such purchaser, and so contravened the provisions of the earlier part of sect. 6. But the difficulty we have felt arises from the provision that an offence shall not be deemed to have been committed under that section where the drug is compounded as in the Act mentioned. It was argued by counsel for the appellant that because the article in question was a compounded drug the sale of it fell within the exception in sub-sect. 3 of sect. 6, and constituted an offence, not under sect. 6, but only under sect. 7. We think it probably did constitute an offence under sect. 7, but we think it did also constitute an offence under sect. 6. The offence in sub-sect. 3 of sect. 6 does not apply to all compounded drugs, but only to drugs compounded as in the Act mentioned. It is very difficult to understand the meaning of the words "as in this Act mentioned." We find no provisions in the Act to which the words can apply. But it seems to us that it is impossible to reject the words. We cannot read the exception in sub-sect. 3 as if it were not qualified by the concluding words. But, although it is difficult to say what is the exact meaning of the words, this, we think, is clear—that no possible meaning that can be given to the words can apply to the ointment in the present case. It was certainly not compounded as in the Act mentioned. The sale of it, therefore, does not fall within the exception.

Conviction affirmed.

Solicitors for the appellant, *Archibald Hair*, for *W. E. Farr*, Leeds.

Solicitor for the respondent, *Clements, Williams, and Co.*, for *Trevor Edwards*, Wakefield.

Friday, Feb. 1, 1901.

(Before WILLS and PHILLIMORE, JJ.)

PEARL ASSURANCE COMPANY v. SCOTTISH LEGAL LIFE ASSURANCE SOCIETY. (a)

Industrial assurance—Transfer of person insured from one company to another—Notice of transfer—Collecting Societies and Industrial Assurance Companies Act 1896 (59 & 60 Vict. c. 26), ss. 4 (2), 14 (1).

By sect. 4 (1) of the Collecting Societies and Industrial Assurance Act 1896 it is provided that a person insured with a collecting society or industrial assurance company shall not, except in certain cases, become or be insured with any other society or company without his written con-

sent. By sect. 4 (2): "The society or company to which . . . the person is sought to be transferred shall within seven days from his application for admission to that society or company give notice thereof in writing to the society or company from which he is sought to be transferred." By sect. 14 (1): "It shall be an offence under this Act if . . . (c) a collecting society or industrial assurance company to which a . . . person is sought to be transferred fails to give such notice as is by this Act required." B. was insured in P. Company, which was an industrial assurance company within the Act. J. induced B. to agree to transfer to the S. Assurance Society and in exchange for his policy in the P. Company gave B. a policy in the S. society. The S. Society gave the P. Company no notice of the transaction, and B's policy in the P. Company was still subsisting, and the P. Company admitted their intention of continuing it as long as possible. The P. Company laid an information against the S. Society for a breach of sect. 4 (2) of the above Act. The magistrates dismissed it on the ground that as the policy in the P. Company was still subsisting there was no transfer of B. from the P. Company within the Act.

Held, that, as a matter of fact B. had become a member of the S. Society and would cease to be a member of the P. Company as soon as the period covered by his past payments had elapsed, and that therefore he was a person "sought to be transferred" from the P. Company to the S. Society within the Act.

THIS was a case stated by an alderman of the city of London raising a question under the Industrial Assurance Companies Act of 1896.

An information was preferred before a court of summary jurisdiction at the Mansion House by the Pearl Life Assurance Company against the Scottish Legal Assurance Society for that that society in the city of London being a collecting society within the meaning of sect. 4 of 59 & 60 Vict. c. 26, did not within seven days from the application, dated the 13th June, of one William Perkins, a person insured with the Pearl Life Assurance Company, for admission to the Scottish Legal Assurance Society, give notice in writing of such application to the Pearl Life Assurance Company from which Perkins was sought to be transferred contrary to sect. 4 (2) and 14 (1) of 59 & 60 Vict. c. 26, and that the default had continued up to the date of the issue of the summons. There was a second information alleging against the Scottish Legal Assurance Society a similar offence in respect of Rebecca Perkins, the wife of William Perkins. The alderman, after hearing the parties, dismissed the information.

Collecting Societies and Industrial Assurance Companies Act 1896 (59 & 60 Vict. c. 26):

Sect. 4.—(1) A member of or person insured with a collecting society or industrial assurance company shall not . . . become or be made a member of or be insured with any other such society or company without his written consent, or in the case of an infant without the consent of his father or other guardian. (2) The society or company to which the member or person is sought to be transferred shall, within seven days from his application for admission give notice thereof in writing to the society or company from which he is sought to be transferred.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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Sect. 14.—(1) It shall be an offence under this Act if . . . (c) a collecting society or industrial assurance company to which a member or person is sought to be transferred fails to give such notice as is by this Act required.

The facts as found in the special case were as follows:—

The Pearl Life Assurance Company (hereinafter called the appellant company) was an industrial assurance company, and the Scottish Legal Life Assurance Society (hereinafter called the respondent society) was a collecting society within the meaning of sect. 1 of the Collecting Societies and Industrial Assurance Companies Act 1896, and were duly registered under the Friendly Societies Acts.

The man William Perkins stated that he and his wife, the said Rebecca Perkins, had been insured in the office of the appellant company about two years, and that a collector named Jones, whom he had known as a collector for the appellant company had in or about the month of June 1900, asked him to transfer to the respondent society. He assented to this and signed a proposal form in the respondent society, and gave up to the collector Jones his books and policies in the appellant company, and received in lieu thereof the policies in the respondent society which he produced before the alderman. At the time this transaction took place collector Jones had left the appellant company, and was a collector of the respondent society.

The applications of William Perkins and Rebecca his wife for insurance in the respondent society, dated the 20th June 1900, were produced at the hearing. The policies issued by the respondent society were in different form to the policies issued by the appellant company.

A witness for the appellant company, named Herbert Pilbeam, stated that when he was conversing with William Perkins, at Perkins' house, the assistant superintendent of the respondent society accompanied by the society's collector, Jones, came in and stated to the witness that Perkins' insurances had been transferred to the respondent society.

No notice was given by the respondent society to the appellant company within the meaning of sect. 4 (2) of the Collecting Societies and Industrial Insurance Companies Act 1896, either within or at any time subsequent to the period prescribed by that sub-section.

The two policies on the lives of Mr. and Mrs. Perkins in the appellant company were in existence on the day when the said informations were heard by the court below. The company further admitted that it was not their wish or intention to cancel Mr. or Mrs. Perkins' policies, and that they were desirous under the circumstances of keeping them alive.

The alderman was of opinion on these facts that no actual transference had taken place at the date of the alleged offence, and that sect. 4 (2) did not apply as, the policies in the appellant company and those in the respondent society being admittedly co-existent, there could be no legal "transfer" or "seeking to transfer" within the meaning of sect. 4 (2).

Avory, K.C. (Bousell with him) for the appellant company.—Sect. 1 of the Act should be looked at to see the scope of it. That shows

that it is intended to apply only to insurance companies whose dealings are with the poor, and therefore with a class more or less uneducated. That circumstance indicates that the provisions of sect. 4 are precautionary in their nature—to prevent I submit the collectors making a trade in transferring the persons insured in one company to another, according as their own personal interests require. As a matter of fact the persons insured in these societies insure practically with the collector and not with the company, and when the collector leaves or is dismissed by one company and becomes collector for another he usually can induce the persons who were insured by him in his late company to transfer to his new one. In this very case we had to get an injunction to restrain Jones from soliciting persons insured with us to join the respondent society. And I submit the object of sect. 4 is to take care as far as possible that the insured shall know what he is doing when he is transferred by making his written consent necessary, and by making the transferee company give notice to the transferor company of the transfer. Of course this last provision is also for the protection of the transferor company against the proceedings of dismissed servants. Both purposes are served by giving the transferor company notice—the company is enabled to ascertain what its agents or former agents are doing, and at the same time it is enabled to make the member transferred aware of the nature of the transaction to which he has consented, and so to prevent his being induced to transfer by misrepresentation or fraud. This seems clear from the language of the section. The section refers to the transfer not of the policy as the magistrate seems to think, but of the member himself. Its object is to prevent the member being transferred at the will of the collector without himself or the company in which he was insured being aware of it. A legal transfer of the policy is not necessary to create an offence under the section.

Cohen, K.C. (J. B. Mathews with him).—I submit that the object of this action or of sub-sect. (2) at any rate, was not to protect the insurance company against the former collectors but to facilitate the work of different companies. It often happens that two or more companies have members in the same district. One of these finds it unprofitable to keep a collector there on account of the small number of its members. Therefore it agrees to transfer them to another company. In order to enable it to know with certainty who have and who have not agreed to be transferred the transferee company is bound to give notice to it of each member transferred. I submit this must be the object of the provision since a member can be transferred from one company either by operation of law, of which there is no question here, or by consent of both the companies and the persons transferred. On the facts stated in the case there is neither a transfer of the member nor a transfer of the policy. The member is not transferred because the appellant company has not agreed to the transfer, and the policy is not transferred since the original policy still exists. In fact, so far as it from the new policy being the old one transferred, that its terms are quite different from those of the old one.

Avory, K.C. was not heard in reply.

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WILLS, J.—I am of opinion that in this case the magistrate has come to an erroneous conclusion. The Act of Parliament is certainly not artificially drawn, but I do not desire to use disrespectful language concerning it on that ground, because I think it is exceedingly likely that the phraseology used is that which is perfectly well understood among the class of people to whom it refers, and the transfer of a member from society A to society B is a phrase which would be perfectly intelligible to them. I think it is very likely indeed to be the case that the language is, from any point of view, popular rather than artificial. It seems to me quite abundantly plain what it does mean. Everybody knows that among the poor people who are insured by these societies there is a vast amount of touting for the insurances by the agents, and that all sorts of frauds are very often committed on poor people by reason of the temptation offered to the agents to make money *per fas or nefas*, and it is not too much to say that they are a class that rather want watching, and I think this section is intended to put some check on their proceedings. The first check is that if a member of one society proposes or is persuaded to drop his insurance with that society or go over to another there should be evidence that he intended to do it at all events by requiring that his written consent should be produced or should be capable of production. That puts some sort of a check on it. It prevents people at all events from making such entries as are necessary to effect what is called a transfer without some sort of evidence that the man knows what is being done. But then comes the second sub-section, and it does not seem to me to be really capable of much doubt as to what it means. "The society or company to which the member or person is sought to be transferred" (it is not to which he is transferred, but to which he is sought to be transferred) "shall, within seven days from his application for admission to that society or company, give notice thereof in writing to the society or company from which he is sought to be transferred." When he makes his fresh insurance, if it dates from a time which is still covered by the first insurance the result may be that there will be two policies concurrent for a certain time. I should think probably that would give rise to some difficulty of a different nature; probably somehow or other he would be required to state whether he was insured with any other society or not. But it may very well be that for a few weeks, or a few months, he is doubly insured; and certainly I should think from what I have seen as a judge (I have not seen so much of it as my learned brother has, but I have tried some cases in criminal courts in the north of England which have made me pretty familiar with the proceedings of these collecting agents) it is very likely that an agent will himself pay a small premium for a few weeks or whatever may be necessary, in order to secure the man. But whether there is a concurrent policy or concurrent insurance by another society or not, as soon as he pays his first premium there is an insurance with the second society. Nobody who knows anything about these people will suppose he really means to be permanently insured twice over, and the natural course of events would be that as soon as the current year in company A comes to an end he will drop his connection with the insurance com-

pany A, and he will be insured only in company B; and in that sense he is transferred from company A to company B. And the Act of Parliament says in language which I cannot help thinking would among these people be perfectly well understood, and is probably better in that respect than more formal language, that any attempt to effect that transfer should be communicated to the other society from which he is sought to be transferred. I do not suppose there was any passionate desire on the part of the Legislature particularly to protect the first company, but I think the intention was to put a check upon this touting. It was a very mischievous process, of course, and I think the intention was to make it less operative than it otherwise would be, and therefore to discourage it, and that seems to me to be the principle and the motive which underlie the legislation which we have to deal with. And, if I am right in my construction of sect. 4, then *cadet quæstio*, because it is clear that this offence has been committed. Being of opinion that I ought to adopt that particular construction of sect 4 (2), I have come to the conclusion that this appeal must be allowed, and that the judgment must be altered.

PHILLIMORE, J.—I am of the same opinion. The clause is a strange one, and strangely expressed. But I think with the knowledge we possess of this class of business, these agents, these companies, and these insurances, we can see what was attempted to be driven at. I agree with the contention made on behalf of the respondent before the alderman, and made by Mr. Cohen to-day, that at least one object of the 1st sub-section may have been to protect a man from being transferred by a company to another company without his consent, and I think it is quite possible that such cases might happen but for this provision. But the words are wide enough, and under them we must hold he is not to be transferred by a company to a company, or by a collector from one company to another company without his consent. Then, with regard to the 2nd sub-section, I differ a little from my learned brother in this respect, that I rather doubt whether it was intended for the protection of the assured, and I rather agree with the alderman that it is difficult to see what it was intended for. I incline to think it was intended as a protection for a company against its servants and agents. I do not think it was intended so much for the prevention of touting; but I think it was to prevent that which I know does happen, and I think on this occasion has happened. A collector quarrels with his society. He has got all the good-will of the connection; he knows all the people insured, and all these know him, and he revenges himself on the society by going over to another society. Without saying in the least that it has happened in this case, it does often happen that the cause of the quarrel is some act of dishonesty or malpractice on the part of the collector. Now, the difficulty in such a case is as to dismissing him, since he is usually able to take away all the clients he has collected. It seems to me it is more likely that it was with a mind to prevent this that sub-sect. 2 was drawn. However that may be, there are the words, and when once we get to the understanding on which this section is based, which is that a member is in practice

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treated as a bale of goods, and passed from hand to hand as it seems to me he is, there is no difficulty in construing the words of this section.

WILLS, J.—I only wish to add that I do not differ from anything my learned brother has said. He has seen more of the working of these societies than I have, and it is very likely that his view of this section is more correct than mine. I do not wish to differ from him. I only want to point out that for one reason or another the Legislature has thought it desirable that the first society which is affected by this transaction shall have notice of what is going on.

Appeal allowed.

Solicitors for the appellants, *Hickling, Washington, and Passmore.*

Solicitor for the respondents, *W. H. Court.*

Monday, Feb. 4, 1901.

(Before WILLS and CHANNELL, JJ.)

ANDREWS (app.) v. WITTS AND HOLLY (resps.). (a)

Water—Supply for certain purposes—Use for other purposes—Agreement between water company and district council—Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93), s. 18.

By an agreement made between the T. District Council and the W. G. Water Company, the company covenanted to supply water sufficient for purposes of domestic use and the washing of carts, as well as in the case of fire, but not for street watering or sewer flushing purposes.

The respondents were ratepayers of T., and used the water for trade purposes.

Held, that they had been guilty of an offence within sect. 18 of the Waterworks Clauses Act 1863.

CASE stated on an information preferred by the appellant, the secretary and manager of the West Gloucestershire Water Company, against the respondents, charging them with having used water for purposes other than those for which they or either of them were entitled to use the same—namely, for trade purposes, contrary to the provisions of the Waterworks Clauses Act 1863.

By an agreement, dated the 16th Sept. 1898 and made between the Thornbury Rural District Council and their assigns of the one part and the West Gloucestershire Water Company of the other part, certain mains, stand pipes, &c., the property of the district council in Thornbury, were demised by the council to the water company for thirty years at a nominal rental of 1s. a year, and, in consideration of such demise and of a rental of 30l. per year and of certain covenants contained in the agreement the water company, covenanted to supply the stand pipes with water sufficient for purposes of domestic use and the washing of carts, as well as in the case of fire, but not for street watering or sewer flushing purposes; the district council covenanted on their part (*inter alia*) that they would, to the utmost of their power, assist the company to prevent the waste or misuse of the water of the company by means of the stand pipes.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

The water was supplied to the stand pipes in accordance with the agreement.

The respondents were both ratepayers of Thornbury and pay the rates imposed and authorised by the district council.

On the 16th July 1900 the respondent Holly was seen by the appellant to fill a cask with water from one of the stand pipes in Thornbury and take it to the premises of the respondent Witta, who is a baker carrying on business in Thornbury. The premises to which the water was taken were used as a bakery. It was admitted by Witta to the appellant that he had used water for baking purposes and said that he should continue to do so.

It was contended on behalf of the respondents that they were not the proper persons to be proceeded against if an offence had been committed, and that the respondents paid the district council for the water, and had the water from the council and did not pay, and had no agreement with the water company, nor did they get the water from the company.

It was, on the other hand, contended on behalf of the appellant that the water in this case had been drawn for an improper purpose and not authorised by the agreement; and that, therefore, the water so drawn and used by the respondents still remained the property of the water company, and that the property in it had never passed either to the district council or to the respondents; and that, therefore, the respondents were misusing the water belonging to the company.

It was also contended that the district council had made the agreement for and on behalf of the ratepayers of Thornbury, who were really the principals in the agreement and who really paid through the agency of the district council for the water supplied through the stand-pipes by the water company.

The justices, however, were of opinion that the respondents were not persons who had from the company a supply of water for other than domestic purposes as charged in the information, and they accordingly dismissed the charge.

By the Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93):

Sect. 18. If any person, first, not having from the undertakers a supply of water for other than domestic purposes, uses, for other than domestic purposes any water supplied to him by the undertakers; or secondly, having from the undertakers a supply of water for any other than domestic purposes, uses, for any purposes other than those for which he is entitled to use the same, any water supplied to him by the undertakers, he shall for every such offence be liable to a penalty not exceeding forty shillings, without prejudice to the right of the undertakers to recover from him the value of the water misused.

Duke, K.O. (*Metcalf* with him) for the appellant.—The question in this case depends upon the construction of sect. 18 of the Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93). Was this a supply from the water company that was being misused? The offence is defined in the second part of sect. 18, and the undertakers are the water company. North, J. in *West Surrey Water Company v. Guardians of Chertsey Union* (71 L. T. Rep. 368; (1894) 3 Ch. 513), said: "What is 'supply'? 'Supply' I understand to mean the passing of water from persons who have it to persons who want it." The power of the Thornbury Rural District Council to make the agree-

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ment is to be found in the Public Health Act 1875 (38 & 39 Vict. c. 55).

The respondents did not appear.

WILLS, J.—The case is clear. At first I could not see why the first part of sect. 18 of the Waterworks Clauses Act 1863 did not apply. But under the second part of that section the respondents are persons who have a supply of water from the undertakers. The water came from nowhere else but the water company. They, the respondents, used it for other purposes than those for which they were entitled to use it.

CHANNELL, J.—I think the justices were puzzled by the words "from the undertakers," but sect. 18 is directed against persons who rightfully get water for one purpose and use it for another.

Appeal allowed and case remitted to the justices.

Solicitors: Stanley, Wasbrough, and Doggett, Bristol.

Thursday, Feb. 7, 1901.

(Before WILLS and CHANNELL, JJ.)

MAYOR, &C., OF SOUTH SHIELDS (apps.) v. WILSON BROTHERS (resps.). (a)

Local government—Buildings—Bye-laws—Wooden structure—Stable—"New building"—Local Government Act 1858 (21 & 22 Vict. c. 98), s. 34.

Under the powers given by sect. 34 of the Local Government Act 1858 a local board made a bye-law that every person intending to erect any "new building" should give fourteen days' notice to the local board of such intention, and should at the same time deliver detail plans and sections of the proposed new building:

Held, that a wooden structure, being under 20ft. each way and with a slanting roof of 12ft. high, intended for a stable and erected in the centre of inclosed private ground of nearly an acre in extent, was a "new building" within the meaning of this bye-law.

CASE stated by justices of the peace for the borough of South Shields in pursuance of a rule granted by the High Court directing the justices to state a case.

The complaint was made on behalf of the appellants (the corporation of South Shields) against Wilson Brothers (the respondents) for that they within the last four months did unlawfully erect a new building in the county borough of South Shields without having first given fourteen days' notice to the corporation of the borough by a writing delivered to the surveyor or left at his office, and without having delivered to the surveyor plans thereof, contrary to the bye-laws.

The following facts were proved or admitted:—

The defendants were owners of a piece of ground of nearly an acre in extent, situate in Headhead-street. It was boarded on every side, and was occupied in part by a veterinary surgeon who has an office, a stable, and some other wooden erections for his business. The defendants also occupy other part of the ground as a builder's yard, and near the centre of the ground the defendants have an open shed; against this shed the defendants put up the wooden structure

complained of. It was of no great size, being under 20ft. each way and, at the apex of a slanting roof, only 12ft. high. The public had no access to it, and it was to all intents and purposes on the inclosed private ground of the defendants and intended for a stable.

On the part of the complainants it was contended that this wooden erection required plans to have been delivered to and approved by the corporation before commencing to build the stable, and this the defendants had not done, nor proceeded according to the bye-laws.

On the part of the defendants it was contended that it had never been the custom to require any plans for wooden built stables to be submitted to them, or in any way to have their approval, neither had this bye-law been insisted upon previously as being applicable to such a case as the present, and, in addition, that the bye-law did not apply to such a case as the present.

The justices adjourned the hearing, and surveyed the erection and its surroundings, and having carefully perused the bye-law, they came to the determination that the bye-law did not apply to a stable built of wood upon inclosed ground such as in the present case; and that, in their opinion, a building to be a building within that bye-law should answer to the description of an edifice having some approach to architectural design and structurally fit and intended for use and occupation by humanity in a civilised form.

They therefore decided (after due consideration and after inspection) that as a matter of fact it was not a building, and did not come within the bye-law, and they added that in their opinion no question of law arose upon the complaint.

If the court should be of opinion that their decision or order dismissing the complaint was right and proper, then the order was to stand; otherwise the complaint was to be sent back to them to be dealt with.

Bye-laws as to new streets, buildings, &c., for the borough of South Shields:

No. 6. Plans, &c.—Previous to building every person who shall intend to erect any new building shall give fourteen days' notice to the local board of such intention, by writing, delivered to the surveyor of the local board or left at his office, and shall at the same time deliver to such surveyor or leave at his office, detailed plans and sections, drawn in ink on drawing paper, tracing cloth, or mounted tracing paper on a scale of one-eighth or a quarter of an inch to every foot, of every floor of such intended new building, showing the thickness of the walls, the dimensions of the rooms, the situations of the fireplaces, stoves, chimneys, and flues, and generally the position, form, and dimensions of the several parts of such building, and of the water-closet, privy, gully, and drain, ashpit, coal-house, and all other buildings and appurtenances connected therewith; and such plans and sections shall be accompanied by a description of the materials of the building, the mode in which it is proposed to be constructed and the number of the site on estate plan it is intended to occupy. . . . Any person who shall erect any new building without giving such notice and delivering such plans and sections as aforesaid, or without having the said plans and sections approved of by the local board, or in anywise contrary to plans and sections which have been approved of by the local board, shall be liable for each offence to a penalty of forty shillings.

No 9. Materials for external walls:—

The external and party, or side and divisional walls of every new building shall be constructed, of brick,

(a) Reported by W. W. OAK, Esq., Barrister-at-Law.

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stone, or other hard and incombustible material. Any person offending against this bye-law shall be liable for for each offence to a penalty of forty shillings.

These bye-laws were made under sect. 34 of the Local Government Act 1858 (21 & 22 Vict. c. 98)—now repealed by sect. 343 of the Public Health Act 1875—which provided that

Every local board may make bye-laws with respect to the following matters: (that is to say) . . . (2) With respect to the structure of walls of new buildings for securing stability and the prevention of fires.

B. V. Banks for the appellants.—The question is whether this wooden stable is or is not a new building within the meaning of this bye-law. The justices came to the conclusion that a stable built of wood was not a "building." Two points are raised here: First, is this a "building" within the meaning of the bye-law (No. 6), and secondly, is there any question of law raised for this court to determine. When the justices give their opinion and say that this as a matter of fact was not a building, that does not bind this court as a matter of fact; it is a mere inference from the fact, and does not bind this court, as the question is one of law. In *Stevens v. Gourley* (1 L. T. Rep 33) a wooden shop, very similar to the wooden stable in this case, was held to be a "building" within the Metropolitan Building Act 1855. As Byles, J. says in that case, the meaning of the word "building" must be decided by that which is its ordinary acceptation, and he says that an edifice built of wood, a house or a stable, or a coachhouse, are evidently buildings. In the recent case of *Mayor of Southend-on-Sea v. Archer* (ante, p. 129) a wooden shed erected as a cover for a weighing-machine was held not to be a "building"; but that was a temporary erection, whereas this structure is a permanent stable. In *Hobbs v. Dance* (29 L. T. Rep. 687; L. Rep. 9 C. P. 30) a wooden stable was held to be a "new building" within a bye-law made by a local board under the same Act of Parliament as the bye-law in this case. The justices in this case came to the conclusion that practically no wooden stable of this kind could be a "building," because there was an absence of architectural design. They were clearly wrong in that view and in the way they looked at the case, which is one of considerable importance to town councils, because these bye-laws were framed to prevent the risk of fire. [WILLS, J. referred to bye-law No. 9.] Although the justices say that they held as a matter of fact that the structure was not a building, yet that question is properly raised as a question of law for the opinion of the court (*Hobbs v. Dance*, *ubi sup.*), and the case ought to be sent back to the justices to be dealt with.

The respondent did not appear.

WILLS, J.—I think that this structure was a new building within the meaning of the bye-law. There is not much to be said on the question. It is clearly a "new building" within bye-law 9, which provides that "the external and party, or side and divisional walls of every new building shall be constructed of brick, stone, or other hard and incombustible material." That is a very strong reason for thinking that bye-law 6 also was intended to apply to such a building. The difficulty in the construction of the bye-law is caused by the use in it of terms which are pro-

perly applicable to dwelling-houses only. These words, however, ought to be read as if they were qualified by the words "if any." I think that the justices came to a wrong conclusion, and that this appeal ought to succeed.

CHANNELL, J.—I agree.

Appeal allowed. Case remitted to the justices.

Solicitors for the appellants: *Speechly, Mumford, Rodgers, and Craig*, for *J. Moore Hayton*, Town Clerk, South Shields.

Jan. 26 and Feb. 17, 1901.

(Before BRUCE and PHILLIMORE, JJ.)

HULL v. LONDON COUNTY COUNCIL. (a)

Metropolis — Building — Projection from — Continuing offence — London Building Act 1894 (57 & 58 Vict. c. ccciii.), ss. 73 (8), 200 (3) (c) — Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11.

By sect. 73 (8) of the London Building Act 1894 it is enacted that "Except in so far as is permitted by this section in the case of shop fronts and projecting windows, and with the exception of water pipes and their appurtenances, copings, string-courses, cornices, fascias, window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of buildings in the street except with the permission of the council after consulting the local authority."

Held, that by "projection from any buildings" was here meant only a projection which was itself structurally part of the building itself, and not a projection which was subsequently attached to the windows or front wall of the completed building.

Held, further, that the offence arising under this sub-section and sect. 200 (3) was not a continuing offence, and that the offence was complete when the projection was erected, and an information laid more than six months after such erection was bad under sect. 11 of the Summary Jurisdiction Act 1848.

THIS was an appeal, by case stated, from the decision of the metropolitan magistrate sitting at Clerkenwell convicting the appellant upon an information preferred by Mr. Thomas Chilvers, on behalf of the respondents, charging the appellant with unlawfully extending a projection at No. 209, Seven Sisters-road, Islington, beyond the general line of buildings of Seven Sisters-road and Campbell-road, Islington, without the permission of the council, contrary to sect. 73 (8) of the London Building Act 1894 (57 & 58 Vict. c. ccciii.).

Upon the hearing of the information the following facts were proved:—

No. 209, Seven Sisters-road is at the corner of Seven Sisters-road and Campbell-road, Islington. By an agreement in writing made on the 9th June 1899, the appellant let to Mr. H. S. Benson, an advertiser's agent, a position covering the first floor window at the corner of the premises for the purpose of erecting thereon an electric or other advertising sign. The tenancy was to commence as soon as the sign was let, and in any case not later than the 24th June 1899, and was to be for

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the term of one year, with the option of renewal for a period of not less than two years at a yearly rental of 20*l*.

This agreement was entered into by Mr. Benson on behalf of his clients, Messrs. Frederick King and Co. Limited, whose registered office is in London. They were the proprietors of an article known as Edwards' Desiccated Soup, which was the subject-matter of the advertisement.

Between the 13th and 20th June 1899 the Electric Sign and General Advertising Company Limited put up for Messrs. Frederick King and Co. Limited an electric advertisement sign over the front of the appellant's premises in the position mentioned in the agreement. The sign was commenced to be put up on the 13th June 1899, and was completely affixed to the external wall of the premises on the 20th June 1899. It consisted of a wooden case with a glass front, the case being attached to the external wall of the premises by iron brackets, a space of 6in. intervening between the back of the case and the wall, and a portion of the apparatus working the sign being within the room on the first floor. The sign measured 10ft. 6in. in height by 7ft. in breadth, and when lighted by electricity showed an advertisement of Edwards' Desiccated Soup. The sign was placed immediately over the cornice of the shop front and, including the iron brackets, projected only 16in. beyond the external wall of the premises. The cornice of the shop front, which was below the sign, projected 20in. beyond the external wall of the premises, so that the sign projected 4in. less than the existing projection of the cornice. The sign did not project over the highway.

On the 16th March 1900 a notice was served on the appellant requiring him to comply with the law.

The information, which was preferred on the 17th May 1900, charged that the offence was committed on or about the 19th Dec. 1899, the date on which it was brought to the attention of the council.

On the 2nd June 1900 the superintending architect of metropolitan buildings gave his certificate defining the general line of buildings of the premises as being the main fronts of the buildings on the eastern side of Campbell-road and on the northern side of Seven Sisters-road respectively.

On the part of the appellant it was contended, firstly, that the information was invalid inasmuch as it was not laid within six calendar months from the time when the matter arose, as required by sect. 11 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43); inasmuch as the offence, if any, was complete and the matter of the information arose on the 20th June 1899, the date on which the sign was completely affixed to the premises; and the alleged offence was not a continuing offence and was wrongly stated in the information to have been committed on or about the 19th Dec. 1899; secondly, that the sign was not a projection within the meaning of sect. 73 (8) of the London Building Act 1894, inasmuch as the sign did not extend beyond the existing projection of the shop cornice and did not extend over the highway; and, thirdly, that the appellant was not liable or a proper defendant to the information, inasmuch as by the agreement he had demised the part of the premises on which the sign was affixed, and had no power to control or alter the position of the sign without trespassing on the property of

his tenant or to remedy the alleged breach of the section.

On behalf of the council it was contended that the offence was a continuing offence, that the sign was a projection, and that the appellant was liable notwithstanding the agreement.

The learned magistrate found as a fact that the sign did project beyond the general line of buildings in the street as defined by the superintending architect, and held that the offence was a continuing offence.

The questions for the opinion of the court were:

(1) Whether the prosecution of the alleged offence was barred under sect. 11 of the Summary Jurisdiction Act 1848 by lapse of time; (2) whether the sign constituted a projection within the meaning of sect. 73 (8) of the London Building Act 1894; (3) whether the appellant could, having regard to the agreement, under the circumstances be properly convicted of the alleged offence.

London Building Act 1894 (57 & 58 Vict. c. cxliii.):

Sect. 22.—(1) No building or structure shall, without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street, place, or row of houses in which the same is situate, in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway.

Sect. 73, which comes into Part VI. of the Act, which is entitled "Construction of Buildings," begins by enacting that the following provisions shall (except with the consent of the council) apply to projections from buildings. The first sub-section deals with the material of which copings, cornices, balconies, &c., shall be composed; the second, with the mode in which balconies, cornices, and other projections shall be tailed into the wall; the third, with the distance shop fronts may project; the fourth, with the height of shop fronts; the fifth, with the mode of building and extent of projection of bay windows; the sixth, with the extent of projection of oriel windows and turrets; and the seventh, with the erection of gutters round balconies, verandahs, shop fronts, and other similar projections or projecting windows to prevent drip into the public road. Sub-sect. 8 then enacts:

Except in so far as is permitted by this section in the case of shop fronts and projecting windows, and with the exception of water-pipes and their appurtenances, copings, string course, cornices, facias, window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of buildings in any street, except with the permission of the council after consulting the local authority.

Sect. 200. Subject to the provisions of this Act every person who does any of the things specified in this section shall be deemed to have committed an offence against this Act, and shall be liable upon conviction in a summary manner to a penalty not exceeding the amount hereafter specified in connection with such an offence, and to a further penalty not exceeding the amount hereafter stated as the daily penalty in connection with such offence for every day on which the offence is continued after such conviction (that is to say) . . . (3) Every person who (c) fails to comply with any of the provisions of part 6 of this Act . . . shall be liable to a penalty not exceeding twenty pounds.

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a day during every day of the continuance of the non-compliance with the order of the court in reference to the matters aforesaid.

Macmorran, K.C. (G. H. B. Kenrick with him).—Of the grounds on which the appeal is based the second is the most important, and I will deal with it first. I submit that sect. 73 (8) does not refer to such a projection as this. The section occurs in the part of the Act dealing with the construction of buildings. The projection here has nothing to do with the construction of the building. I contend that sect. 73 (8) applies only to projecting parts of the building such as the shop fronts, projecting windows, and water-pipes referred to in it. Projections such as this which form no part of the structure of the building are dealt with in other Acts. Thus by sect. 119 of the Metropolitan Management Act 1855 projections causing annoyance to passengers are dealt with, and by sect. 164 (1) of this Building Act the council have power to make bye-laws regulating lamps, signs, or other structures overhanging the public way. [PHILLIMORE, J. referred to *Fortescue v. Bethnal Green (Vestry of St. Matthew)* (65 L. T. Rep. 256; (1891) 2 Q. B. 170).] The second ground is technical. We submit the information is barred under sect. 11 of the Summary Jurisdiction Act as not having been laid until more than six months after the offence. The offence (if any) was complete on the 30th June 1899, the information was not preferred till May 1900. It will no doubt be contended that the offence is a continuing offence. But that point is concluded in our favour by *London County Council v. Cross* (66 L. T. Rep. 731). The effect of that decision is that where anything is forbidden by a statute the offence is complete when the thing forbidden is done. To make the neglect to undo the thing done a continuing offence, the statute must expressly direct that:

Marshall v. Smith, 28 L. T. Rep. 538; L. Rep. 8 C. P. 416.

Even if it is a continuing offence we are not liable since it is not we who continue it. Our part in the transaction ceased with the lease. Now, we cannot legally interfere with what the lessee does. To do so would be to commit a trespass. Therefore we are not continuing the offence, even though we were parties to the original committal of it:

Welsh v. West Ham Corporation, 19 Mag. Cas. 482; 82 L. T. Rep. 262; (1900) 1 Q. B. 324;

Metropolitan Board of Works v. Antony, 54 L. J. 39, M. C.

Avory, K.C.—As to the question whether or not this is a projection within sect. 73 of the Act, I submit that sects. 22 and 73 should be read together. If projection in sect. 73 means only a projection which is part of the structure of the house, then everything that comes within sect. 73 comes within sect. 22, and the former enactment is futile. I submit that the more reasonable interpretation is this, that where you erect any parts of your house beyond the building line, you come within sect. 22; where you erect something upon your house which projects beyond the building line, then you come within sect. 73:

Coburg Hotel Company v. London County Council, 63 J. P. 805.

[PHILLIMORE, J.—That was a dispute as to a portico which was part of the house. Now, as

portico is expressly mentioned in sect. 73, it must come within that section as well as within sect. 22.] Sect. 73 consists of two distinct parts. The first part refers to the materials of which certain things must be made; the second as to the distance, &c., which certain things may project. I contend this thing is within the second part of the section, whether it is part of the structure of the house or merely something fixed to the house in a more or less permanent way. At the same time I do not contend that it is in fact a projection within sect. 73; but my argument is that the justice has found that it is, and it lies on the appellant to show that there is no evidence to support this finding. [PHILLIMORE, J.—The magistrate has not found that this was in fact a projection. He has found the facts about its nature, and then left to us to say whether these facts make it a projection within sect. 73.] Sect. 73 cannot apply merely to things which, at the original erection of the building, were part of the structure. Sect. 201 (16) excludes from the operation of Part VI. of the Act flower cases for windows, provided they do not project over the public way or more than 12in. beyond the external face of the wall. This shows that such cases would be within sect. 73 if not expressly exempted. As to the second point, this is clearly a continuing offence. The fact that sect. 200 (3) inflicts a daily penalty for its continuance is enough to prove this. There is no difference between this case and the *Metropolitan Board of Works v. Antony* (*sup.*), and see *London County Council v. Wortley* (71 L. T. Rep. 487; (1894) 2 Q. B. 826). [PHILLIMORE, J.—The continuing offence there was got out of the section creating the duty. Here you have to go to a general penalty clause.] Yes; but without this general clause there is no penalty attached to breach of the section creating the duty. [PHILLIMORE, J.—That may be; but the general penalty clause may, as far as the continuing penalty is concerned, be satisfied in many ways as well as by making this a continuing offence.] The offence created by sect. 73 is not the erecting of the projection. It enacts that "no projection shall extend." The continuance of the projection is therefore as much an offence as the erection of it. Counsel also referred to

Rumball v. Schmidt, 46 L. T. Rep. 661; 8 Q. B. Div. 608.

Macmorran, K.C. in reply.

Cur. adv. vult.

Feb. 17.—BRUCE, J. read the following written judgment of the court:—In this case we think that the sign does not constitute a projection within the meaning of sect. 73, sub-sect. 8, of the London Building Act 1894. The section in question commences: "The following provisions shall (except with the consent of the council) apply to projections from buildings." In order to ascertain the meaning of the phrase "projections from buildings," used at the commencement of the section, and the meaning of the words "projection from any building," used in the last sub-section, the provisions of the whole section must be considered. The 1st sub-section provides in substance that every coping, cornice, string-course, fascia, window-dressing, and such like, and every architectural projection or decoration and also the eaves, barge boards, and cornices to any

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overhanging roof shall, except as therein mentioned, be of brick, tile, stone, or other fireproof material. We think it clear that this sub-section refers only to projections from buildings in the nature of architectural projections or decorations and to the overhanging parts of buildings, and it relates to the material for the construction of the parts of buildings to which it refers. Sub-sect. 2 enacts that every balcony, cornice, or other projection shall be tailed into the wall of the building and weighted and tied down to the satisfaction of the district surveyor, and that no cornice shall exceed in projection 2ft. 6in. over the public way. This sub-section relates only to projections in the nature of architectural projections. Sub-sect. 3 lays down rules regulating the extent to which in a street a shop front and a cornice to a shop front may project beyond the external wall of the building to which the shop front or cornice belongs. Sub-sect. 5 relates only to bay windows, and sub-sect. 6 lays down the rules under which projecting oriel windows or turrets may be constructed. Sub-sect. 7 provides that the roof, flat, or gutter of every building, and every balcony, verandah, shop front, or other similar projection or projecting window shall be so arranged and constructed and so applied with gutters and pipes as to prevent the water therefrom from dropping or running upon any public way. We now come to the 8th sub-section, upon the construction of which the main question in the case turns. The sub-section is in these terms: "Except in so far as is permitted by this section in the case of shop fronts and projecting windows and with the exception of water-pipes and their appurtenances, copings, string-courses, cornices, fascias, window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of buildings in any street except with the permission of the council, after consulting the local authority." The whole of the preceding part of the section relates to the construction of buildings, to projections from buildings, in the nature of architectural projection or decoration, or to the overhanging parts of buildings, and therefore it is plain that the projections from buildings to which the main provisions of the section apply are projections forming part of the buildings from which they project. The question we have to determine is whether the words in the 8th sub-section, "no projection from any building," are used in a different sense and apply to a different class of projection; whether they include such things as poles, blinds, sign-boards, or other structures hung out from or attached to the outside wall of a house. Giving the best consideration we can to the words of the 8th sub-section we think that the words "projection from any building" are there used in the same sense as in the earlier part of the section. It would be strange to find in the last sub-section of a long section containing a code of minute provisions relating to a particular class of projections, a sudden departure from the subject to which all the preceding provisions of the section are devoted. The meaning of the two branches of the 8th sub-section, we think, is that, with the exception of architectural decorations of the character specified, and for an obvious reason water-pipes, no part of the structure of a building, no architectural projection not being a shop

front or projecting window falling within the first branch of the sub-section, shall extend beyond the general line of buildings in any street. But it is contended by the counsel for the respondents that, although the words apply to such projections as we have mentioned, yet that they are wide enough to extend to everything attached to a building and extending beyond the general line of buildings, and that they apply to a structure such as the wooden box attached to the external wall of a house by brackets as described in the case. We do not think that the words, even apart from the context, have so extended a meaning. A projection from a building means a part of a building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building. If the words are taken in this sense they fall in with the scope of the section. It is quite clear that the object of the section is to preserve the width of the street and the general line of building frontage, in order to maintain architectural uniformity. But to extend the meaning of the words in the 8th sub-section to include structures not being part of the building and not joining any part of the architectural structure of the building would be to give an effect to the enactments altogether beyond the object to which the section seems to be directed. Further, we feel strengthened in the conclusion at which we have arrived by the circumstance that the 73rd section is in Part VI. of the Act, which is headed "Construction of Buildings." In another part of the same Act, where power is given to the council to deal with dangerous structures, the word structure is said to include anything affixed to or projecting from any building, wall, or other structure: (see sect. 102). Had the Legislature intended the 73rd section to apply to a structure affixed to a building it may fairly be assumed that it would have used in that section words similar to the words used in the 102nd section. The 102nd section and the 73rd section were not, we think, intended to overlap. In each case the Legislature uses apt words to describe the particular kind of structure to which the several provisions apply. We may add that no inconvenience seems to be likely to arise from the construction we have placed on the sub-section in question, because the council has power under the 164th section of the same Act to make bye-laws for the regulation of lamps, signs, or other structures overhanging the public way not being within the City. And by the 7th sub-section of sect. 60 of the 2 & 3 Vict. c. 47, a penalty is imposed upon any person who shall set up or continue (*inter alia*) any pole, blind, awning or any other projection from any window, parapet or other part of any house, shop, or other building so as to cause any annoyance or obstruction in any thoroughfare. And by the 119th section of the Metropolis Management Act 1855 provision is made for the removal of any lamps, iron sign-post, show board, window shutter, gate, fence, or any other projection or obstruction placed or made against or in front of any house or building which shall be an annoyance in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street. Further, as to the point raised by the case whether the prosecution of the alleged offence is barred under sect. 11 of

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the Summary Jurisdiction Act 1848, by lapse of time, we think it is. If any offence was committed it was, we think, complete on the 20th June 1899, the date on which the said sign was completely affixed to the premises. The case *London County Council v. Cross* (66 L. T. Rep. 731) is, we think, in point. As to the third point, we think that, if the sign had been a projection within the meaning of sect. 73 of the London Building Act 1894 and the proceedings had been taken in due time, the appellant could not have escaped liability on the alleged ground that he had no power to control or alter the position of the sign without trespass. The result of our judgment is that the conviction, determination, and order must be reversed, and we think the appellant is entitled to the costs of the appeal.

Solicitors for the appellant, *S. M. and J. B. Benson*.

Solicitor for the respondents, *Blazland*.

Friday, Feb. 1, 1901.

(Before WILLS and PHILLIMORE, JJ.)

LANGRIDGE v. HOBBS. (a)

Vaccination—Neglect to have vaccinated—Limitation of proceedings—Vaccination Act 1867 (30 & 31 Vict. c. 84), s. 29—Vaccination Act 1871 (34 & 35 Vict. c. 98), s. 11—Vaccination Act 1898 (61 & 62 Vict. c. 49), s. 1 (1)—Vaccination Order 1898, sched. 4, par. 6 (d).

When a parent or person having the custody of a child has without lawful excuse failed to have such child vaccinated within six months from the birth, matter for a complaint or information against him has arisen for an offence under sect. 29 of the Vaccination Act 1867, and if a complaint or information be not laid against him within the twelve months following all proceedings for the offence are barred by sect. 11 of the Vaccination Act 1871.

Par. 6 (d) of the 4th schedule to the Vaccination Order 1898, which directs the vaccination officer to serve a notice on such a parent or person within seven days after the expiration of the said six months requiring him to have the child vaccinated within the time specified in such notice, does not affect the period of limitation of proceedings under the Vaccination Acts, but is merely an instruction to vaccination officers as to the mode in which they are to carry out their duties under those Acts.

CASE stated by three of the justices of the peace for the county of Sussex.

At a petty session holden at East Grinstead, in and for the division of East Grinstead, in the county of Sussex, on the 16th July 1900, an information preferred by Henry George Hobbs (hereinafter called the respondent) against John Langridge (hereinafter called the appellant) under sect. 29 of 30 & 31 Vict. c. 84, charging that the appellant, being at the time of the offence thereafter mentioned the parent having the custody of a certain child called Charles Langridge, born in England, on or about the 30th Dec. 1898, unlawfully did neglect to cause the child to be vaccinated according to the provisions of the Vaccina-

tion Acts 1867 and 1898, that is to say that he, the appellant, did not within six months after the birth of the child cause it to be vaccinated by some medical practitioner, he, the appellant, not rendering a reasonable excuse for his neglect, contrary to the form of the statute in such case made and provided, was heard and determined, and upon such hearing the appellant was duly convicted before the justices of the offence, and they adjudged him to forfeit and pay the sum of 1l. and the sum of 1l. 12s. 7d. for costs forthwith.

By the Vaccination Act 1867 (30 & 31 Vict. c. 84):

Sect. 29. Every parent or person having the custody of a child who shall neglect to take such child or to cause it to be taken to be vaccinated, or after vaccination to be inspected, according to the provisions of this Act, and shall not render a reasonable excuse for his neglect, shall be guilty of an offence and be liable to be proceeded against summarily, and upon conviction to pay a penalty not exceeding twenty shillings.

By the Vaccination Act 1871 (34 & 35 Vict. c. 98):

Sect. 11. Any complaint may be made and any information laid for an offence under the Vaccination Acts 1867 and 1871 at any time not exceeding twelve months from the time when the matter of such complaint or information arose and not subsequently.

By the Vaccination Act 1898 (61 & 62 Vict. c. 49):

Sect. 1.—(1) The period within which the parent or other person having the custody of a child shall cause the said child to be vaccinated shall be six months from the birth . . . and so much of that section as requires the child to be taken to a public vaccinator to be vaccinated shall be repealed.

At the hearing before the justices the following facts were proved in evidence or admitted:—

The appellant was the parent having the custody of the child Charles Langridge, born on the 30th Dec. 1898.

The appellant's name was duly included in form H by the vaccination officer and sent to the public vaccinator.

The usual notice in form I was served by the public vaccinator on the appellant of his intention to attend and vaccinate the child twenty-four hours previous to such attendance.

The public vaccinator visited the appellant's house on the 1st May 1899, being within two weeks after receipt of the notice from the vaccination officer, and offered to vaccinate the child, and vaccination was refused.

On the 7th July 1899 the vaccination officer served notice in form K on the appellant, requiring him to have the child vaccinated within fourteen days from the date thereof.

No certificate of postponement or successful vaccination had been received in respect of the child, and the information against the appellant was laid on the 12th July 1900.

Forms H, I, and K referred to above are those contained in the 5th schedule to the Vaccination Order 1898, made by the Local Government Board in pursuance of the powers given to them by the statutes in that behalf.

At the hearing the appellant by his counsel took the objection that the information was out of time by virtue of sect. 11 of the Vaccination Act 1871, but the justices overruled the objection and convicted the appellant.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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The grounds set out in the case for this decision of the justices were as follows: The child Charles Langridge was born on the 30th Dec. 1898, and accordingly the six months allowed by sect. 1 (1) of the Vaccination Act 1898, in which the parent or person having custody of the child had to have the same vaccinated would expire on the 30th June 1899.

The Vaccination Order of 1898, made by the Local Government Board under the authority of statutes in that behalf, provides, by par. 6 (d) of the 4th schedule, that

If the vaccination officer has not received in respect of any child a certificate under sect. 2 of the Vaccination Act 1898 within the time limited by that section, and at the end of seven days, after the expiration of six calendar months from the birth of the child has not received any other of the certificates mentioned in subdivision (a) of this paragraph, the vaccination officer shall forthwith give a notice in form K set out in the 5th schedule to this order, or to the like effect, to the parent or other person having the custody of the child by delivering the same by post or otherwise at the last known residence of such person or persons. If that notice is not duly complied with within the time specified therein, it shall become the duty of the vaccination officer under the Vaccination Act 1871 to take proceedings for the enforcement of the law.

The notice in form K, in compliance with the Vaccination Order of 1898, was served on the appellant on the 7th July 1899, and required the appellant to have the child vaccinated within fourteen days from the date thereof, so that such notice expired on the 21st July 1899, and as therefore the vaccination officer could not commence proceedings before that date, the offence was not till then complete, and time should be reckoned as running from the date of the expiration of the notice, and not from the date of attainment by the child of the age of six months.

The justices therefore held that the matter of the information within sect. 11 of the Vaccination Act 1871 did not arise till the expiration of the fourteen days' notice, and that, therefore the time for taking proceedings could not expire until the 21st July 1900.

Schultess Young for the appellant. — The justices were mistaken in holding that the schedule to the Vaccination Order 1898 was intended to or could alter the statutory conditions of the offence. This order and schedule were made under the powers given to the Local Government Board by sect. 5 of the Vaccination Act 1871, sect. 1 of the Vaccination Act 1874, and sect. 6 of the Vaccination Act 1898. None of these Acts gives the Local Government Board power to alter any enactment of the statute. All it is empowered to do is to make rules and orders with regard to the duties of guardians and officers. This was clearly all that was meant to be done here. The very title of the schedule shows this. It is "Instructions to Vaccination Officers." It was intended to direct officers as to how they should carry out their duties under the Acts, not to alter the effect of the Acts themselves.

The respondent did not appear.

WILLS, J. — This seems to us a very clear case. The effect of sect. 29 of the Vaccination Act 1867 as read with sect. 1 (1) of the Vaccination Act 1898 is to impose on a parent or person having the custody of a young child to have it

vaccinated within six months after its birth. This is a positive duty. If it is not performed within the six months the penalty is incurred, and under sect. 11 of the Vaccination Act 1871 an information may be laid against the person offending at any time within twelve months of the expiration of the six months, but if not laid within this period it is out of time. These are the only two sections which for our purpose are material. Now here the child was born on the 30th Dec. 1898. The offence was complete when it still remained unvaccinated on the 30th June 1899. The proceedings against the appellant were not commenced until the 12th July 1900. They were therefore out of time. The magistrates apparently thought that this had been altered by the Vaccination Order of 1898. This is a mistake. The Vaccination Order 1898 did not create fresh legislation. That order laid down and could only lay down rules for the guidance of vaccination officers in the discharge of their duties under the different Acts. This is clearly shown by the enactments giving them the power to make such rules, and also by the heading of the paragraph relied upon by the magistrates which is "Instructions to Vaccination Officers." The sole object was to explain to the vaccination officers how they should carry out the duties imposed upon them by the Acts and order, and not to alter the statutory conditions under which an information had to be laid for an offence under the Acts. Par. 6 (d) directs the vaccination officer at the end of six months and seven days from the birth of the child to serve the notice to have the child vaccinated within the time therein specified, and it is only on failure to comply with this notice that proceedings are to be taken. This does not and cannot alter the statutory conditions of the offence. It is only intended to give to offenders a *locus penitentis*, and amounts to an instruction to vaccination officers to take proceedings only after failure to get the Acts complied with by less harsh measures. The offence then was as I have said complete on the 30th June 1899, and no fresh offence was created by the failure to comply with the notice of the 7th July 1899. As the proceedings were not instituted till the 12th July 1900, they were out of time.

PHILLIMORE, J. concurred. *Appeal allowed.*

Solicitor for the appellant, *B. Alabone Cheverton*, for *E. P. Whitley Hughes*, East Grinstead.

Thursday, Feb. 7, 1901.

(Before WILLS and CHANNELL, JJ.)

KENTON (app.) v. SHEFFIELD COAL COMPANY LIMITED (resps.). (a)

Local government—General district rate—Valuation list—Rate based on valuation list—Appeal—Reduction of valuation list and of general district rate—Claim for reduced rate—Time when "matter of complaint" arose—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 256.

In a valuation list the respondents were rated as

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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the occupiers of certain premises, and poor rates and two general district rates were made upon this valuation, and after demand payment of part of the general district rates was made by the respondents on account. The respondents, upon an appeal against the poor rates, succeeded in getting the valuation lowered for the periods in respect of which these general district rates were made, and the valuation list was amended accordingly, and the figures of the above general district rates were amended and lowered in accordance with the reduced valuation. A demand was then made upon the respondents to pay the amount of the two amended general district rates, less the sums which they had already paid on account, and a summons to enforce payment of the balance was taken out within six months after the demand for the reduced amount, but more than six months after the demand for the whole unamended rates.

Held, that, the complaint being that the respondents had not paid the amended rate, "the matter of the complaint" first arose within sect. 11 of the Summary Jurisdiction Act 1848, when the demand was made to pay the reduced claim and not when the demand was made to pay the original rates, and that, as the summons was taken out within six months from the demand to pay the reduced rate, the claim was not barred by the section.

CASE stated by justices of the peace for the West Riding of the county of York sitting as a court of summary jurisdiction at Sheffield, upon a determination by them of a claim made by the appellant on behalf of the Handsworth Urban District Council for the payment by the respondents to the council of the sum of 869*l.* 3*s.*

The facts proved or admitted were as follows:—

The appellant was the collector of rates of the Handsworth Urban District Council (herein called "the council"), and was authorised by the council to make the above-mentioned claim and to initiate summary proceedings in support of such claim.

The respondents were the rateable occupiers of certain premises situate in the parish of Handsworth within the council's district, and comprising the coal mine, shafts, and the land, buildings, machinery, plant, and sidings connected with the Birley Collieries (herein referred to as "the premises").

In a supplemental valuation list made for the parish on the 6th Nov. 1897, and included in the valuation list in force for the parish on the 28th Dec. 1897, the premises were valued and assessed at a rateable value of 10,137*l.*

On the 28th Dec. 1897 a poor rate was made by the overseers of the poor of the parish by which the respondents were assessed and rated in respect of the premises upon the rateable value of 10,137*l.*

On the 23rd March 1898 a general district rate of 3*s.* in the pound, payable in two instalments, was made by the council, to which the respondents were rated in respect of the premises upon the rateable value of 10,137*l.* at the sum of 1520*l.* 11*s.*

On the 21st June 1898 a second poor rate was duly made by which the respondents in respect of the premises were assessed on the same rateable value.

On the 28th July 1898 payment of the first instalment of the above sum of 1520*l.* 11*s.* was demanded by the council from the respondents by serving upon them a written demand note of that date, and on the 23rd Sept. 1898 the respondents paid the sum of 356*l.* 8*s.* 6*d.*, which last-mentioned sum was accepted by the council on account of the first half of the district rate; and on the 25th Oct. 1898 payment of the second instalment was likewise demanded as aforesaid, and on the 27th March 1899 the respondents paid a like sum of 356*l.* 8*s.* 6*d.*, which was accepted by the council on account of the rate.

On the 22nd Nov. 1898 a third poor rate was made for the parish by the overseers, by which the respondents were rated in respect of the premises upon the same rateable value of 10,137*l.*

On the 22nd March 1899 a general district rate of 3*s.* 4*d.* in the pound, payable in two instalments, was made by the council to which the respondents were rated in respect of the premises upon the above rateable value of 10,137*l.* at the sum of 1689*l.* 10*s.*

On the 21st April 1899 the respondents gave notice of appeal against the hereinbefore-mentioned poor rates, but not against either of the district rates.

Payment of the first and second instalments of the last-mentioned district rate was demanded by the council from the respondents on the 10th May 1899 and on the 17th Oct. 1899 respectively, by service upon them of written demand notes on these dates, and the respondents paid the sums of 475*l.* 9*s.* 10*d.* and 450*l.* on the 29th Sept. 1899 and 5th April 1900, which sums the council accepted on account of the district rate.

On the 4th Jan. 1900 the arbitrator (to whom the appeals against the above poor rates had been referred by agreement) awarded that the rateable value of the premises was for the several periods relating to the two first-mentioned poor rates of the 28th Dec. 1897 and the 21st June 1898 respectively the sum of 7517*l.* 9*s.* 9*d.*, and for the period relating to the last-mentioned poor rate of the 22nd Nov. 1898 the sum of 8279*l.* 4*s.* 1*d.*

In accordance with this award alterations and amendments were duly made in the valuation lists upon which the above poor rates were based, and on the 19th March 1900 the council altered the figures of the above general district rates of the 23rd March 1898 and the 22nd March 1899 so as to accord with the alterations so made in the valuation lists—that is to say, the rateable value of the premises in the general district rate of the 23rd March 1898 from the sum of 10,137*l.* to the sum of 7517*l.* 9*s.* 9*d.*, and the amount due in respect of the premises from 1520*l.* 11*s.* to the sum of 1127*l.* 12*s.* 6*d.*; and the rateable value in the general district rate of the 22nd March 1899 from 10,137*l.* to the sum of 8279*l.* 4*s.* 1*d.*, and the amount due in respect of the premises from the sum of 1689*l.* 10*s.* to 1379*l.* 17*s.* 4*d.*

The council on the 30th May 1900, and again on the 14th June 1900, demanded payment by the respondents of the sum of 869*l.* 3*s.*, such last-mentioned sum being made up as follows:

1898, March 23, General District Rate, 1520*l.* 11*s.*, altered to 1127*l.* 12*s.* 6*d.*

1898, Sept. 23, Amount paid by the respondents on account of the said rate, 356*l.* 8*s.* 6*d.* 1899, do. do.,

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356l. 8s. 6d. Total paid on account of the said rate, 712l. 17s. Balance claimed, 414l. 15s. 6d.

1900, March 22, General District Rate, 1689l. 10s., altered to 1379l. 17s. 4d.

Amounts paid on account of the said rate on 29th Sept. 1899 and 5th April 1900, 475l. 9s. 10d. and 450l. Total paid, 925l. 9s. 10d. Balance claimed, 454l. 7s. 6d. Total amount claimed, 869l. 3s.

The respondents having refused to pay this sum of 869l. 3s., complaint was made on behalf of the council and a summons was issued on the 24th July 1900, calling upon the respondents to answer the claim. This summons was heard by the justices on the 3rd and 14th Aug. 1900.

On behalf of the respondents it was contended that the matter of the complaint in respect of which the summons was issued arose more than six months previously to the issue of the summons, and that the recovery of the amount claimed was barred by 11 & 12 Vict. c. 43, s. 11.

On behalf of the appellant it was contended that until the general district rates had respectively been altered so as to agree with the valuation lists as amended in accordance with the award, no valid demand could be made upon the respondents by the council in respect of either of the rates, and that payment of the amount claimed had not been demanded until within six months of the issue of the summons, and that therefore the matter of the complaint in respect of which the summons was issued arose within six months, and the claim was not barred by 11 & 12 Vict. c. 43, s. 11.

The justices were of opinion that the recovery of the amount claimed by the council was, under the circumstances above stated, barred by 11 & 12 Vict. c. 43, s. 11, and accordingly they dismissed the summons.

The question for the opinion of the court was whether or not the justices were right in so doing.

The Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) provides:

Sect. 11. And be it enacted, that in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

Hugo Young, K.C. (R. Cunningham Glen with him) for the appellant.—The magistrates were wrong in holding that the claim was barred by sect. 11 of the Summary Jurisdiction Act 1848 because the cause of complaint had not arisen within six months before the issuing of the summons on the 24th July 1900. Sect. 211 of the Public Health Act 1875 deals with the assessment and levying of general district rates under the Act; and sect. 256 provides for the recovery of these rates by summons before a court of summary jurisdiction where there is a failure to pay the rates within fourteen days after a lawful demand in writing, and sect. 269 gives a right of appeal to quarter sessions to any person who may feel aggrieved by any rate made under the Act, or by any order or determination of a court of summary jurisdiction. In this case the appeal was against the poor rates, and there was no appeal against the general district rates. Sect. 11 of the Act of 1848 says that the complaint shall be

made within six months from the time when the matter of such complaint arose. When did the cause of complaint arise here? The cause of complaint was the nonpayment of the reduced sum of 869l., and the failure to comply with the demand for that sum. This reduced sum was the sum claimed in the proceeding, and the cause of complaint arose when there was a demand to pay this sum. Was there as regards this sum of 869l. a "lawful demand in writing" within sect. 256 of the Public Health Act 1875 on the 30th May 1900 and again on the 14th June 1900? We submit that there was a lawful demand in writing on these dates for the payment of this sum, and that within fourteen days afterwards we could have proceeded under that section for the recovery of the same. When the rates were amended and reduced in accordance with the award of the arbitrator given on the 4th Jan. 1900, they were in substance new rates and no valid demand could be made for these district rates until they were amended in accordance with the new rateable values. The cause of complaint therefore did not arise until there was a demand on the 30th May 1900 to pay this claim, and, as the summons was issued on the 24th July following, the claim was not barred by sect. 11. He referred to

Sheffield Waterworks Company v. Mayor, &c., of Sheffield, 54 L. T. Rep. 179.

Tindal Atkinson, K.C. (T. E. Ellison with him) for the respondents.—The claim was clearly barred by sect. 11 of the Act of 1848, and the magistrates were right in so holding. Sect. 221 of the Public Health Act 1875 gives an urban authority power to amend rates and to raise or reduce the sum at which a person has been assessed, and the section says that "no such amendment shall be held to avoid the rate." The cause of complaint was the nonpayment of the general district rates made respectively on the 23rd March 1898 and the 22nd March 1899. Sect. 11 says that the summons must be taken out within six months from the time the cause of complaint arose, otherwise the claim is barred. The summons ought to have been taken out within six months from the time these two rates were first demanded, but it was not taken out till the 24th July 1900, which was long afterwards. The demands made on the 30th May and the 14th June 1900, which are the demands relied on, were not demands for new or fresh rates. The rates, *quid* rates, had not been altered; the amount only had been altered or affected. It could never have been intended that the limitation in sect. 11 should apply to such a case where a long time might be taken to effect the alteration. It was the appellant's own fault that he did not pursue his remedy in time. When the whole of a debt is barred by a statute of limitations, no creditor can recover a part of it; so here if the whole of the old rates were barred by sect. 11—as clearly they were—a part of those rates cannot now be recovered. If summonses had been taken out within six months after each original demand was made, then the respondents would have had no answer to the claim; but this summons is out of time, as the rates claimed are still the rates made on the 23rd March 1898 and the 22nd March 1899.

H. Young, K.C. in reply.

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WILLS, J.—I am of opinion that the decision of the magistrates was wrong, and that the amount of the amended rate is recoverable under the circumstances of this case. What was demanded and what was the subject of the summons was the amended and reduced amount. Until the amount had been reduced by the competent authority and until the rate had been amended there never was any right to demand that smaller sum. There was only a right to demand the larger sum. It is not necessary to decide it, but I am very much of the opinion that has been expressed by counsel for the respondents, that, if the demand had been proceeded with and a summons taken out on the larger demand that was made originally, there would have been no answer to it; but that does not seem to me to be material for the present purpose. Had that been the case, of course it would have been quite useless to proceed upon a summons for the amended and the reduced amount, because the larger amount would have been paid or recoverable, and, under these circumstances, nobody would have thought of taking out a fresh summons. In my opinion, also, the excess might have been recovered by a ratepayer who paid too much. It is not necessary to decide that, but I cannot believe that any such injustice as has been suggested—namely, that the rating authority might keep that rate which has turned out to be excessive—would have been allowed to stand. It seems to me that there are ample reasons consonant with both the legislation and the general law why that excess amount would have been recoverable, but it is not necessary to decide that. I take my stand on this—that the moment the rate was reduced by the process pointed out by the Act of Parliament, there came into operation for the first time a right to demand the reduced sum. Counsel for the respondents has said that if a man owes a large debt or owes a definite sum, and the Statute of Limitations runs with regard to that sum, he certainly cannot recover half of it beyond the period of limitation. No doubt he could not recover it as things stand, if that simple proposition is put; but I think if you add this to it, that by the effect of legislation and what has taken place, there is a new right altogether created afterwards which makes the smaller sum for the first time a debt, I think the matter might stand very differently. But here it seems to me we have to look at the words of sect. 11 of the Summary Jurisdiction Act 1848, and we have to look at the question when the cause of complaint first arises. The complaint is that the respondents have not paid the amended rate. The amended rate is to follow the valuation list in force at the time being; the valuation list as amended never was the valuation list in force until the amendment was made, and therefore the rate which is amended according to the amended valuation list becomes for the first time the instrument which makes it the duty of the ratepayer to pay a smaller amount. It seems to me, therefore, that the case is really free from difficulty, and that the law in this instance is consonant with what reason and common sense would point out—namely, that the reduced amount is not to be extinguished by the payment of a small sum under the circumstances under which the respondents had last paid. I am clearly of opinion that the appeal must succeed, and that

this case must go back to the magistrates to make the proper order—namely, an order for the payment of the arrears of the reduced rate.

CHANNELL, J.—I am of the same opinion, and for the same reasons.

Appeal allowed. Case remitted to magistrates. Leave to appeal on payment of the 869l. within a fortnight.

Solicitors for the appellant, *Crowders, Visard, and Oldham*, for *Creswick and Son*, Sheffield.

Solicitors for the respondents, *Dollman and Pritchard*, for *H. and A. Maxfield*, Sheffield.

Feb. 12 and 18, 1901.

(Before Lord ALVERSTONE, C.J.)

LAMBERT v. MAYOR AND CORPORATION OF LOWESTOFT. (a)

Highway—Repair—Nuisance—Sewer under highway—Latent defect—Excavation under surface—Injury caused by—Liability of sanitary authority—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 13, 15, 19.

The plaintiff's horse while being driven along a highway under which was an old sewer, broke through the surface of the road and the horse's foot went into a hole and the horse was injured. The hole, which was underneath the surface, was caused by rats eating through the mortar of the joint which connected the sewer with a drain. The road had been taken over and made up by the defendants, the sanitary authority responsible for the sewers, and also the highway authority. There was no negligence on their part, and nothing to warn them that there was anything wrong with the sewer or the road, or that there was a hole underneath the road. The plaintiff sued for injuries to the horse upon the ground that the existence of the hole under the road caused by a defect in the sewer was a nuisance on the highway for which the defendants were liable as being the sanitary authority responsible for the sewers:

Held, that there being no negligence on the part of the defendants they were not liable for the injuries to the horse.

FURTHER CONSIDERATION by Lord Alverstone, C.J. in an action tried before him with a jury at the assizes for the county of Norfolk held at Norwich.

The plaintiff carried on business in Norwich, and the defendants were, under the Public Health Acts, the urban sanitary authority of the borough of Lowestoft, and also the highway authority.

The plaintiff in his statement of claim alleged that on the 11th July 1900 his horse was being driven along a highway in the borough of Lowestoft, known as Cambridge-road, when, owing to the defective condition of the highway, the horse broke the surface of the road and was injured, and that the defective condition of the highway was owing to the defendants having so negligently and improperly constructed a sewer therein that the soil of the highway was washed away and the highway undermined at the place where the plaintiff's horse broke through the

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surface; and, alternatively, that the defendants had negligently constructed the highway where it had been excavated in order to construct or repair a sewer therein, and that they, knowing that the sewer and the highway over the sewer were in a defective condition, neglected to repair the sewer and reinstate the highway: and that, owing to such neglect, the highway was unable to bear the weight of the horse.

The plaintiff claimed 76l. 3s. 6d. for injuries to the horse and expenses.

The defendants (*inter alia*) pleaded that there was no misfeasance on their part, and that they were not liable for their nonfeasance (if any); also that the statement of claim disclosed no cause of action.

The facts, which are fully stated in the judgment, were shortly these:—

Underneath the road in question and running along the middle of the road at a depth of some 4ft. or 5ft. was an old brick sewer constructed about the year 1863.

This road was taken over in 1886 by the defendants, who were the sanitary authority and also the highway authority for the district, and it was then made up.

A 6in. drain to take the surface drainage had been put in when the sewer was made, and the junction of the drain with the sewer had been made with mortar and with a mortar joint, which was then the usual way of making such joints.

At some subsequent time rats had eaten through the mortar of the joint, and had made a hole under the road, which was enlarged either by rats or by the water, and at the time in question there was a hole of some 2ft. in diameter under the surface of the road.

As the plaintiff's horse was passing along the road, the road gave way under the weight of the horse and the horse's foot went through the surface of the road into a hole and the horse was injured.

The learned judge at the trial found that there was no evidence to go to the jury of any negligence on the part of the defendants which caused the accident, and he withdrew the case from the jury. He also stated in his judgment that there was nothing to give the defendants warning that there was anything wrong with the sewer and drains or with the road, and that they could not by the exercise of reasonable care have discovered the hole until after the accident.

The case was then reserved for further consideration as to the liability of the defendants, apart from negligence.

Witt, K.C. and E. E. Wild for the plaintiff.—The defendants have two separate functions; they are the highway authority and they are the sanitary authority and as such are responsible for the maintenance of the sewers, but it is a mere statutory accident that the two functions are combined in one body. As sanitary authority they are liable for a nuisance existing on the road and arising from the state of the sewer, and they are so liable apart from negligence. Secondly, it is absolutely immaterial whether the defendants made this sewer or took it over, because, under the provisions of the Public Health Act 1875, ss. 13, 15, 19, they would be liable to keep the sewer right, and (sect. 13) this would apply to all existing and future sewers. By the statute these

sewers are vested in the local authority, and therefore they take them over and are responsible for their future maintenance:

White v. Hindley Local Board, 32 L. T. Rep. 460; L. Rep. 10 Q. B. 219.

Thirdly, assuming that the defendants are in the same position as if they had made the sewer, they are liable for a nuisance without any negligence on their part. Negligence is absolutely distinct from nuisance, and in many cases where there is a liability the principle of the liability is not negligence, but the cause of action is that the act of the defendants has caused a nuisance on the highway. The distinction between an act of omission and an act of commission is important so far as highway authorities are concerned, but outside the highway authority it is not so important. That distinction is well brought out by Lord Herschell, L.C. in *Municipal Council of Sydney v. Bourke* (72 L. T. Rep. 605, at pp. 606-8; (1895) A. C. 433, at pp. 435-443). That case is important, because of the explanation there given by the Lord Chancellor of the case of *Borough of Bathurst v. Macpherson* (41 L. T. Rep. 778; 4 App. Cas. 256). In the latter case the borough had constructed a drain under a highway; the drain fell into disrepair and the highway fell into it, leaving a hole into which the plaintiff's horse fell and the plaintiff was injured. The Judicial Committee were of opinion that the borough, by reason of their construction of the drain and their neglect to repair it, whereby the dangerous hole was formed which was left open and unfenced, caused a nuisance in the highway for which they were liable to an indictment and also in damages to the plaintiff. In *Municipal Council of Sydney v. Bourke* (*ubi sup.*), the case was merely one of nonfeasance in allowing the highway to fall into disrepair, and not of misfeasance; and Lord Herschell, after dealing minutely with *Borough of Bathurst v. Macpherson* (*ubi sup.*), says (72 L. T. Rep. at p. 607; (1895) A. C. at p. 441): "The *ratio decidendi* was that the defendants had caused a nuisance in the highway. It was entirely independent of the questions whether there was an obligation to keep the highway in repair. . . . The case was not treated as one of mere nonfeasance, and indeed it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become foundrous." There are many cases which show the same principle. Where drains have been merely neglected you must prove negligence, but, assuming that to be good law, it does not affect the present case, as it is an act of obstruction, the intentional doing or permitting the doing of a thing, and not negligence, which is the cause of action. The defendants caused a nuisance on the highway and are therefore liable to the plaintiffs. *Steel v. Dartford Local Board* (60 L. J. 256, Q. B.) is strongly in the plaintiff's favour. In that case the defendants, who were both the sanitary and the highway authority were held not liable, but only on the ground that it was the act of one Clifford, and not the defendants which caused the nuisance, and the judgment of Lindley, L.J. shows that the defendants would

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have been liable if they had done the thing complained of. The principle is that the local authority, *quid* sanitary authority, is as much liable for an interference with, or a nuisance on, the highway as a private person. In that case Clifford would have been liable, apart from negligence, because he created a nuisance on the highway, and that is the point here. They referred to *Kent v. Worthing Local Board* (48 L. T. Rep. 362; 10 Q. B. Div. 118), as showing the distinction between an act of omission and an act of commission; and Lord Alverstone, C.J. referred to *Blackmore v. Vestry of Mile End Old Town* (46 L. T. Rep. 869; 9 Q. B. Div. 451).

A. H. Poyser and F. Low for the defendants.—The contention for the plaintiff is an attempt to establish a proposition which would render unnecessary all the decisions in the previous cases, because that contention, if well founded, would come to this, that the local authority would be in the position of insurers. The defendants have two functions, functions as a sanitary authority and functions as a highway authority. Dealing with them as a sanitary authority, they are, with regard to the sewers, in a statutory position; they are acting under an Act of Parliament and under particular powers given by statute. Therefore in doing what they are authorised to do they cannot be guilty of a nuisance. We quite agree that if there were negligence here, then it would be a different question; but here there was no negligence and therefore there can be no nuisance, as the defendants, in doing what they did, were acting under an Act of Parliament. A public body acting under statutory powers do not create a nuisance, though it is quite true they are bound to carry out their statutory duty without negligence. For instance, the vibration caused by a railway train or damage caused by sparks from the engine, is not a nuisance, because the railway company are carrying out a lawful act under statutory powers. If it were an unlawful act it might and would be otherwise. There is in such cases no liability for an act of nonfeasance unless the statute clearly imposes it. In the case of *Municipality of Pictou v. Geldert* (69 L. T. Rep. 510; (1893) A. C. 524), the case of *Borough of Bathurst v. Macpherson* (*ubi sup.*) was dealt with, and the judgment there shows that practically the *Borough of Bathurst v. Macpherson* (*ubi sup.*) is no longer an authority for the plaintiff's contention, and that, at all events, the conduct complained of there was not in the view of the Judicial Committee nonfeasance, but misfeasance arising from negligence. The defendants as the local authority have to look after their sewers, keep them in repair, and cleanse them (sects. 13, 15, and 19 of the Public Health Act 1875), but in doing these acts under their statutory powers they are not liable unless they are guilty of negligence—that is, negligence in the sense of there being some want of reasonable care. Here it is not pretended that there has been any want of reasonable care. Apart from negligence in such cases there is no liability. In *Stretton's Derby Brewery Company v. Mayor of Derby* (69 L. T. Rep. 791, at p. 795; (1894) 1 Ch. 431, at pp. 442-443), Romer, J., in a considered judgment on this question, says that the liability in circumstances like the present, "though in form not limited, is in fact limited to cases where

the public authority has been guilty of negligence, or, as it is sometimes expressed, of want of reasonable care and diligence." Then the learned judge cites various authorities for that proposition, and, amongst others, *Bateman v. Poplar District Board of Works* (58 L. T. Rep. 720; 37 Ch. Div. 272), which is in point here. There is no case which supports the proposition that, whatever may happen in consequence of a sewer being under a road, the authority responsible for the sewers is liable, except, perhaps, the dictum of the Lord Chancellor in *Municipal Council of Sydney v. Bourke* (*ubi sup.*). The real test is, Has there been such a negligent omission by the defendants in carrying out their duties under the Act as to constitute what in law is negligence? If there has, then the defendants would be liable, but it would only be upon the ground of negligence: (*Thompson v. Mayor of Brighton* and *Oliver v. Horsham Local Board*, 70 L. T. Rep. 206; (1894) 1 Q. B. 332); *Fleming v. Corporation of Manchester* (44 L. T. Rep. 517, reversed by Court of Appeal, but only on the ground that there was no evidence of negligence to go to the jury. See Lumley's Public Health, 5th edit., p. 36).

Witt, K.C., in reply, referred to *Baron v. Portlade Urban District Council* (*ante*, p. 7; 83 L. T. Rep. 363; (1900) 2 Q. B. 588), and to the judgment of Blackburn, J. in *White v. Hindley Local Board* (*ubi sup.*).

Cur. adv. vult.

Feb. 18.—Lord ALVERSTONE, C.J. read the following judgment:—In this case the plaintiff brought an action against the Mayor and Corporation of Lowestoft for injuries sustained by a horse while passing along Cambridge-road, Lowestoft, owing to the horse's foot going through the crust of the road into a hole underneath. Running along the middle of the road was an old brick sewer, constructed about the year 1863 by the Ipswich Building Society. The road was taken over by the defendants in the year 1886, when it was made up and manholes placed at certain points communicating with the sewer; the old gully pits replaced by new and larger ones which were connected with the then existing 6in. drains, which had been put in to take surface drainage when the sewer was originally constructed. The sewer was at a depth of some 4ft. or 5ft. and the length of the 6in. drain from the gully pit to the sewer was between 8ft. and 9ft. It was proved before me, and I find as a fact, that the junction of the 6in. drain with the sewer had been made in mortar, and that at some time rats had eaten or worked through the mortar of the joint, and had subsequently made a hole of about 2ft. in diameter underneath the surface of the road. The crown of the road had given in under the weight of the horse, thereby causing the injury. After the accident the road was repaired by the defendants, and the joint made good in cement. It was proved before me, and I find as a fact, that it was the common practice in the year 1863, and for some years afterwards, for sewers to be made in the way in which this sewer was constructed—namely, with mortar and with mortar joints for the connecting drains. Nothing had occurred to give the defendants warning that there was anything wrong with the sewer and drains or with the road. A previous subsidence in the road which was suggested as having been

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brought to the notice of the defendants some years before the accident, was proved at the trial to be in no way connected with, and I find that it was not connected with, either the sewer or the connecting drains. I held at the trial, and still hold, that there was no evidence to go to the jury of any negligence on the part of the defendants which caused or contributed to the accident. I therefore discharged the jury, the counsel on both sides agreeing that the court, or, if necessary, the Court of Appeal, should have the power to draw any inferences of fact necessary to decide the case. Upon further consideration, before me counsel for the plaintiff did not rely upon negligence, nor was any argument addressed to me to show that I was wrong in holding that there was no evidence of negligence to go the jury, but the plaintiff sought to recover on the ground that the existence of a hole under the road caused by a defect in the sewer constituted a nuisance, and that the defendants, as the authority responsible for the maintenance of the sewers, were liable apart from negligence. In my opinion, this contention cannot be successfully maintained. The responsibility of the defendants to maintain the sewers rests upon sects. 13, 15, and 19 of the Public Health Act 1875. In fulfilling these duties they are acting under statutory authority, and it is now clearly established that under ordinary circumstances no action lies for injury occasioned by the execution of statutory duty unless it has been negligently performed: (*Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas., at p. 455; *Bateman v. Poplar Board of Works*, *ubi sup.*; *Thompson v. Mayor of Brighton*, *ubi sup.*; *Stretton's Derby Brewery Company v. Mayor of Derby*, *ubi sup.*, and many other cases). It was, however, argued that if the conditions of the sewer which had been taken over by and vested in the defendants did, in fact, cause a nuisance, the plaintiff could recover apart from negligence. In support of this view the case of *Borough of Bathurst v. Macpherson* (*ubi sup.*), and particularly the language of the Lord Chancellor in *Municipal Council of Sydney v. Bourke* (72 L. T. Rep. at p. 607; (1895) A. C. at p. 441) explaining that case, was relied upon. I am clearly of opinion that neither of these cases is sufficient to support the argument of the plaintiff. In the case of *Borough of Bathurst v. Macpherson* (*ubi sup.*) not only might the plaintiff have recovered upon the ground of negligence, but, as pointed out by the Lord Chancellor in *Municipal Council of Sydney v. Bourke* (*ubi sup.*), the defective drain had caused the road to become dangerous, and no steps had been taken by the defendants in that case to prevent accidents, although they were well aware of the condition of the road. Their Lordships, in the *Bathurst* case (*ubi sup.*), found that the appellants had caused a nuisance in the highway by the construction of the drain and by their neglect to repair it and by leaving a dangerous hole open and unfenced. In my opinion the expressions of the Lord Chancellor (at p. 441 (1895) A. C.) upon which great reliance was placed by counsel for the plaintiff, must be construed with reference to the subject-matter under discussion, and were not intended to lay down a general rule that, simply because an accident has occurred in a road due to a latent defect in a sewer, the defen-

dants, whose duty it is to maintain the sewer, are liable, apart from negligence. I find that in this case there was nothing to warn the defendants that there was anything wrong with the sewer, nor could they, by the exercise of any reasonable care, have discovered the existence of the hole under the road until the accident happened. I therefore dismiss the action, and give judgment for the defendants with costs.

Judgment for the defendants with costs.

Solicitor for the plaintiff, *Charles F. Martelli*, for *T. C. Martelli Rackham*, Norwich.

Solicitors for the defendants, *Sharpe, Parker, and Co.*, for *R. B. Nicholson*, Town Clerk, Lowestoft.

Tuesday, March 5, 1901.

(Before DARLING and CHANNELL, JJ.)

FORD AND OTHERS (pets.) v. NEWTH (resp.);
Re GLOUCESTER MUNICIPAL ELECTION PETITION. (a)

Municipal election—Office of councillor—Disqualification—Contract with corporation—Tender and acceptance of tender—Release from contract by committee—Ratification by council—Relation back of ratification—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 12, sub-s. 1 (c).

A city council advertised for certain articles for the use of the corporation during the ensuing twelve months ending the 31st Dec. 1900, and invited tenders. N. tendered and offered to supply the articles for the twelve months as required at stated prices. This tender was accepted by the council, and N. supplied the goods as required.

Held, that the acceptance by the council of N.'s tender created a contract for the twelve months between N. and the corporation, and that, therefore, during that time N. had an interest in a contract with the council, and was therefore disqualified by sect. 12, sub-sect. 1, of the *Municipal Corporations Act 1884* for being elected and for being a councillor.

On the 19th Oct. 1900 N., with a view to becoming a candidate for the office of councillor, desired to be released from his contract, and a committee of the council on that day resolved that, subject to the approval of the council, he should be released from his contract as from that date, and this resolution of the committee was afterwards, on the 30th Oct., confirmed and adopted by the council.

In the interval—namely, on the 24th Oct.—N. was nominated for the office of councillor, and on the 1st Nov. was declared to be elected.

On a petition presented against N. alleging that his election was void on the ground that at the date of his nomination he had an interest in a contract with the council:

Held, that the ratification by the council of the act of the committee releasing N. from his contract as from the 19th Oct., whatever its effect may have been as between the parties themselves, did not relate back, for the purposes of removing any disqualification or so as to affect the rights of third parties such as the electors or other candidates, to the 19th Oct., so as to relieve N. from his contract as from that date; and that conse-

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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quently N., having at the date of his nomination an interest in a contract with the corporation was disqualified for being elected.

ARGUMENT of questions of law reserved by a commissioner (Mr. Mansel Jones) to whom was assigned the trial of an election petition.

The petition was a petition under the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) against the return of the respondent, Mr. William James Newth, to the office of town councillor for the Tuffley ward of the city of Gloucester, which was tried before the commissioner to whom the trial of the petition was assigned, on the 29th and 30th Jan. 1901 at Gloucester.

The election was held on the 1st Nov. 1900, when the respondent was declared to be elected.

The petition alleged that the respondent, Mr. Newth, was disqualified for being nominated, and for being elected, and for being a councillor on the ground that at the time of his nomination and election he had an interest in a contract with, by, or on behalf of the council of the city, and prayed that it might be determined that the respondent William James Newth was not duly elected, and that his election was and is void.

It was proved that the council of the city of Gloucester upon the 5th Dec. 1899 advertised for certain articles for the use of the corporation during the ensuing year, and invited tenders.

The advertisement was as follows :

The Streets Committee of the Gloucester Corporation are prepared to receive tenders for the supply of the following materials for the twelve months ending the 31st Dec. 1900, namely [then followed a list of articles including "Oil, Colours, &c."]. Specifications and forms of tender may be obtained at City Surveyor's Office, Guildhall, and tenders must be sent in to Mr. R. Read, City Surveyor, Guildhall, Gloucester, on or before Wednesday, the 13th Dec. instant. Tenders must be inclosed separately in envelopes provided for the purpose, and endorsed with the name of the class of materials tendered for. The lowest or any tender will not necessarily be accepted.—Guildhall, Gloucester, 5th Dec. 1899.

On the 13th Dec. 1899 the respondent tendered for certain goods in the following form, which he had obtained from the council's office :

City of Gloucester.—To the Streets Committee.—Gentlemen,—I hereby offer to supply for the twelve months, ending the 31st Dec. 1900, the undermentioned goods as required, the best of their respective kinds, and to the entire satisfaction of the city surveyor, delivered at the Corporation Depot, Stroud-road, Gloucester, in guaranteed makers' drums or barrels sealed down.

Then followed a long list of articles and prices. It was signed by the respondent.

On the 22nd Dec. 1899 the Streets Committee resolved that it be recommended that certain tenders be accepted at the several prices therein respectively mentioned, among them being that of the respondent for oil and colours.

On the same date a letter was sent to him informing him that his tender was accepted.

On the 30th Jan. 1900, at a quarterly meeting of the council, it was resolved that the minute of the Streets Committee of the 22nd Dec. 1899 be approved, adopted, and confirmed.

From the 22nd Dec. 1899 up to and including the 20th Oct. 1900 the respondent supplied from time to time goods according to the tender when and as required by the council, and received pay-

ments for the same from time to time for a considerable amount.

On the 19th Oct. 1900 there were various accounts amounting to over 54*l.* due to him which were not all paid until the 19th Dec.

On the 19th Oct. 1900 the respondent being anxious to stand as a candidate at the forthcoming election of councillors in November, applied to the finance estates and waterworks committee (and not to the streets committee, which had risen for the day) to be relieved from his tender or contract, when the following minute and resolution of the committee was passed :

It was reported that Mr. W. J. Newth intended to offer himself as a candidate at the following elections if not prejudiced by the fact that he had given an estimate for supplying certain articles that may be required by the corporation up to the end of the year. Resolved : That subject to this minute being approved by the council Mr. Newth be released from the estimate or contract referred to as from this date.

On the 24th Oct. the respondent was nominated, and on the 1st Nov. declared to be elected to the office of councillor.

On the 30th Oct. the council resolved that the minute of the finance, estates, and waterworks committee of the 19th Oct. be approved, adopted, and confirmed.

On the above facts being proved it was contended before the commissioner by the respondent's counsel that the respondent was not disqualified for being elected and for being a councillor under sect. 12, sub-sect. (c), of the Municipal Corporations Act 1882, on the ground that (1) There was no contract; (2) that if there was a contract it was rescinded before the 24th Oct.; (3) that the existence of a debt for goods supplied before the 24th Oct. and not paid for until December was not an interest in any contract within the meaning of the above section.

The commissioner determined, subject to the opinion of the High Court of Justice on the question of law hereinafter submitted, that William James Newth was not duly elected, and that his election was and is void, but he postponed granting his certificate until the question which he now submitted for the consideration of the High Court of Justice has been determined by them.

The question for the opinion of the court was whether William James Newth was disqualified for being nominated and elected and for being a councillor.

If the court should determine in the affirmative the certificate of the commissioner was to be that William James Newth was not duly elected, and that his election was and is void; and if in the negative, that he was duly elected, and that his election was and is valid.

The Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) provides :

Sect. 12.—(1) A person shall be disqualified for being elected and for being a councillor if and while he (c) Has directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council.

H. Terrell, K.C. (*L. Coward*, K.C. with him) for the respondent.—The first point is that there was no contract between Mr. Newth and the corporation. It was simply an offer by him to supply certain articles and there was no consideration to support

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a contract or make it a contract. Before the day fixed for this election Mr. Newth withdrew this offer altogether, and a committee agreed to his withdrawing it; if it had been a binding contract he could not have withdrawn from it. There was no contract which bound the corporation to do anything whatever or take any goods from Newth, and there was no obligation on them to buy anything, even a single pennyworth from him. It was a purely unilateral arrangement not in any way binding the corporation to deal with Newth, and therefore there was no contract:

Sykes v. Dison, 9 A. & E. 693;

Burton v. Great Northern Railway Company, 9 Ex. 507.

The position is this that so long as the tender exists as a tender, the moment the corporation order anything from the person who makes the tender, then a contract is created if that is done before the tender is withdrawn. So, for each article, while the tender is existing and before it is withdrawn when the article is ordered and the order is accepted then there is a binding contract with regard to that article:

Great Northern Railway Company v. Witham, 29 L. T. Rep. 471; L. Rep. 9 C. P. 16.

There, as here, a railway company advertised for tenders, and what the court held was that where goods were ordered before the withdrawal of the tender, there was a contract. [DARLING, J.—In his judgment Brett, J. there says: "If there were no other objection, the contract between the parties would be found in the tender and the letter accepting it."] The very thing that Brett, J. there puts is that if before the tender is withdrawn an order is given, then the acceptance of the order creates a contract. There was nothing in the advertisement or in the acceptance of the tender by which the corporation bound themselves to order any oils or colours from Mr. Newth. They could go anywhere for these articles, and if they had done so, clearly the respondent would have had no remedy against them for getting these goods from any other person. They simply state that they are prepared to receive tenders and they accept his tender. That is a mere continuing order which at any time can be withdrawn. *Great Northern Railway Company v. Witham* (*ubi sup.*) is precisely the same as this case, and shows that there was no contract here unless and until the corporation ordered some particular article from Newth and he accepted the order. There would have been a contract if there had been an undertaking on the part of the corporation to take from Newth all the articles they required for the year, but there was no such undertaking. Secondly, if there was a contract it was rescinded before the 24th Oct., the day of the nomination. On the 19th Oct. the finance committee relieved the respondent of his contract, subject to the approval of the council; and the council approved on the 30th Oct., there being no meeting of the council before that date. Whether this was a contract or was not a contract, it was at an end on the 19th Oct., when the finance committee, who had as much to do with the matter as the streets committee, passed the resolution. When the resolution was confirmed on the 30th Oct., it related back to the 19th Oct., the date of the resolution of the finance committee to release the respondent. Sect. 22 (6) of the Municipal Corporations

Act 1882 shows that the finance committee had power to deal with the matter. If an agent, without the authority of his principal, does an act on behalf of the principal, and this act is afterwards confirmed and ratified by the principal, then the confirmation or ratification has relation back to the act done by the agent, and is binding on the principal as from that date:

Re Portuguese Consolidated Copper Mines Limited, 63 L. T. Rep. 428; 45 Ch. Div. 16;

Bolton and Partners Limited v. Lambert, 60 L. T. Rep. 687; 41 Ch. Div. 295.

In neither of these cases was there any authority at all, and in the former case the act done was an absolutely illegal act, so that both cases are stronger than the present case. These cases show that the subsequent ratification by the council on the 30th Oct. related back to the resolution of the committee on the 19th Oct., and that the respondent was released as from that date. The original contract was confirmed by the council on the 30th Jan. 1900, and related back to the 22nd Dec. 1899, and, if there is a relation back in one case, there must be a relation back in the other case. The third point is that goods had been sent in by the respondent in Sept. and Oct., but payment was not actually made until the 19th Dec. The relation of debtor and creditor which thus existed was not such an interest as to disqualify under the section. If it were, it would enable the council to keep any person out of the office, as they might order a small quantity of goods, keep the account unpaid, and so keep the person disqualified for any length of time. That clearly is not the law:

Royce v. Birley, 20 L. T. Rep. 786; L. Rep. 4 C. P. 296.

Asquith, K.C. (Ruegg, K.C. and S. H. Day with him), for the petitioners.—The words of sect. 12 are very wide; a person who has "directly or indirectly" a share or interest in any contract is disqualified. These words clearly point to this that the intention of the Legislature was that a person should be disqualified for election if his interest and his duty were likely to come into conflict. The advertisement of the 5th Dec. 1899, which is the initiation of the whole matter, provided that "the lowest or any tender will not necessarily be accepted." Two things appear in that, the desire of the corporation to have tenders sent to them and their statement that no tender will necessarily be accepted. Then the second document is the respondent's offer of the 13th Dec., and that is followed by the resolution of the streets committee on the 22nd Dec. and of their letter on the same day: "I have to inform you that your tender has been accepted." It is said that that constitutes no relation and no contract between the parties, and had no effect, but what would be the use of these tenders at all if the person can at any time withdraw from them? The obligation on the part of the corporation was that if they wanted these goods they were bound to go to the respondent and not to another person. They were not bound to go to him if they did not want the articles, but they could not go elsewhere for them, unless they had tenders with other persons for the same goods, in which case they would be confined to those with whom they had tenders. It is quite clear there was no other tender here, the words being "Oil and Colours, Mr. Newth." The contract was not unilateral,

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but was a contract binding on both parties. That appears on the documents and the decisions in the cases do not help us much. In *Burton v. Great Northern Railway Company* (*ubi sup.*), there was no breach of contract, and in *Great Northern Railway Company v. Witham* (*ubi sup.*), the present point was expressly held open. Keating, J. refers to the point and Brett, J. says. "I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice." That case, therefore, merely left the question open and did not decide that a person could withdraw during the currency of the contract. Here both parties regarded themselves as bound; the respondent at least did so, as he asked to be released. The next point is, what was the effect of what was done on the 30th Oct. by the council, and whether it relates back to the 19th Oct. The case of *Harford v. Lynskey* (80 L. T. Rep. 417; (1899) 1 Q. B. 852) is important on this part of the case. There it was held that a petitioner who at the time of his nomination was interested in a contract was disqualified for nomination none the less because he might by assigning his interest in the contract have got rid of his disqualification before the date of the poll. A person, therefore, who on the day of nomination is disqualified for being elected is also disqualified for nomination, because, as Wright, J. says: "On the nomination day no one could know whether the persons nominated will at the poll be effective candidates or not." In other words you cannot alter the status which the candidates had at the date of nomination. Although ratification, according to the maxim, goes back to the act ratified, yet it is a principle of law which runs through all the cases that the ratification cannot affect prejudicially or otherwise the status or rights of third parties. Here it is a matter in which not only third parties but the public as well are interested. By sect. 22 (1) the acts of every committee are to be ratified and approved by the council. The resolution of this committee on the 19th Oct. does not purport to be anything more than a resolution to be approved by the council, and it cannot be contended that the resolution in itself, so framed, can have any effect in altering the status of parties. By sect. 41 a person who acts without being qualified incurs a penalty; if the respondents' contention were right the council could get rid of that provision by merely passing an *ex post facto* resolution. In *Bird v. Brown* (14 L. T. Rep. O. S. 399; 4 Ex. 786) it was held that you could not by ratification affect the rights of third parties. In the considered judgment of the court it is said that for the doctrine of ratification to apply "the act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies." Applying that here, the ratifying party is the council, and, unless at the time the ratification takes place the council could lawfully have done the Act the ratification has no effect. The ratification may be good as between the two parties either to give a right back or to take one away. That is confined to the two parties and cannot affect the rights of third parties or of the whole of the electors of the constituency. The case of *Bolton and Partners Limited v. Lambert* (*ubi sup.*) is doubted in

Fry on Specific Performance, 3rd edit., p. 137, and in note A, and was criticised adversely in a recent case in the Privy Council, where, however, it was not necessary to decide the point. With regard to the third point, the question is whether when a person supplies goods under a contract which is no longer executory on his part, but the payment has not in fact been made—a relation of debtor and creditor existing—and when that is the position of the parties, it is possible to say that such person is not interested in the contract. It is impossible to say that such a person is not interested in the contract, or that he has not an interest which might conflict with his duty, as stated in *Royce v. Birley* (*ubi sup.*), which applies to executory contracts. If a councillor has any pecuniary interest in a matter he cannot vote: (sect. 22 (3)). The language of sect. 12 is still wider, and the present case comes directly within the section as, while the debt subsists, the person still has an interest in the contract which may conflict with his duty.

Terrell, K.C. in reply.

DARLING, J.—This case arises out of a municipal election for the city of Gloucester. Mr. Newth was nominated and was elected, and it is objected that he was disqualified for being elected and for being a councillor by reason of sect. 12, sub-sect. (c), of the Municipal Corporations Act 1882. Mr. Newth was a person who dealt in oils, colours, &c., and at the end of the year 1899 an advertisement was put in the papers to the effect that the Streets Committee of the Gloucester Corporation were prepared to receive tenders for the supply of the following articles for the twelve months ending the 31st Dec. 1900. To that advertisement Mr. Newth wrote this answer: "I hereby offer to supply for the twelve months ending the 31st Dec. 1900 the undermentioned goods," &c. Upon that the tenders were considered by the committee who recommended to the council that certain tenders should be accepted at the several prices therein mentioned, and amongst these tenders was one for oils and colours from Mr. Newth. That minute of the committee was approved, adopted, and confirmed at the quarterly meeting of the council on the 30th Jan. 1900; but before that there had been a letter written by the city surveyor to Mr. Newth on the 22nd Dec., that the tender had been accepted. Upon that it is said that Mr. Newth was disqualified for being elected, because he had a share or interest in a contract with the corporation; and if it were a contract then undoubtedly he had such an interest and was disqualified. But it is said on behalf of Mr. Newth that this was not a contract at all, that it was a mere statement that if called upon to supply certain quantities of oils or colours he would supply them at certain prices, but that he was not called upon to supply them unless he was asked to do so, and that the corporation were under no kind of obligation to buy any oils or colours from him. I should agree that there was no obligation on the part of the corporation if that was not a contract at all. If they were not bound to anything on their side, it seems to me that there was no consideration and that it would not amount to a contract. The question is, was that so. I do not think that there is any direct authority upon the point. Several

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cases have been cited, and the one on which most reliance was placed on behalf of Mr. Newth was *Great Northern Railway Company v. Witham* (*ubi sup.*). In that case there had been a tender like the present which had been accepted, but there was something more. An order had been sent, and the question was whether the order which had been sent should be executed and whether the execution of it could have been enforced. I think the judges in deciding that case distinctly left this question open, the question we have to decide. Keating, J. there says: "If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing." Therefore I think that Keating, J. purposely refrained from deciding this point. Brett, J. also says: "I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice." Therefore it seems to me that so far as the cases cited to us are concerned we are left without any definite authority on the question before us. We have therefore to look at the documents in the case for ourselves. With regard to the advertisement, I think that that amounts to this: That the streets committee were prepared to receive tenders for all the goods of those specified kinds they would require during the twelve months ending the 31st Dec. The supply of the materials for the twelve months is the definite thing which the streets committee said they wanted to have the tender for. Then Mr. Newth said: "I offer to supply the under-mentioned goods as required." That is to say, he would supply such articles as he dealt in—oils and colours—as were included in the supply for the twelve months, whenever he was required to do so by the corporation, and he would supply them "at the following prices." "As required" means "as intimated to me by order that they are wanted." Upon that comes this letter, written on behalf of the corporation: "I have to inform you that your tender has been accepted." I think that means this: "We accept your offer to supply such articles as we intimate to you are a part of the supply wanted during the twelve months at the price you have stated." I think there was an obligation on the part of the corporation to buy those articles from Mr. Newth. I do not think that the corporation would have been justified in simply treating that tender of Mr. Newth's as a mere price list, and going where they pleased to buy what they wanted. If that is so, then that is a contract. I do not say I feel certain about it, because I cannot see that we have any real authority upon the point, and because the question was expressly reserved and left open by the two judges who decided the case of *Great Northern Railway Company v. Witham* (*ubi sup.*). But still, reading the present case for myself, I come to the conclusion that it is a contract. There is an obligation on both sides, and it is clearly a contract in which Mr. Newth has an interest. It is said, however, that the contract was put an end to. Mr. Newth was nominated for the council on the 24th Oct., but on the 19th, he being anxious to stand as a candidate, applied to the finance committee to be relieved from his tender or contract, and the following resolution of that committee was passed: "That subject to

this minute being approved by the council, Mr. Newth be released from the estimate or contract referred to as from this date." That would be as from the 19th Oct. 1900. On the 30th Oct. the council resolved that the foregoing minute be approved, adopted, and confirmed. On the one hand, it was argued that there was a contract, and it must be taken, as I have already said, that there was a contract. On the other hand, it was argued that the contract was put an end to on the 30th Oct. as from the 19th Oct., because the ratification by the council on the 30th Oct. of what was done on the 19th related back to the 19th, and that the contract absolutely ceased and determined on the 19th Oct., and that, therefore, when Mr. Newth was nominated on the 24th Oct., he was not interested in any contract, because there was none. A good deal has been said with regard to how far the ratification by one party of what has been done by another will relate back. If Mr. Newth had not been a candidate at all, and if this had been a matter simply between the man who had undertaken to supply oils and the corporation, I am not going to say that that might not have been a perfectly good putting an end to the contract on the 19th Oct. by reason of what was done on the 19th as ratified by what was done on the 30th Oct. I think, however, that there are considerations in this case which make a difference from a mere ratification of something which was done between the parties themselves to the contract. The question is whether there was a contract subsisting on the 24th Oct. so as to produce a disqualification in Mr. Newth on that day. As between the parties themselves—Mr. Newth and the corporation—it might possibly have been put an end to on the 19th Oct. so that neither could sue the other after that date. If one or other had been sued between the 19th and the 30th—that is, before the ratification—I do not think it necessary to attempt to decide what would have been the consequences, but it is clear that difficulties would have arisen. In this case, it seems to me, we are not dealing with a mere contract between two traders; we are dealing with a question which has received judicial interpretation in the case of *Harford v. Lynskey* (*ubi sup.*). In that case Wright, J. said that the nomination was, for that purpose, an essential part of the election, and if there were no competitors, it of itself constituted the election by virtue of the express words of sect. 56. Then he went on to say that a different construction might produce much confusion, and he indicated what that might be. On the 24th Oct., when Mr. Newth was nominated, it was entirely uncertain whether that contract was put an end to or not as between the parties. Supposing that on the 30th Oct. the council had said "We do not ratify what has been done by the finance committee" it could not then have been contended that the contract was put an end to, for it would have been an enduring contract, and nobody could have said on the 24th Oct. whether Mr. Newth was or was not a person interested in a contract. That was not decided, even as between him and the corporation, until six days later. I think, therefore that the ratification as between Mr. Newth and the corporation cannot put an end to the contract to this extent; that it cannot affect the rights of third parties, such as are the electors of the city of Gloucester and such as are any

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other candidates who might be nominated for the seat for which Mr. Newth was a candidate. It might very well be that there was only one other candidate, as in *Harford v. Lynskey* (*ubi sup.*), and if Mr. Newth were disqualified the other candidate would be entitled to election at once without a poll. Therefore, it seems to me, we cannot hold that the resolution of the 19th Oct. by the finance committee, and the ratification on the 30th Oct. by the council, put an end to the contract so as to qualify Mr. Newth on the 24th Oct., when, if they had not ratified the resolution as they did on the 30th, Mr. Newth would have been disqualified. It is not necessary to go into the general law as to ratification and consider whether the case of *Bolton and Partners Limited v. Lambert* (*ubi sup.*) is really as good an authority as it has been represented to us, or whether it is not. It seems to me that that point is provided for in the case of *Bird v. Brown* (*ubi sup.*), and also is practically provided for in the definition of what ratification can do and how it affects the rights of third parties in certain instances, in the case of *Bolton and Partners Limited v. Lambert* (*ubi sup.*), and in the judgment delivered by Cotton, L.J. There is one other point. Mr. Newth had supplied some oil which was not paid for. It was supplied before the 19th Oct.—that is, before the time when he desired to become a candidate, and up to December it had not been paid for. No doubt there was an existing debt due from the corporation to Mr. Newth, and it is contended that that in itself amounts to such a contract as to be a disqualification within the words of the section. But, in the view I take of the first and second points, it is not necessary to decide the third point which I have just mentioned. I think any judgment on that point ought to be carefully considered, because the difficulties of holding either way are many. Taking the view I have taken on the first and second points, my expressions on the third point would be something like an *obiter dictum*. I prefer, therefore, not to indicate any opinion as to how the third point should be decided.

CHANNELL, J.—I am of the same opinion on all three points. As to the first point, whether at any time prior to the supposed determination of it, there was a contract, I confess I entertain no doubt at all. I quite agree that it depends on the words of the documents used in a particular case, and that there might be documents somewhat similar to those now in question, which do not amount to a contract—that there might be what is called a unilateral contract only; or, on the other hand, the documents might simply show that which becomes a contract only as an order is given for particular goods needed. All that might exist in such documents. On the other hand, applying our knowledge of business to what we know is the function of the parties in such a case as this, a very little indeed in such documents is quite sufficient to turn the transaction into a contract. In the present case I think there is quite enough to do so. First there was a proposal by the Corporation of Gloucester for certain things to be sent to them, and there was an offer made in response to that. Then there was an acceptance, which made a contract, subject only to the question of what was the subject-matter of it. It seems to me perfectly clear that

the subject-matter of this contract was to continue for the year—to supply for that period at the orders of the corporation their requirements in respect of a particular article. Consequently there was an order or a contract between the parties for the supply for a year of that oil and those colours, which Mr. Newth tendered for. Then the second point is the one which, to my mind, is a very real difficulty in the case, as it depends almost entirely, as it seems to me, upon the case of *Bolton and Partners Limited v. Lambert* (*ubi sup.*). That case was considered recently in the Privy Council in the case of *Fleming v. Bank of New Zealand* (83 L. T. Rep. 1; (1900) A. C. 577) and in the view the Privy Council ultimately took of the facts of the case it was not necessary to give any decision on the point whether the decision in *Bolton and Partners Limited v. Lambert* (*ubi sup.*), is a binding authority. There is, however, quite enough in the judgment to show that a good deal of doubt was entertained about the case. Judgment was delivered by Lord Lindley, who was himself one of the judges in the case of *Bolton and Partners Limited v. Lambert* (*ubi sup.*), and in that judgment, speaking of the case of *Bolton and Partners Limited v. Lambert* (*ubi sup.*), he says: "The decision referred to presents difficulties; and their Lordships reserve their liberty to reconsider it if on some future occasion it should become necessary to do so." It is quite clear, therefore, that the Privy Council were not thoroughly satisfied with the case, and that they saw that it presented great difficulties if it were to be treated as of general application. It seems to me that we, sitting in this court, should be bound by that case of *Bolton and Partners Limited v. Lambert* (*ubi sup.*), and all I say is that it presents some difficulty, but it seems to me to establish this and this only: that after there has been a ratification, then the rights of the parties to the contract, or the supposed contract, are to be adjusted between those parties as if there had been the prior authority. Consequently, as between these parties, when the question arises after the confirmation everything must be decided then as if there had been the prior authority. That is to say: If in this particular case any question arose between the parties after the 30th Oct., any such question arising between them on the 30th Oct., whether as to acts between the 19th and 30th Oct., or not, must be decided on the footing that the contract was put an end to on the 19th Oct., because it had been in a preliminary way put an end to as from that date, subject to the confirmation. That is as between the parties. But it is quite clear that there are exceptions to the rule. If anybody has acquired rights in the meanwhile, it is apparent from the case of *Bolton and Partners Limited v. Lambert*, that that is part of the exceptions which are there referred to. Consequently, it seems to me that when as between any other parties than the immediate parties to the contract, or in any question in which anybody else is interested, the question as to the rights of third parties has to be considered and has to be considered prior to the confirmation. It is quite clear then that we must look at the real facts. In the present case the question is whether or not on the 24th Oct. the respondent was qualified or disqualified. At that date there had been a resolution passed—an act done by the committee—

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which might or might not be confirmed, and, as the case of *Harford v. Lynskey* (*ubi sup.*) shows, a man at his nomination must be either qualified or disqualified. At that time it is impossible to say that Mr. Newth was not disqualified. After that particular time he still had in fact—indirectly at all events—a share or interest in the contract, because his rights might or might not be governed by something which was done afterwards. That being so, it seems to me, in any view of the case, the respondent was disqualified by being a party to a contract, which contract was in existence, so far at least as was necessary to preserve a kind of interest, on the 24th Oct., at the time of his nomination. I agree that it is not necessary to decide the third point, and on the whole it is better not to decide it. It does seem to me there is a substantial difference between the words of this Act of Parliament and those of the Act which were considered in *Royse v. Birley* (*ubi sup.*). There is a substantial difference, and conclusions might possibly be drawn both ways, and on the whole therefore it is better not to decide it, or say any more about it.

Application refused with costs. Judgment for petitioners. Leave to appeal refused, and afterwards refused by Court of Appeal.

Solicitor for the petitioners, C. T. Courtney Lewis, for W. Langley-Smith, Gloucester.

Solicitors for the respondent, Ayrton, Biscoe, and Barclay.

Tuesday, March 12, 1901.

(Before DARLING and CHANNELL, JJ.)

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Election petition—Election of mayor—Vote given by councillor afterwards held disqualified—Casting vote given where there is inequality of votes—Mayor continued under provisional order—Right of mayor to give original vote—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 15, 42 (1), 61 (4), 87 (1) (d), 102.

A vote given for a candidate in the election of mayor under the Municipal Corporations Acts by a councillor who upon petition is afterwards declared by the court to be disqualified for being elected a councillor on the ground that at the time of his nomination he had an interest in a contract with the council is a bad and invalid vote, notwithstanding that such vote is given before the decision of the court declaring him to be disqualified for being elected a councillor.

Nell v. Longbottom (70 L. T. Rep. 499; (1894) 1 Q. B. 767) followed.

The chairman at a meeting of the council for the election of mayor may give a casting vote although there is not actual equality—which means equality of valid votes—in the numbers of the votes as announced, if there is reason to believe that one of the votes may be impeached; and if by the subsequent striking out of an invalid vote there comes to be equality of valid votes, then the casting vote so given will be a good and effective vote, but if there still remains an inequality of valid votes, then the casting vote will be bad.

(a) Reported by W. W. OKE, Esq., Barrister-at-Law.

By a provisional order the boundaries of a city were extended, and for the purposes of the election of a town council for the enlarged city it was provided that all the councillors and aldermen of the old or existing city should go out of office, but there was no provision that the mayor should go out of office. The order provided that the mayor of the existing city or such other persons as the Local Government Board should appoint should perform the duties of mayor under the Municipal Corporations Acts, and that the mayor should act as returning officer at the election.

The councillors and aldermen having been elected, the mayor of the old city, who had been a councillor, but who had not been re-elected, presided at the election for mayor, and gave an original vote for one of the candidates:

Held, that the original vote so given by the mayor was good, as there was nothing in the provisional order to take away from the mayor the right which, apart from the order, he would have had under the Municipal Corporations Act 1882, as an outgoing mayor to give an original vote in the election of mayor.

ARGUMENT of questions of law reserved by the commissioner to whom was assigned the trial of an election petition.

The petition was a petition under the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) against the return of the respondent (Mr. Albert Buchanan) to the office of mayor of the city of Gloucester, which was tried before Mr. Mansel Jones, the commissioner to whom the trial of the petition was assigned on the 30th and 31st Jan 1901 at Gloucester.

The petition prayed that it might be declared that Albert Buchanan was not duly elected and that his election was null and void, and that the petitioner, Samuel Bland, was duly elected and ought to have been declared elected.

It was proved on the trial that on the 9th Nov. 1900 the petitioner and respondent were candidates for the office of mayor; that William James Newth purported to vote for the respondent, and his vote was counted as being a good vote for the respondent. That Frank Treasure, who had been elected mayor on the 9th Nov. 1899, presided as chairman at the election and purported to vote thereat for the respondent in the first instance, and counted the vote so given as being a good vote for the respondent. That sixteen votes, including those of Newth (as to the validity of whose vote the learned commissioner had already reserved a question in the case of *Ford and others v. Newth*), Treasure, and the respondent, were purported to have been given for the respondent and fifteen were given for the petitioner; and that Treasure, the chairman, thinking that Newth's vote might be impeached, purported to give a casting vote for the respondent, and counted this casting vote as a good vote.

By the Local Government Board's Provisional Orders Confirmation (No. 14) Act 1900 (63 & 64 Vict. c. clxxxiii.) the area of the city of Gloucester was extended.

By art. 9 it is provided that

For the purposes of the election of a town council for the city in pursuance of the Municipal Corporations Acts in the month of November 1900 the following provisions shall apply: (a) The town clerk and the mayor of the

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existing city, or such other persons as the Local Government Board shall appoint, shall perform the duties devolving upon the town clerk and mayor respectively under the Municipal Corporations Acts, and the mayor of the existing city or such other person as he shall appoint shall be the returning officer at the election for each ward. (b) Thirty councillors of the city shall be elected on the first day of November 1900, and ten aldermen of the city shall be elected on the ninth day of November 1900. (c) Notwithstanding anything in the Municipal Corporations Acts to the contrary, all the councillors of the existing city who shall be in office on the first day of November 1900 shall go out of office on that date, and all the aldermen of the existing city who shall be in office on the eighth day of November 1900 shall go out of office on that date, and all such councillors and aldermen shall be eligible for election as councillors on the first day of November 1900.

Mr. Treasure, who had been a councillor up to the 1st Nov. did not avail himself of that provision, and was not re-elected among the thirty councillors who were elected on the 1st Nov.

At the conclusion of the trial, after hearing the arguments of counsel, the commissioner determined, subject to the opinion of the High Court of Justice on the question of law hereinafter submitted, that Mr. Treasure was entitled to vote as mayor in the first instance, but that the second so-called vote which he gave was bad. He postponed granting a certificate until the questions which he now submitted for the consideration of the High Court had been determined by them.

The questions were: (1) Was Mr. Treasure, as mayor, entitled to vote in the first instance? (2) Was he, under the circumstances above stated, entitled to give a casting vote?

If the court should answer both the above questions in the affirmative, the certificate of the commissioner was to be that the respondent was duly elected and the petition dismissed, whether Newth's vote was good or bad.

If the court should answer the first of the above questions in the affirmative, and the second in the negative, his certificate was to be that the respondent was duly elected, and the petition was to be dismissed if Newth's vote was good, but be allowed if Newth's vote was bad.

If the court should answer both questions in the negative then his certificate was to be that the respondent was not duly elected, and that his election was void, and the petition was to be allowed, whether Newth's vote was good or bad.

If the court should answer the first of the above questions in the negative and the second in the affirmative, his certificate was to be that the respondent was duly elected, and the petition was to be dismissed if Newth's vote was good, but be allowed if Newth's vote was bad.

Newth, who in his office of councillor had voted as a councillor in the mayor's election for the respondent, was afterwards declared by the court to be disqualified for being elected and for being a councillor by reason of his having an interest in a contract with the corporation: (see *Ford v. Newth*, ante, p. 153). The question of the validity of his vote in the election of mayor, though not in terms left as one of the questions for the court, was considered to have been intended to be so left to them and to be raised. Consequently the validity of Newth's vote for the respondent was the first question now argued.

The Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) provides:

Sect. 10.—(2) The council shall consist of the mayor, aldermen, and councillors.

Sect. 15.—(1) The mayor shall be a fit person elected by the council from among the aldermen or councillors or persons qualified to be such. (3) The term of office of the mayor shall be one year, but he shall continue in office until his successor has accepted office and made and subscribed the required declaration.

Sect. 42.—(1) The acts and proceedings of a person in possession of a corporate office, and acting therein, shall, notwithstanding his disqualification or want of qualification, be as valid and effectual as if he had been qualified.

Sect. 61.—As to the Election of Mayor.—(4) In case of equality of votes, the chairman, although not entitled to vote in the first instance, shall have the casting vote.

Sect. 87.—As to Election Petitions.—(1) A municipal election may be questioned by an election petition on the ground—(c) That the person whose election is questioned was at the time of the election disqualified; or (d) that he was not duly elected by a majority of lawful votes.

Sect. 102. Where a candidate who has been elected to a corporate office is, by a certificate of an election court or a decision of the High Court, declared not to have been duly elected, acts done by him in execution of the office, before the time when the certificate or decision is certified to the town clerk, shall not be invalidated by reason of that declaration.

Henry Terrell, K.C. (*L. Coward*, K.C. and *Dalry* with him) for the respondent.—The first question is as to the validity of Newth's vote, and the question is whether Newth's vote is a good vote under sect. 102 of the Act. The matter was considered in *Nell v. Longbottom* (70 L. T. Rep. 499; (1894) 1 Q. B. 767), and it was there decided under sect. 42 (1) (by Mathew and Cave, J.J., in a considered judgment read by Cave, J.), that on an election petition on the ground that the respondent was not elected by a majority of lawful votes, you might raise the question of the legality of the vote of a person who purported to vote by virtue of holding a corporate office. That decision is based on sect. 42 (1) and sect. 87 (1) (d) of the Act, and although the commissioner would be bound by it, this court would not be bound by it, but can review it. The question in that case arose under sect. 42 (1); the question in this case arises under sect. 102, which is different. Sect. 102, when read with sect. 87 (1) (d), shows that Newth's vote was a lawful vote by virtue of sect. 102, which expressly says that if a person, who has been elected to a corporate office, is afterwards declared by the court not to have been duly elected, his acts done in execution of his office before the decision is certified to the town clerk "shall not be invalidated by reason of that declaration," and by sect. 100 (4) the High Court would have power to stay the proceedings. Sect. 102 in terms applies here, as Newth was elected to the corporate office of councillor, and although he was afterwards declared by the court to be disqualified for being elected, yet before that decision was given or certified he did this act—namely, he gave this vote in the election of the mayor, "in execution of the office" of councillor, and therefore by that section that act—his giving of that vote—was "not invalidated by reason of the declaration" declaring him not to be elected. The section goes much further than sect. 42 (1), which simply provides that if a person

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who is disqualified is elected and he acts for the corporation, then nobody with whom the corporation has contracted through him, shall suffer. Sect. 15 (1) shows that the election of the mayor by the council is an act done by the councillors in their corporate capacity; and therefore Newth's vote for the mayor in execution of his office was a good vote under sect. 102, notwithstanding that he had at the time a contract on which he was subsequently declared disqualified. It would also be for the same reason a good vote under sect. 42 (1) but for the decision in *Nell v. Longbottom (ubi sup.)*, as this section renders the acts of Newth in his corporate capacity valid. It was therefore a valid vote under either section, but especially so under sect. 102, and as he held this corporate office at the time, the vote cannot be questioned. There are the two cases, mere disqualification (which would come under sect. 42 (1), and a declaration by the court of such disqualification (which would come under sect. 102), and the effect of the two sections is that, notwithstanding the disqualification in the one case and the declaration of such disqualification in the other, acts done in a corporate capacity in the meantime are valid. *Nell v. Longbottom (ubi sup.)* is upon this point directly at variance with these provisions of the statute. Sect. 42 (1) provides that the act done "shall be as valid and effectual" as if the person had been qualified; and "valid" here means "lawful," and when sect. 87 speaks of a person not being elected by a majority of lawful votes, it means valid votes. *Nell v. Longbottom (ubi sup.)* would have been right if it had been confined to the case of a person who was not the holder of a corporate office giving a vote, or of a person giving a vote who was forbidden by the Act to vote—as, for instance, an outgoing alderman voting in the election of alderman, which he is forbidden to do by sect. 60 (3); but if the vote is given by a person who holds a corporate office, and who by virtue of his corporate office is entitled to give and gives that vote, then that vote is a valid and lawful vote by sects. 42 (1) and 102. That case, therefore, ought not to be followed.

Aquith, K.C. (Ruegg, K.C. and S. H. Day with him) for the petitioner.—With regard to the validity of Newth's vote, the case is absolutely concluded by *Nell v. Longbottom (ubi sup.)*, which is a stronger case than the present. In that case, in the election of mayor, one vote was given by a councillor named Griffin who, at the time of his election as councillor and when he gave the vote in question, held an office under, and was interested in a contract with, the council. In a petition against the mayor the court held the vote bad, and yet it was a vote given by a councillor while acting in his corporate office of councillor. That case was all the stronger, as there was no petition against Griffin that he had not been duly elected, and no court had declared him disqualified for being elected a councillor. Here there was a petition against Newth, and he was declared to be disqualified for being a councillor. If Griffin's vote as a councillor was declared bad, although there was no petition against him and no court had declared him disqualified as a councillor, much more ought Newth's vote as a councillor to be declared bad when on a petition against him this court has

declared him disqualified for being elected or being a councillor. Sect. 42 (1) carries the matter as far as sect. 102, and in fact much further. There could not be wider words than those in sect. 42, and the well-known object of the section was to protect persons who might have contracts or dealings with persons in the corporation, and to prevent those dealings being invalidated if such members of the corporation were afterwards declared to be disqualified. So far as sect. 42 (1) is concerned, *Nell v. Longbottom (ubi sup.)* is absolutely conclusive that this vote is bad; and clearly the matter is not affected in the respondent's favour by sect. 102, because that section merely says that the act done shall not be invalidated "by reason of that declaration." This vote is not rendered invalid "by reason of that declaration"—that is, by reason of the declaration whereby Newth was declared to be disqualified. It would have been equally open to question apart from that declaration altogether. Therefore, if *Nell v. Longbottom (ubi sup.)* is rightly decided, this court must decide as to Newth's vote in the petitioner's favour, and it would be a strong thing for this court not to follow that case. By sect. 7 a municipal election is defined as an election to a corporate office—that is, to every corporate office—and by sect. 87 (1) it may be questioned on the ground (d) that the person was not elected by a majority of lawful votes. If sect. 42 (1) is to be read as validating every act done by a councillor, then no office can be effectually questioned by election petition under this sub-section. Suppose the whole or the major part of the councillors were disqualified by having contracts, then if the argument for the respondent be right, it would be impossible to question the election of the mayor or aldermen whom the councillors had put into office. It is conceded that you could get rid of the councillors if persons voted for them who had no right to vote, but if the argument be right, you could not get rid of the nominees of these councillors. The case of *Nell v. Longbottom (ubi sup.)* was rightly decided, and there is no sufficient ground for departing from it. [DARLING, J.—We think that Newth's vote was not a valid vote, but we do not propose to give our reasons for that until we give our judgment on the whole case.] The effect of holding Newth's vote bad is to bring into consideration the two votes of the mayor. If both these votes are good the respondent is seated; if both are bad the petitioner is seated, and if one is good and one bad the election is invalid. Both the original and the casting vote of the mayor are bad. First, as to the original vote, if this had not been specifically dealt with by the provisional order it would have been a good vote. Sect. 10 (2) and sect. 15 (3) make this clear. The latter section says that the mayor shall continue in office until his successor has accepted office. I agree that the effect of those two sections would in ordinary cases be to give the outgoing mayor a right to take part in the election and to give an original vote. The sole question is whether that has been altered by the provisional order, and art. 9 is the one on which the whole matter turns. By sub-sect. (c) all councillors—including the mayor in his capacity of councillor—ceased to be councillors on the 1st Nov., so that the mayor had ceased to exist or to hold office as a councillor on the 1st Nov. He was by the order continued as mayor, but only to

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a limited extent which is defined by the article. He, or the person appointed by the Local Government Board, was to be returning officer for the election of the town council. He remains mayor only as returning officer, unless the Local Government Board appoint some other person to act as returning officer, in which case he does not even remain as returning officer. He is retained as mayor only for this special purpose; but I agree that if it were not for these special provisions he would have remained mayor until his successor was appointed. He was never mayor of the new or extended city, of the entity which came into existence for the first time on the 1st Nov., and we cannot apply to that state of things the provisions of the Act of 1882, which presuppose an existing and continuing thing. He had no statutory right at all, and no right to give this original vote. As to the casting vote, Newth's vote being disallowed, if the original vote of the mayor was bad there would be inequality and the question of the casting vote would not arise. Sect. 61 (4) provides that in the election of mayor "in case of equality of votes" the chairman shall have the casting vote. The casting vote, therefore, is only to be given when there is "equality of votes." When the mayor gave this casting vote there was not an equality of votes, as the voting then was sixteen to fifteen. At common law there is no such thing as a casting vote; it is the creature of statute, and can only be given in the event and subject to the conditions which the statute lays down. In this case it can only be given when, on adding up the votes, there is actual equality of votes. If the votes given are the votes of those who are presumptively entitled to vote, then the chairman has no right to speculate as to whether the votes may afterwards become equal by some being struck out, or to give a contingent or hypothetical casting vote which may be saved up to be used at some future time if and when required. There being an inequality of votes at the time, the casting vote was therefore bad.

Terrell, K.C. (having been previously heard in reply as to Newth's vote).—Art. 9 of the order provides that the mayor of the existing city is to perform the duties of mayor under the Act of 1882. That Act enacts in sect. 15 (3) that an outgoing mayor is to continue in office until his successor is appointed. The Act therefore imposes on the outgoing mayor the duties of mayor until his successor is appointed. Applying the provisions of the provisional order to that state of things, the mayor of the existing city is to perform all the duties of mayor under the Municipal Corporations Acts for the purposes of this election. One of these duties is to vote and take part in the election, and he is mayor for the purposes of the election just as much as if the boundaries had not been extended. It would be an absurd construction of the order to hold that it takes away the original vote which the Act in express terms gives to an outgoing mayor, without putting any other person in the place of the mayor. The original vote was therefore good. As to the casting vote, the equality of votes which in sect. 61 (4) gives the right to the casting vote, means an equality of valid votes and not an equality merely of those who purport to vote. It is a very reasonable thing for the chairman to

say, as he and Newth vote the same way, "If Newth's vote is good I need not give my vote, but if it is held to be bad then there would be equality, and I give my casting vote." The casting vote given under such circumstances is good.

DARLING, J.—In this case the first point that was argued for the respondent was that the vote given by Mr. Newth upon the question of the election of the mayor was a good vote. Mr. Newth was upon petition held by the commissioner to be disqualified for being a candidate or for being elected as a councillor; and upon appeal we have held that Mr. Newth was so disqualified because he had a contract with the corporation of Gloucester; and therefore, one would suppose, that Mr. Newth was a person who would not be in a position to elect somebody else. But it is said for the respondent that Mr. Newth's vote cannot be questioned, and that that is so by reason of sect. 42 of the Municipal Corporations Act 1882. That section has been the subject of a decision which was cited to us—namely, the decision in the case of *Nell v. Longbottom* (*ubi sup.*)—and, if that decision is right, it appears to us that the argument for the respondent entirely fails, and I think counsel for the respondent admits that himself. But he contends that *Nell v. Longbottom* (*ubi sup.*) was wrongly decided, and that it is not binding upon us. It may be, strictly speaking, that it is not binding upon us, and I do not put my judgment upon the ground that it is. I think, however, that it was rightly decided, and for that reason I think that Mr. Newth's vote can be questioned, and, having been questioned, it can be held to be bad—not only that his election can be held to be bad as we have held, but that the vote which he gave upon the question of who should be mayor can be held to be bad. Therefore I am of opinion that Mr. Newth's vote should be disallowed in counting the votes as to whether there were fifteen or sixteen. The next point arises in this way: There being a question in the election of the new mayor of the enlarged city of Gloucester, the person who had been mayor of the old city of Gloucester, which was smaller than the present one, voted, and it was contended for the respondent that he had a right to vote, and that his original vote was good. Counsel for the petitioner, on the other hand, says that his original vote was bad, but admits that, if it depended on the statute alone, by sects. 10 and 15, sub-sect. (3) the original vote of the mayor would be a good vote; but he says it is bad, and for this reason, that the general law under which it would be good has been reversed in that respect by the provisional order which was made last year, and the object of which was this: The boundaries of Gloucester were being enlarged and a corporation was to be given to the enlarged city, and for that purpose it was necessary that the corporation of the old and smaller city of Gloucester should come to an end, and the provisional order provided that that should be done. It provided that the old councillors should cease to exist on a given day, and that the old aldermen should cease to exist on a given day. It did not say in so many words that the mayor should cease to exist, but it provided for the matter in art. 9. [His Lordship read art. 9.] That article did not take away from the mayor the title of mayor, and he re-

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mained mayor by title at all events; but counsel for the petitioner says that, notwithstanding that, it destroyed all his functions as mayor, and that he was preserved in order to be a returning officer, and in order to be nothing else. Let us see what he was to do. The mayor was to act "for the purposes of the election of a town council," and he was to "perform the duties devolving upon the mayor under the Municipal Corporations Acts." One of the duties devolving upon the mayor under the Municipal Corporations Acts was to sit and preside at the election of the new aldermen and to vote for the new mayor. He was, under those Acts, to be not merely the returning officer for the return of the town council. If that had been so, no doubt he could not have given his original vote at all; but he had something else to do as "duties devolving upon the mayor under the Municipal Corporations Acts"—that is, by reason of the sections applying to the election of mayor and aldermen, which have been cited to us. It is quite true that apparently the Local Government Board could have appointed somebody to perform these duties, and, if they had actually done so, I think a very much graver question than arises now would have arisen. If they had appointed some person to perform these duties for him, it would have been arguable that the mayor would have been entirely deprived of some or all his duties under the Municipal Corporations Acts. It may be that he would only have been deprived of such duties as fell upon the mayor as returning officer upon the election of a town council; or it may be that he would have been deprived of all the duties in electing a town council under the Municipal Corporations Acts. However that may be, the question does not arise before us here, as the Local Government Board did not appoint anybody, and the mayor was left to perform the duties. In what capacity was he left? He was still mayor by title; he was the returning officer at the election of town councillors, and the only question is, Was he to perform the duties devolving upon the mayor for the purposes of the election of a town council under the Municipal Corporations Acts? It is not only a person who is called a town councillor who is part of the town council; the mayor himself is part of the town council, and the first thing he was engaged in was the election of mayor. It seems to me that these words do put upon him the doing of something not only as returning officer, but as mayor, and that when he took part in the election of the new mayor, although he was the mayor of the old corporation, which had power in the restricted district and which had gone, this provisional order did not deprive him, and was not intended to deprive him, of the power which he would have had under the Municipal Corporations Acts of giving a vote in the election of mayor. I therefore think his original vote was a good vote. The next question is as to his casting vote. If his original vote was a good vote, as things turned out, it made an equality of votes for the mayor—that is, if Newth's vote was held to be bad and was struck off. If Mr. Newth's vote was held to be good, then there was not an equality of valid votes. Mr. Newth had voted, and there appeared not to be an equality, but it was perfectly well known that Mr. Newth's vote was challenged and

that there was a petition against it; and the minute which has been read to us shows that it was considered at the time whether Mr. Newth's vote was a good vote or not, so that there would or would not be an equality of votes according as Mr. Newth's vote was held to be bad or good. Thereupon the mayor said he would give a casting vote. That was equivalent to his saying: "I will give a casting vote if there is an equality of votes; if there is not an equality of votes, there can be no casting vote, because it only arises when there is equality." But, as it turned out, Mr. Newth's vote being struck out there was equality; but then, it is said that the chairman could not give a casting vote of a contingent character, and that he could only give a casting vote if there is equality upon the counting of the number of the voters who have voted, supposing they are equally divided on one side and the other. I do not think that is the meaning of the provision which says that when the number of votes is equal on each side a casting vote may be given. I think that means that a casting vote may be given when the number of valid votes is equal, and I think that a casting vote may be given to take effect if the number of valid votes is equal, but not to be a vote of any kind if the number of valid votes is not equal. Therefore it seems to me that Mr. Newth's vote was bad, that the mayor's original vote was good, and that resulting in equality, his casting vote was good, and therefore that the person for whom he voted was elected by a majority of one. That will amount to a judgment for the respondent on this petition. Then the only other matter is as to whether there should be an appeal. As I have said, I think the case of *Nell v. Longbottom* (*ubi sup.*) was rightly decided; but it is a grave question, and I think there should be leave to appeal in this case upon all three points as to the validity of Newth's vote and the ex-mayor's original and casting votes. This leave is given upon the assumption that the appeal will be proceeded with at once, because, as this is a case where a number of persons are elected for a short time only, obviously, unless the appeal is proceeded with at once, and unless the appellant could get the Court of Appeal to expedite the appeal, it would be perfectly useless to have it decided a year hence. Therefore, it is allowed on the assumption that notice of appeal will be given at once, and the Court of Appeal asked to fix a day for the hearing of it.

CHANNELL, J.—I have very little to add, as I agree with my brother's judgment upon all the points. The only thing I wish to add is this: That I think it right for us to follow this case of *Nell v. Longbottom* (*ubi sup.*) quite apart from whether in one sense it is strictly binding upon us. I think that in a matter where two judges on an election petition have given a judgment which is directly in point, whether or not it is technically binding upon us, it would be very wrong for us to decide that that was bad, unless, of course, there had been some other cases decided since or something to throw doubt upon the case. That being so, I have not thought it necessary to consider whether or not that case is in my opinion right; and in what I say I certainly do not wish it to be understood that I have formed any opinion that it is wrong. I do think, however, that the

reasoning upon which it went is inconclusive. It seems to me that the reasoning upon which it went is entirely this: That, first of all, sect. 42, sub-sect. 1, says that "the acts and proceedings of a person in possession of a corporate office, and acting therein, shall, notwithstanding his disqualification or want of qualification, be as valid and effectual as if he had been qualified"; and then it is pointed out in the judgment that a subsequent section—sect. 87, sub-sect. 1 (d)—provides that "A municipal election may be questioned by an election petition on the ground that the person whose election is questioned was not elected by a majority of lawful votes." The court seem to think that the provision in this latter section shows that sect. 42 does not prevent the vote in such a case as this from being questioned on an election petition. If those two provisions covered the same ground, the reasoning would be conclusive; but there are a great many cases that can be suggested other than those coming under sect. 42, sub-sect. 1, in which a municipal election petition might be presented on the ground that the person elected had not a majority of lawful votes—for instance, the case of the election of a town councillor by the burgesses at large, where, of course, there is no question of any disqualified person acting in fact in a corporate office and his acts being made good, or the case where somebody had voted who had been prohibited from voting as by having a pecuniary interest; therefore there are many cases which will account for the provision in sect. 87 that an election petition may be presented on the ground there specified other than those cases which would come under sect. 42, sub-sect. 1, according to the operation of that section contended for by the respondent. It seems to me therefore that the reasoning of that case is inconclusive. I do not pretend to say that the decision is not in fact well founded, but there is that criticism to be made upon it, and consequently as this matter is one of very general importance, I concur in giving leave to appeal if there is anybody who wants to appeal. Then upon the other point as to the original vote of the mayor, I have little to add. It seems to me that the general policy of the Municipal Corporations Acts is to keep the mayor in office until his successor has been appointed. There are special provisions in this provisional order which do not seem to me to indicate any intention to interfere with the general policy of the Act in that respect. Consequently the original vote of the ex-mayor stands. Then with regard to the last point—namely, the casting vote of the ex-mayor who presided, there seems to be no authority for that, but it is really a very practical and business-like view to take, I venture to think, to say that a person who has got a casting vote in some events and not in others may say in order to prevent any question hereafter, "I do not know whether I have got a casting vote or not, but, if I have, I declare it is given for so-and-so." If in that event it is decided that he had got a casting vote, then it is a good vote; but if he has not a casting vote then it is a bad vote. It seems to me upon general principles that the casting vote may be allowed in such cases. It is very convenient that it should be allowed, and I see nothing in the provision in the statute about equality of votes to prevent its being done. Consequently, it seems to me that that casting vote ought to be held

good. The judgment therefore is for the respondent upon this petition.

Judgment for the respondent. Leave to appeal.

Solicitor for the petitioner, *C. T. Courtney-Lewis*, for *W. Langley-Smith*, Gloucester.

Solicitors for the respondent, *Ayrton, Biscoe and Barclay*.

March 20 and 21, 1901.

(Before DARLING and CHANNELL, JJ.)

GUARDIANS OF WEST HAM UNION (resps.) v. LONDON COUNTY COUNCIL (apps.). (a)

Poor law—Settlement—Addition to parish of part of another parish—Settlement not lost.

Settlements acquired in a parish are not destroyed by the subsequent addition to such parish of a part or the whole of another parish by an order made under the Divided Parishes Act 1876, as amended by the Poor Law Act 1879.

In 1852 H. had acquired by birth a settlement in the parish of W. H. In 1886 the Local Government Board, by an order made under the Divided Parishes Act 1876, as amended by the Poor Law Act 1879, ordered that a certain portion of the parish of W. should cease to be part of the parish of W. and should be amalgamated with the parish of W. H. Afterwards H. was found in the county of L., and was sent as a pauper lunatic to an asylum belonging to such county.

Held, that H. was removable to the parish of W. H., as her settlement there had not been destroyed by the amalgamation of the part of the parish of W. with the parish of W. H.

Reg. v. Inhabitants of Tipton (3 Q. B. 215) and St. Saviour's Union v. Dorking Union (78 L. T. Rep. 29; (1898) 1 Q. B. 594) distinguished.

APPEAL from the decision of the Court of Quarter Sessions for the County of London (north side of the Thames) quashing an order made by two justices for the county of London at petty sessions whereby it was adjudged that the place of the last legal settlement of one Elizabeth Heritage, a lunatic pauper then confined in the Claybury Lunatic Asylum of the respondents at Woodford, in the county of Essex, was in the parish of West Ham, in the appellant's union, and whereby the appellants were ordered to pay to the treasurer of the respondents the sum of 25*l.* 17*s.* 1*d.* in respect of the past maintenance of the lunatic pauper, and to pay to the treasurer of the asylum weekly the sum of 9*s.* 11*d.* for her future maintenance.

Elizabeth Heritage (hereinafter referred to as the pauper lunatic) was born in Stephenson-street, Canning Town, in the parish of West Ham, in the West Ham Union, on or about the 11th Feb. 1852, and resided at Nos. 3 and 5, Widdicombe-terrace (afterwards and now known as Nos. 40 and 42, Barking-road), in the said parish, for about seventeen years until the month of Aug. 1888.

The pauper lunatic resided at the address aforesaid in such manner and under such circumstances during the whole of the period of seventeen years and in each of such years as to render her irre-

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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movable from the parish in which such residence took place.

By an order of the Local Government Board dated the 24th Aug. 1886, and made under The Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) as amended and extended by the Poor Law Act 1879 (42 & 43 Vict. c. 54), it was ordered that a certain part of the parish of Wanstead should cease to be part of that parish, and should be amalgamated with the parish of West Ham. A copy of the order, which took effect on the 24th March 1887, was made part of the case.

The address at which the pauper lunatic so resided was situate in the parish of West Ham, as constituted previously to the date of the order, and not in any part of the parish of Wanstead.

The pauper lunatic left the parish of West Ham in the month of Aug. 1888, and did not thereafter acquire a settlement in any parish.

The pauper lunatic was afterwards found in the hamlet of Ratcliffe in the Stepney Union in the County of London, and was sent therefrom to the Claybury Lunatic Asylum of the respondents.

By an order of two of the justices of the peace acting in and for the County of London dated the 14th Feb. 1900, the pauper lunatic was, under sect. 290 of the Lunacy Act 1890 (53 & 54 Vict. c. 5), adjudged to be chargeable to the County of London.

On the 15th May 1900 the respondents procured from two of the justices of the peace acting in and for the County of London the said order of that date, whereby amongst other things the pauper lunatic was adjudged to be settled in the appellants' union (West Ham Union).

On the above facts the court of quarter sessions held that they were bound to follow the reasoning of the decisions in *Reg. v. Inhabitants of Tipton* (3 Q. B. 215) and *St. Saviour's Union v. Dorking Union* (77 L. T. Rep. 466; 78 L. T. Rep. 20; (1898) 1 Q. B. 594), and that such reasoning applied not only to a district where the parish is divided, but also where a district is destroyed by reason of amalgamation. They therefore allowed the appeal.

Daddy for the appellants.—The court of quarter sessions misunderstood *Reg. v. Inhabitants of Tipton* (*sup.*). The principle of that decision is this: A pauper acquires a settlement in the whole parish, not in any particular part of it. Accordingly when a parish is divided up, you cannot say he has a settlement in this part or in that part. The parish in which he had a settlement is gone, but the addition to an existing parish of the whole or a part of a neighbouring parish does not destroy that parish. That has been held in the case of *Reg. v. Inhabitants of St. Martin's, New Sarum* (9 Q. B. 241). There is no reason why the addition of part of a parish to another should destroy the latter if the addition of a whole parish to it does not destroy it. He also referred to *Bristol Guardians v. Guardians of Burton Regis Union* (66 L. T. Rep. 190).

Earle for the respondents.—I quite agree that the principle of *Reg. v. Inhabitants of Tipton* (*sup.*) is that settlements are acquired in the whole parish. I would go further and say and in nothing but the parish. The pauper here never acquired any settlement in that part of the parish

of Wanstead which is now amalgamated with the old parish of West Ham. If you hold she has a settlement in the new parish of West Ham, you impose on this part of it a liability which it never before was subject to. The settlement therefore is gone, and as the pauper was found in London County, London County must maintain her until it can show that some other parish or union is liable. The case of *Reg. v. Inhabitants of St. Martin's, New Sarum* (*sup.*) was decided on a special Act, which declared that the two parishes were to be one parish for all save ecclesiastical purposes. He also referred to *St. Saviour's Union v. Dorking Union* (*sup.*).

DARLING, J.—I think in this case our judgment must be for the appellants, the London County Council. What happened appears to have been this: that by virtue of the Acts of Parliament which have been cited to us, and of the order of the Local Government Board, a part of the parish of Wanstead was added to the parish of West Ham, and was, in the words of the statute, amalgamated with it, so that they were amalgamated with one another—it was not a mere question of joining one to the other, but they were amalgamated in the sense that you could knead two malleable things together, so that they became one. The parish of West Ham from that moment exists with its old overseers, the only difference being then that the authorities of West Ham—the overseers and so on—have authority over the area of what was their old parish and over the portion joined to it and amalgamated with it, which was part of Wanstead. The pauper in question in this case had a birth settlement in West Ham, and it is said that that settlement is lost and gone by reason of the amalgamation with West Ham of this part of Wanstead, and for that proposition the *Tipton* case (*sup.*) is cited. What happened in the *Tipton* case (*sup.*) was this: It is stated exactly by the then Master of the Rolls, Lindley, in his judgment in the *Dorking* case, where he says: "As I understand the law, it seems now to be established that a settlement gained by birth is a settlement gained in the parish and not in any particular part of that parish, and if that parish is subdivided, the old parish ceases to exist and the settlement goes with it. No settlement in the portion made into a new parish can be implied in favour of a person who had acquired a birth settlement in the old parish which has passed away." Now, the *Tipton* case (*sup.*) has been followed, with a good deal of reluctance, by judges who have had to deal with and decide other cases; I do not myself in the least wish to say anything which would suggest that in my opinion it was not properly decided, but I think that this case does not come within the *Tipton* case at all. The reason why the pauper in the *Tipton* case lost his birth settlement was because he had been born in a parish which had passed away. This pauper was born in West Ham, and West Ham has not passed away in my opinion. West Ham has been amalgamated with a small portion of another parish which has been joined on to it and amalgamated with it; but West Ham, in my judgment, still remains, and the parish in which the pauper was settled still remains, although the boundaries of it have been enlarged. Now, what happened in the other case seems to me to be immaterial. The case of *Reg. v. Inhabitants of St. Martin's, New*

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Sarum (sup.) is this: the pauper gained a settlement in parish J., and afterwards, by Act of Parliament, that parish was united for all but ecclesiastical purposes with parish B., by the title of the united parishes of J. and B., and it was held that the pauper was settled in the united parishes. That would have been an authority, it seems to me, for this: that if all West Ham and all Wanstead parishes had been joined together with the title of the united parishes of West Ham and Wanstead, the paupers of both would have kept their settlements in the united parishes. But what has happened here is, that a portion has been taken off Wanstead and amalgamated with West Ham. Has that destroyed West Ham so as to bring it within the *Tipton* case? I do not think so. It may have destroyed Wanstead, and I do not say that it has not. It may have destroyed the old parish of Wanstead, and by reason of the *Tipton* case the paupers situate in Wanstead may have lost their settlements; but although one may think that that is so, I do not see that that forces us to extend the doctrine (which was reluctantly accepted by the judges in many cases) which is laid down in the *Tipton* case to say that a parish is destroyed, or has ceased to exist, when you take a part of something else and add that part to it. It is quite enough to say that the *Tipton* case settled that if you took away something from the parish that you destroyed that parish, but no one yet says that adding something to a parish equally destroys it. Then there is the authority of *Reg. v. New Sarum* (sup.) for saying that adding something to a parish does not destroy either of them. It seems to me, therefore, that this case is not brought within the rule which has been laid down in the *Tipton* case, and unless it comes within that rule the pauper is not deprived of her settlement, and for that reason I think the London County Council succeed as against the parish of West Ham, where the pauper still remains, in my judgment, settled.

CHANNELL, J.—I am of the same opinion. It seems to me to come to this, that where settlements have been acquired in a parish and that parish is destroyed, then the settlements are gone unless the authority which has destroyed them has made some provision for the settlements, which ought of course to be done. When it is not done, it is because it has been overlooked; but there is a provision which I think meets the case under this Divided Parishes Act, and which, as far as I can see, is acted upon now because the point has turned up in the courts and is foreseen. But where the settlements are not in fact provided for by the authority, the statute, or whatever it is which destroys the parish, then the settlements are gone. In that case the question which one has to consider is, what is a destruction for the purpose of producing that result. Now, you have it decided in the *New Sarum* case that the adding to one parish the entirety of another parish does not destroy, for this purpose, the parish to which the entirety of another parish is added. What we have to say is, whether adding to one parish not the entirety of another parish but a portion of another parish, destroys the first parish; and inasmuch as the adding of the entire portion would not destroy it I do not see why it should be said that the adding of a part does so. Consequently we are not bound by that doctrine,

and we may follow the *New Sarum* case and say that it is more applicable to this case than the other one. Upon that ground we are able to decide that the settlements are not gone. Then there is a little addition to the argument, namely, with regard to the use of the word amalgamation, which my learned brother has already dealt with, and I agree with what he has said. I think that, for all purposes, taking a little bit from Wanstead and incorporating it with West Ham has not the effect of destroying West Ham.

Appeal allowed.

Solicitor for the appellants, *W. A. Blazland*.
Solicitors for the respondents, *Hillearys*.

Tuesday, April 16, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRENCE, J.)

REX v. NORTH-EASTERN RAILWAY
COMPANY. (a)

Criminal law—Verdict—Misdirection—Staying entry of judgment—Judgment not determining rights.

After verdict on an indictment where the proceedings though in form criminal are in substance for the asserting of civil rights of the parties (even when the verdict is due to a misdirection by the judge on a point of law) the court will not stay entry of judgment unless the judgment would alter the rights of the parties by operating as an estoppel to a second trial of the matters in issue.

The N.E. Railway Company were indicted for obstruction of a highway. At the trial the judge directed the jury to acquit them on one of the counts on the ground that they were justified under their special Act in doing what was alleged in such count to be an obstruction. The jury found a verdict for the defendants. The prosecutors obtained a rule nisi to stay entry of judgment for the defendants on the ground that such direction was wrong in law.

Held, that such rule must be discharged, since, whether the direction was wrong or not, the entry of the judgment would not prevent the prosecutors from bringing a second indictment for the continuance of the alleged obstruction, and therefore their rights would not be altered by it.

RULE nisi calling upon the defendants to an indictment to show cause why the entry of judgment given on the verdict should not be stayed until the court should further order.

The facts, as far as they were of importance in connection with the point before the court, were as follows:—

Under a certain lease granted by the Bishop of Durham to the defendants' predecessors in title the defendants were entitled to use for the purposes of their railway a tract of land fourteen yards in width over what was formerly a common, and across a highway over that common. At first only one line of rails was laid on this tract, but in 1874 another line was laid within it.

The district council in whose district the before-mentioned highway lay indicted the defendants for an obstruction of the highway. There were

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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seven counts in the indictment, the first of which was in reference to laying this second line of rails. The judge (Ridley, J.) at the trial directed the jury that, on the construction of the special Act under which the railway had been made, there was no case as far as the first count of the indictment was concerned, and directed them to acquit on it. The jury did so, and on the evidence acquitted them also on the other six counts. The prosecutors thereupon obtained the rule *nisi*.

Scott Fox, K.C. (Manisty, K.C. with him) now showed cause.—The verdict in this case was merely to the effect that, on the evidence presented, the defendants were not obstructing the highway. If the alleged obstructions were continued for a single day it would not in any way prevent the prosecutors laying a fresh information. Their offence—if they are guilty of any offence—is a continuing offence, and on a second indictment for it the judgment in this case could not be pleaded in bar. The rule now asked for has never been made except where the judgment would operate as an estoppel to any further proceedings—i.e., where it finally decided the rights of the parties.

Reg. v. Southampton County, 57 L. T. Rep. 261;

19 Q. B. Div. 590;

Rex v. Wandsworth, 1 B. & Ald. 63;

Reg. v. Russell, 3 El. & Bl. 943;

Reg. v. Johnson, 2 El. & El. 613;

Reg. v. Duncan, 44 L. T. Rep. 521; 7 Q. B. Div. 198;

Reg. v. Chorley, 12 Q. B. 515.

Here it is said that the judge was wrong in directing the jury that, on the construction of the special Act, the second line of rails could not be an obstruction. I do not admit that this was a misdirection, but, assuming that it was, a misdirection could not possibly operate as an estoppel to a second indictment.

Tindal Atkinson, K.C. (R. Glen and Bethune with him) in support of the rule.—I do not dispute that the entry of judgment in this case could not operate as an estoppel to a second indictment. I contend it is not necessary to obtain the rule to show that the entry would absolutely preclude a second trial. It is sufficient if it can be shown that at a second trial we should be greatly prejudiced by the result of this trial. That is the effect of Lord Ellenborough's remark in *Rex v. Wandsworth* (*sup.*), at p. 66, that to allow judgment to be entered under such circumstances would be to send "the parties to a second trial with a millstone about their neck, the weight of which it would be impossible to resist." Here I submit the result of this trial, while it does not absolutely preclude a second trial, renders such a trial hopeless, because the error here arises, not from a mistaken view of the facts, but from a direction wrong in law of the judge. He has here construed, and wrongly construed, an Act of Parliament. If we bring a second indictment, the ruling of the judge in this trial will be cited by the defendants, and I submit the judge who tries the second indictment will be bound by this ruling, which we contend is wrong. [Lord ALVERSTONE, C.J.—Is there any case where entry of the judgment has been stayed merely on a misdirection?] In the *Southampton* case, at p. 599, the court said that there was no misdirection, but, if there had been, it would have stayed entry of the judgment. But,

even saying there is no express authority on the point, why should the entry of the judgment be stayed when it is due to misdirection? [Lord ALVERSTONE, C.J.—Because, as a matter of fact, the direction of the judge at one trial does not bind the judge at another trial. My difficulty is that the principle of the cases seems to be that the court will interfere only when the judgment would alter rights.]

Lord ALVERSTONE, C.J.—In this case a rule has been moved calling upon the defendants to the indictment to show cause why the entry of judgment given on the verdict should not be stayed until the court should further order. The effect or object of that rule is to obtain a decision from this court that upon an indictment for obstruction to a highway the proceedings on the indictment may be stayed upon the ground that there has been some misdirection on the part of the learned judge in the way that he has left the question to the jury. The case has been very fairly and clearly argued by Mr. Tindal Atkinson, and he is obliged to admit that the case is novel in so far as he asks us to extend a practice such as was laid down by Lord Ellenborough in *Rex v. Wandsworth* (*sup.*) to the case of an indictment for obstructing a highway. Now, of course, if we could see that the same principle ought to apply, we should not hesitate to lay down the rule, but, as I have ventured to point out in the course of the argument, it seems to me that there is a broad distinction of principle to show that the same considerations do not apply. In *Rex v. Wandsworth* (*sup.*) Lord Ellenborough appears to have laid down the rule that under special circumstances, where rights would have been affected by previous proceedings, he stayed proceedings suspending the effect of the former verdict, because great injustice would arise from precluding further discussion; and it is important to observe that he referred to the previous case in which he had so acted—a very peculiar case—of *Rex v. Middlessex*, reported in the note at page 65 of the same volume, showing that it was because in law the rights of parties would be affected in subsequent proceedings that he had taken the step of interfering so as to prevent the proceedings taking their ordinary course. Now, there have been a long series of decisions—*Reg. v. Russell* (*sup.*), *Reg. v. Johnson* (*sup.*), and *Reg. v. Duncan* (*sup.*)—which were, I think, all of them applications for a new trial, in which the court has uniformly refused to grant a new trial; but it is important to point out that even in those cases the court had thought it right to take the same action as Lord Ellenborough took in *Rex v. Wandsworth* (*sup.*). As Lord Coleridge, C.J. pointed out in *Reg. v. Southampton County* (*sup.*), they of course could have done so, as the rule moved in one form would not have precluded them from giving a remedy. I now come to consider whether on principle we ought to apply the same rule and extend the rule to cases of obstruction, and I would point out that the reasoning which has been used by the learned judges in more than one of those cases would seem to afford a conclusive argument against our extending or the granting of the indulgence to such a case. It was pointed out in the case in 3 El. & Bl. of *Reg. v. Russell* (*sup.*) that—the verdict determining no special right—the day afterwards an indictment might have been preferred to which the present acquittal would have

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STIFF (app.) v. BILLINGTON (resp.).

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been no bar; and I need not refer to the other cases where the same law is laid down, because it has been most fairly admitted by Mr. Atkinson that, in the event of an indictment being preferred in respect of the same obstruction being continued, the present acquittal could not be used as any answer by the defendant to those proceedings. Therefore, as I point out, it is attempted to induce us to extend the rule which is applied in cases where rights would be affected to cases in which the rights would not be affected. The main ground on which this has been urged is that the difficulty in which the prosecutors would find themselves—the difficulty which in the *Wandsworth* case arose from a different state of circumstances altogether, from the fact of there having been a previous trial—ought to induce us to extend the rule, because it is said the learned judge in this case misdirected the jury, and to a certain extent withdrew even a part of the case from their consideration. Speaking for myself, of course I express not the slightest opinion as to whether there was a misdirection. We have not heard either side upon that at length, and for the purposes of my judgment I told Mr. Atkinson to assume that he could establish that there had been a misdirection. In my opinion the fact that the judge had misdirected would not be sufficient to justify the court in staying the proceedings in a previous indictment, nor remove the so-called difficulty in the way of future proceedings. Misdirection is the direction of the judge upon the evidence before him, and applying the law to the facts that are before him. It is not a case in which the learned judge has given a judgment which will finally determine the rights of the parties. The learned judge has upon the facts before him directed the jury with reference to what his view was of the legal rights applicable to those facts. Mr. Atkinson says any other judge who tries another indictment will feel himself bound to adopt exactly the same view of the law which Ridley, J. expressed. All I can say is that I do not think any judge would feel himself so bound. He would endeavour to apply to the facts then before him his view of the law, and it would certainly be a very startling rule if it were to be supposed that we were to sit here, there being a verdict of acquittal, to consider whether or not the parties would be prejudiced because there may be some expression of a learned judge which may amount to misdirection when the case comes to be further examined. I would point out that in *Reg. v. Duncan* it is true the application was for a new trial, but still that application was refused although it was based upon misdirection, and, as I have pointed out, the Lord Chief Justice, in the *Southampton* case, indicated that of course in a proper case the court, although the application was for a new trial, would have adopted the course which Lord Ellenborough adopted and which they approved, and have stayed the proceedings. Of course, we are not expressing any opinion that there was a misdirection, but, even assuming there was, in my opinion, inasmuch as the prosecutors can tomorrow take proceedings in respect of the obstruction, it would be a very wrong thing to extend the rule of arresting the entry of judgment to a case in which no rights had been finally determined, but the only question has been the question of whether the jury thought there was obstruction or not. I

will only add that there seems to be a further broad distinction of principle, because, as has been pointed out in the course of the argument, the parties can, by informing the Attorney-General, obtain the use of the Attorney-General's name, and then proceedings can be taken in respect of that obstruction which can be carried to the Superior Courts and to the House of Lords if necessary, so that any rule of the learned judge can be finally determined on the question. In my judgment we should do wrong if we were to make this rule absolute, and therefore I think the rule ought to be discharged.

LAWRANCE, J.—I entirely agree.

Rule discharged.

Solicitors for the prosecutors, G. Reader and Co., for John McCartan, Durham.

Solicitor for the defendants, A. Kaye Butterworth.

Friday, April 19, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

STIFF (app.) v. BILLINGTON (resp.). (a)

Game—"Search or pursuit"—*Game Act 1831* 1 & 2 Will. 4, c. 32, s. 30.

In order to support a conviction under sect. 30 of the Game Act 1831 for trespassing in the daytime in search or pursuit of game, it is not necessary to prove that the searching and pursuing was with the intention to kill at the time.

CASE stated on an information preferred by the respondent against the appellant under sect. 30 of 1 & 2 Will. 4, c. 32, charging him with trespassing by unlawfully being in the daytime upon certain land in search of game.

The respondent was in the employment of one Barford, who was the owner of the sporting rights over certain land at Sundon.

The appellant was a keeper in the employment of one Sievier, who was the tenant of and had the right of sporting over the adjoining land.

The appellant was seen to come from Sievier's land on to Barford's, having with him a retriever dog. The appellant beat the hedge on Barford's land, and the dog searched the whole length of the land.

The appellant said he was acting under his master's orders, and he believed that his master wanted him to be caught.

Barford bred pheasants for the purpose of his shooting, and though no nests had been seen on the land in question, this season pheasants and game were on the land.

The land comprised about sixty acres, divided into four plots. It was a detached portion of Barford's shooting, and was surrounded on three sides by Sievier's shooting and on the other side by a railway, beyond which Barford had other shooting.

One portion of this land, containing about four acres, was sown with mustard, but it was so sown by the farmer who was the tenant of the land, and not by Barford, who had the sporting rights.

The appellant gave evidence, admitting that he went upon the land in question, and stated that he acted upon instructions. He had a retriever

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

Div.]

CHARTER v. CHARTER.

[Div.]

dog with him, but denied that he beat the hedge or that his dog hunted.

It was contended on behalf of the appellant that there was no evidence that the appellant was in search of game; that it was necessary to prove that he was searching for game for the purpose of killing or taking it; that the appellant had gone on the land for the purpose of raising the question whether the respondent's employer was entitled to plant the land with mustard for the purpose of attracting pheasants from the adjoining land.

No evidence was given by the appellant in support of this last contention.

The justices found as facts (1) that the appellant trespassed upon the land; and that there was game on the land; (2) that he trespassed in search of game; (3) that there was no evidence of a *bona fide* claim of right; and (4) that if it was material he acted under the instructions of his employer.

They thereupon convicted the appellant.

By the Game Act 1831 (1 & 2 Will. 4, c. 32), s. 30:

And whereas, after the commencement of this Act game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exists for protecting the same from trespassers; be it therefore enacted that if any person whatsoever shall commit any trespass by entering or being, in the day-time, upon any land in search or pursuit of game . . . such person shall, on conviction thereof before a justice of the peace, forfeit, &c.

Sturges for the appellant.

Stimson for the respondent.

LORD ALVERSTONE, C.J.—In this case the justices have found that the appellant trespassed on the land, that there was game on the land, and that the appellant trespassed in search of game. We are asked to say that the words "search" and "pursuit" in the section are limited to searching and pursuing with an intention to kill at the time, and that there was no evidence of that. I think it would be very dangerous to lay down any such rule as to the meaning of those words. I am clearly of opinion that we cannot say the magistrates were wrong in finding as they have done.

LAWRANCE, J. concurred. *Appeal dismissed.*

Solicitors: *F. Hastings Dauneay; Neve and Beck.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Tuesday, March 5, 1901.

(Before Sir F. JEUNE, President, and BARNES, J.)

CHARTER v. CHARTER. (a)

Appeal—Married woman—Desertion—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), s. 4—Costs of appeal.

If a wife leaves her husband in consequence of a mere expression on his part that she can go where she likes and do what she likes, and then refuses to return home at his request, the husband is not guilty of desertion.

To constitute desertion, although it is not actually necessary that the husband should drive his wife away from him, there must be an intention on his part to break off matrimonial relations.

THIS was an appeal of the husband, George William Charter, from a conviction dated the 21st Jan. 1901, under the Summary Jurisdiction (Married Women) Act 1895, by the metropolitan magistrate sitting at Clerkenwell.

The appellant was summoned on the 7th Jan. by his wife, under sect. 4 of the Act, for persistent cruelty to her and wilful neglect to provide reasonable maintenance for her, whereby she had been caused to leave and live separately and apart from him.

The magistrate was not satisfied as to the charge of cruelty, and amended it to one of desertion.

In her evidence at the police-court Mrs. Charter said:

On the morning of the 30th Sept. we had some words. He said I had deceived him, and had he known of it I should not have occupied his room. That afternoon he abused me and said he was resolved to have a separation, and that I should not occupy his room that night. He said I could go where I liked and do what I liked. He threw my things out of the room, and next morning I left him. I took him at his word when he said he would have a separation and that I could go where I liked. Because of what he said and what had happened previously I left him—not on account of his having neglected to maintain me. Had he not said I might go I should not have gone. After I left he tried to get me back, but I refused to return.

The appellant in person.—There was not the slightest evidence given in support of the charge of desertion. He had been married for twenty-nine years, and his wife left him after a slight quarrel last year. He offered to take her back, but she declined to return home. He received a letter from her on the 31st Oct. in which she said, "It is stated that you wish to induce me to rejoin you. Since the night of September 30, when you refused me my room and told me I could go where I liked and you would maintain me, I had no alternative but to leave you. As you have not accepted my offer to abrogate our marital rights by private agreement, the matter is now in the hands of my solicitors." The learned magistrate came to the conclusion that his wife did not wish to live with him, and thereupon convicted him of desertion.

H. T. Kemp for the respondent.—The order of the learned magistrate was right. There was evidence of persistent cruelty extending over a number of years, although there was not evidence before him that it was the cruelty and neglect of the husband which had caused her to leave and live separately and apart, as required by sect. 4 of the Act of 1895. He came to the conclusion that there was no evidence of desertion and amended the summons. The appellant had every opportunity of meeting the fresh charge, as the magistrate granted an adjournment.

The PRESIDENT.—From the wife's evidence at the police-court it seems to me that there was a separation by consent. There is the wife's own admission. "He tried to get me back, but I refused." I cannot understand on what ground the magistrate found desertion.

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

[CR. CAS. RES.]

REG. v. KANE.

[CR. CAS. RES.]

H. T. Kemp referred to the following cases on the question of desertion :

Graves v. Graves, 10 L. T. Rep. 273; 3 Sw. & Tr. 350;
Dickinson v. Dickinson, 62 L. T. Rep. 830;
Bradshaw v. Bradshaw, 75 L. T. Rep. 391; (1897) P. 24;
Pizzala v. Pizzala, 12 Times L. Rep. 451;
Koch v. Koch, 81 L. T. Rep. 61; (1899) P. 221;
Sickert v. Sickert, 81 L. T. Rep. 495; (1899) P. 278.

The PRESIDENT.—It appears to me that in this case there was not the slightest evidence of desertion. The learned magistrate was perfectly right in coming to the conclusion that the wife did not leave and live separately and apart from her husband in consequence of his cruelty and neglect; but when he came to consider the question of desertion, he seems to have gone back on his former decision and to have formed the opinion that the wife was perfectly justified in refusing to return home. It is clear law that desertion by a husband does not necessarily mean that he has actually turned his wife out of doors. It is sufficient to constitute desertion if his conduct is such as to compel her to leave his house. The principle which underlies the cases is the intention of the husband to break off matrimonial relations. In the present case there was a quarrel, and the husband said: "Go where you like; do what you like." The wife "took him at his word," to use her own phrase, and when he asks her to return home she refuses to do so. It is obvious that the wife went away of her own free will, and not because she was compelled to do so. The separation was not contrary to the wishes of the wife, but was really at the time a separation by mutual consent. The appeal must therefore be allowed.

BARNES, J. agreed.

On the authority of *Medway v. Medway* (19 Mag. Cas. 595; 82 L. T. Rep. 627; (1900) P. 141) the husband, although successful, was ordered to pay the costs of the appeal.

Solicitor for the respondent: *B. T. Baker*.

CROWN CASES RESERVED.

Thursday, Dec. 20, 1900.

(Before Lord ALVERSTONE, C.J., BRUCE, RIDLEY, BIGHAM, and DARLING, JJ.)

REG. v. KANE. (a)

Criminal law—Agent—Larceny by agent—"Banker, merchant, broker, or attorney"—Direction in writing—Larceny Act (24 & 25 Vict. c. 96), s. 75.

The Larceny Act (24 & 25 Vict. c. 96), s. 75, enacts that "whosoever having been intrusted, either solely or jointly with any other person, as a banker, merchant, broker, attorney, or other agent with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security" for any purpose or to any person specified in such direction, shall convert it to his own use or benefit, shall be guilty of a misdemeanour.

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

The section applies only to persons of the occupations named therein, and the words "or other agent" refers to occupations ejusdem generis. Reg. v. Portugal (16 Q. B. Div. 487) approved. Quære: Whether a document in the form of a receipt signed by the person charged is a direction in writing within the meaning of the section.

THIS case, stated by Ridley, J., was, so far as is material, as follows:

The prisoner Lewis Kane was indicted at the Central Criminal Court on an indictment containing four counts, charging him in the first count for that he, having been entrusted as an agent by Elizabeth Mary Williamson with a certain security for the payment of money—to wit, for an order of payment of the sum of 60*l.*, with a certain direction in writing to apply such security to a certain purpose specified in such direction, to wit, for the application of sixty shares in the Baker-street and Waterloo Railway—unlawfully, in violation of good faith and contrary to the terms of such direction, did convert such security to his own use and benefit contrary to the provisions of the first branch of sect. 75 of the Larceny Act 1861 (24 & 25 Vict. c. 96).

The other three counts of the indictment varied the charge by describing the thing converted to be "the proceeds of such security," and the conversion to be "to the use and benefit of a person other than the said Elizabeth Mary Williamson."

The prisoner was stated to be a conjurer and a thought-reader, and in Nov. 1900 made the acquaintance of the prosecutrix at an hotel where they were both staying. On the 13th Nov. he called her attention to an advertisement relating to the Baker-street and Waterloo Railway Company, in which he said he was himself going to invest, and that it was a safe thing and would pay good interest. He further said that he was going to apply for sixty shares for himself, and advised the prosecutrix to make an application for a similar number.

The prosecutrix in the prisoner's presence wrote out a cheque for 60*l.*, which ran as follows:

14, High-street, W., London, Nov. 13th, 1900.—No. B. 192,064.—Parr's Bank Limited, Notting Hill Branch.—Pay L. Kane or order sixty pounds only—60*l.* 0*s.* 0*d.*—E. M. Williamson, Head Office, Bartholomew-lane, London, E.C.—(Reverse side) LUDWIG KANE.

Whilst the prosecutrix was writing the cheque the prisoner asked her not to cross it, as he said the application list closed that afternoon, and it was necessary to pay cash with the application in order to secure the shares.

Upon these representations the prosecutrix handed the cheque to the prisoner, and on the same afternoon asked him for a receipt for the 60*l.* represented by the cheque when the prisoner wrote out a receipt in the following words:

Received of Mrs. Williamson 60*l.* for the application of sixty shares in the Baker-street and Waterloo Railway, to be returned if those shares are not obtainable.—Professor L. KANE, 13th Nov. 1900.

On this document was a receipt stamp cancelled by the figures 13/11/00 being written by the prisoner upon it.

The prisoner made no application for the shares in the company, but himself cashed the cheque, and used the proceeds for purposes of his own.

CR. CAS. RES.] *REX v. HAMILTON—REX v. COCKERTON; Ex parte HAMILTON & OTHERS.* [APP.]

The substantial question raised at the trial was whether the document signed by the prisoner when taken together with the cheque given to him by the prosecutrix was such a direction in writing as to bring the offence of the prisoner within the first part of the 75th section of the Larceny Act.

The jury convicted the prisoner, and the learned judge reserved the question whether the cheque and the receipt given by the defendant constituted a direction in writing within the meaning of the section.

C. W. Mathews for the Crown.—The conviction cannot be supported; it has already been decided in *Reg. v. Portugal* (16 Q. B. Div. 487) a case which was not cited at the trial, that sect. 75 of the Larceny Act only applies to persons who carry on business as bankers, merchants, brokers, or attorneys, or businesses *ejusdem generis*.

Travers Humphreys, for the defendant, did not argue.

Lord ALVERSTONE, C.J.—Although the decision in *Reg. v. Portugal* is not binding upon us, we should follow it, and the conviction must therefore be quashed. But the point reserved by the case is one on which a decision is necessary, and should be brought before us on another occasion.

BRUCE, RIDLEY, BIGHAM, and DARLING, JJ. concurred.

Solicitor for the Crown, *Solicitor to the Treasury*.
Solicitors for the defendant, *Osborn and Osborn*.

Saturday, March 30, 1901.

(Before Lord ALVERSTONE, C.J., MATHEW, LAWRENCE, BRUCE, and RIDLEY, JJ.)

REX v. HAMILTON. (a)

Criminal law—Forgery—Common law misdemeanour—Imprisonment with hard labour—Jurisdiction to inflict—14 & 15 Vict. c. 100, s. 29.

The jurisdiction to inflict the sentence of imprisonment with hard labour depends upon statute. The common law misdemeanour of forgery is therefore not so punishable, because it is not one of the offences specified in 14 & 15 Vict. c. 100, s. 29. A forgery committed with the intention of concealing the misappropriation of property is not the commission of a cheat or fraud within the meaning of that section.

THE facts in this case, which was stated by the Common Serjeant for the City of London, were as follows:—

The prisoner Hamilton had been employed by one Cobb to collect subscriptions. He collected and fraudulently misappropriated a number of sums of money contributed by various donors. Being ordered in a County Court action to render an account, he delivered to Cobb a document which he represented as a list of the subscriptions he had received, but which was in fact a list of the names of the donors with amounts set out smaller than those they had actually contributed. In some cases Hamilton had altered the names of the donors, his object being to conceal his misappropriations. He was convicted on an indictment which charged the common law misdemeanour of forging and altering certain writings with

intent to defraud, but did not charge any of the offences specified in 14 & 15 Vict. c. 100, s. 29.

The Common Serjeant postponed judgment, and stated the case for the opinion of the court on the question whether he had power to pass a sentence of imprisonment with hard labour.

No counsel having been instructed, *Herman Cohen*, as *amicus curiæ*, referred the court to

Russell on Crimes, 6th edit., vol. 2, p. 467;

Hawkins' P. C. Bk. 1, c. 70 (11) and c. 71 (4);

2 East's P. C. 819, 824;

R. v. Minister and Churchwardens of St. Botolph, Bishopsgate, 1 Wm. Bl. 442.

Lord ALVERSTONE, C.J.—We are obliged to Mr. Cohen, who, having appeared for the prosecution in the court below, has assisted us by citing the authorities to us. In my opinion, however, the prisoner cannot be punished with hard labour. He was indicted for forgery at common law; if he had been indicted for a cheat or fraud he might have been so punished because of the provisions of sect. 29 of 14 & 15 Vict. c. 100. But the question is whether, having been convicted of forgery on this indictment, he can be punished with hard labour. The indictment does not allege that he obtained the property by a cheat or fraud, which is an offence provided for by sect. 29. I think, therefore, that the Common Serjeant would have been wrong if he had punished this man with hard labour.

MATHEW, J.—The statute applies to cheating at common law. Cheating seems to me to mean obtaining property by deceitful means, and the definition of "forgery" in *Hawkins' Pleas of the Crown* appears to me to be too wide. The particular crime to be punished under this indictment was the prisoner's concealing by forgery the fact that he had obtained property by a cheat or fraud.

LAWRENCE, BRUCE, and RIDLEY, JJ. concurred.

Supreme Court of Judicature.

COURT OF APPEAL.

March 18, 19, 20, and April 1, 1901.

(Before SMITH, M.R., COLLINS, and ROMER, L.JJ.)

REX v. COCKERTON; Ex parte HAMILTON AND OTHERS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Education—School board—Elementary education—Science and art classes—Day schools—Evening continuation schools—Payment of expenses out of rates and school fund—Legality—Elementary Education Acts 1870 to 1891—Technical Instruction Acts 1889 to 1891—Education Code (1890) Act 1890.

A school board, as a statutory corporation, has no power to provide science and art schools or classes for teaching the education prescribed by the directory of the Science and Art Department, either in day schools or in evening continuation schools, and to pay the expenses thereof out of the school board rate or school fund.

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

[CT. OF APP.]

REX v. COCKBURN; *Ex parte* HAMILTON AND OTHERS.

[CT. OF APP.]

THIS was an appeal by the applicants from the order of a divisional Court (Wills and Kennedy, JJ.) discharging a rule *nisi* for a *certiorari* to bring up and quash certain certificates of disallowances and surcharges made by the auditor of the accounts of the London School Board.

The applicants for the *certiorari* were three members of the London School Board upon whom the surcharges in question were made.

The total expenditure of the board for the half year ending the 29th Sept. 1898 amounted to the sum of 1,582,504*l.* 18*s.* 3*d.*, out of which a considerable sum represented expenditure incurred by the board in connection with day and evening science and art schools and classes and schools of science maintained and registered under the Science and Art Department.

The auditor held his audit during the months of Feb., March, April, May, and June 1899, and heard the representatives of certain schools and ratepayers, and after taking time to consider his decision disallowed seven separate sums selected as representative or test items, and entered and charged in the accounts of the board for the half year, as being payments illegally made out of the funds of the board, and surcharged the sums upon members of the board.

Three of the sums selected by the board for the purposes of this case were surcharged upon the applicants respectively.

The three sums, and the auditor's reasons for disallowing them, appear in the auditor's certificates.

On the 5th Dec. 1899 an order *nisi* was made by a divisional court calling upon the auditor to show cause against the issue of a writ of *certiorari* to remove into the Queen's Bench Division the three aforesaid disallowances and surcharges made by the auditor as against the applicants.

On the 31st Jan. 1900 an order was made by the court that the corporation of the city of London should be at liberty to show cause against the writ of *certiorari*, and that the facts should be stated in the form of a special case for the decision of the court, and on the 24th May 1900 an order was made by the court that the Camden School of Art and Science Corporation should be heard in the argument.

All the above-mentioned three sums, the payment of which had been disallowed by the auditor, had been paid out of the school fund of the board referred to in sect. 53 of the Elementary Education Act 1870.

The three sums were more particularly expended in maintaining and keeping efficient science and art schools and classes which were held in buildings provided and maintained by the board, the first being the sum of 32*l.* 6*s.* 10*d.* paid to Mr. Langman for salary as drawing instructor. He was appointed by a resolution of the board, dated the 28th March 1889, and it was provided that he should give his whole time to the work at a salary of 300*l.* per annum, rising by annual increases of 5*l.* to a maximum of 350*l.* per annum together with travelling expenses.

At Lady Day 1898 Mr. Langman had under his supervision the instruction in drawing in 491 departments of schools (namely, 225 boys' departments, 224 girls' departments, and forty-two mixed departments), containing altogether 190,268 scholars under instruction in drawing,

and also six pupil teachers' schools containing 1422 pupil teachers.

The principal part of Mr. Langman's time was given to the supervision of drawing, in accordance with the code of regulations for day schools under the Education Department. Among the classes and schools so supervised by him were art schools and classes under the Science and Art Department of the Committee of Council of Education.

A directory published by the Science and Art Department, containing the provisions under which science and art schools and classes were carried on under the department during the half-year ending Michaelmas 1898 was referred to as forming part of the case.

The second of the three sums was the sum of 4*l.* paid to Mr. Crick for special instruction in chemistry at the science class No. 7229, held at the Medburn-street evening continuation school. Mr. Crick was appointed by a resolution of the board, dated the 21st Oct. 1897. Under that resolution Mr. Crick taught theoretical and practical chemistry in evening schools under the Science and Art Department. A large part of Mr. Crick's duty was to supervise the science classes held in day schools and evening continuation schools. From a certificate sent in to the Science and Art Department on behalf of the board, containing the arrangements for the session 1897-8, it appeared that forty-four students attended the science class No. 7229, and paid a fee of 4*s.* each for instruction in science.

The third of the three sums was the sum of 58*l.* paid to the Polytechnic for Science and Art Examination Papers (R. Mitchell, local secretary). Mr. Mitchell was nominated and appointed local secretary in Feb. 1898 under clause 23 of the directory. This sum of 58*l.* was a payment made to the polytechnic as remuneration for Mr. Mitchell's services as local secretary, and for the services of his assistants and superintendents in conducting the science and art examinations held in accordance with the directory at several schools in May 1898, and consisted of a charge of 6*d.* for each student presenting himself or herself for examination.

Until the 1st April 1900, when the Board of Education Act 1899 came into force, the Education Department, which was controlled by the Lords of the Committee of the Privy Council on Education, comprised two establishments or departments, one of which (called "the Education Department at Whitehall") administered the annual Parliamentary grant made for public education (including education at public elementary schools), and the other (called "the Science and Art Department at South Kensington") administered the grant from the Parliamentary vote made for instruction in science and art. The Science and Art Department at South Kensington was incorporated by Royal Charter. Both of these establishments were controlled by the president and the vice-president of the Committee of the Privy Council on Education, but the administrative staff were entirely separate, and had no members in common. The grant for public education was administered by the Education Department at Whitehall in accordance with the code of regulations for day schools (called "the code") and the code of regulations for evening continuation schools (called "the evening school code"), both of which codes were published.

annually by the Education Department at Whitehall. The grant from the Parliamentary vote for instruction in science and art was administered by the Science and Art Department at South Kensington in accordance with the science and art directory, which was published annually by the Science and Art Department at South Kensington. Each establishment or department accounted separately to Parliament.

All scholars in day schools or in evening continuation schools maintained by the board, or in classes under the Science and Art Department at South Kensington held either in the daytime or the evening, were registered either under the Education Department at Whitehall or under the Science and Art Department at South Kensington. All of those scholars in day schools who were under instruction in the seven standards referred to in the code were registered under the Education Department at Whitehall in accordance with the code. Of the scholars in day schools who were under instruction outside the standards, some (called "ex-standard scholars") were registered under the Education Department at Whitehall, and the rest (called "science and art students") were registered under the Science and Art Department at South Kensington. In the practice of the board the principal teacher of each school decided under which of these departments scholars who were being instructed outside the standards should be registered. In many of the day schools maintained by the board there were both ex-standard scholars and science and art students. In some cases ex-standard scholars were taught in the same classes with science and art scholars. In some cases scholars in the standards were also taught in the same classes. Grants were obtained by the board in respect of ex-standard scholars under art. 101 of the code.

At Lady Day 1898 there were in London, provided and maintained by the board, 485 day schools containing altogether 547,106 scholars and 280 evening continuation schools attended by about 29,153 scholars. The number of individual students under instruction in science and art schools and classes in the day schools of the board in the session 1897-8 was about 2644 in science and about 2615 in art. The number of individual students under instruction in science and art schools and classes held in the evening continuation schools of the board in the session 1897-8 was in science about 1768 and in art about 2069. Grants were obtained by the board in respect of the students in the schools, other than the students under instruction in science and art schools and classes, from the Education Department at Whitehall. Grants were made by the Science and Art Department at South Kensington to the board, as managers under the department, in respect of the students in the schools under instruction in science and art schools and classes.

The great majority of scholars in science and art schools and classes in day schools maintained by the board were over thirteen and below fifteen years of age. All of these scholars before entering science and art schools and classes had passed through the standards in the day schools, except a few who were allowed, by virtue of clause 57 of the directory, to enter a school of science on having received instruction up to and including

the work of standard 6. In evening continuation schools, under art. 8 of the evening school code, no scholar under fourteen years of age was admitted unless he was exempt from the legal obligation to attend school. There was no superior limit of age in evening continuation schools and a great number of the scholars were adults.

The subjects of instruction for scholars in the seven standards in day schools for which grants were obtained from the Education Department at Whitehall are set out in arts. 15 to 17 of the code of 1898 and in the schedules to the code. Sched. 1 comprises the standard subjects, sched. 2 the class subjects, sched. 4 the specific subjects, sched. 3 (a) drawing, sched. 3 (b) needlework, and sched. M. manual instruction. The subjects of instruction for students in evening continuation schools for which grants were made by the Education Department at Whitehall are set out in arts. 2 and 3 of the evening school code 1897 and in the schedule to that code.

In the Medburn-street Board School, which is a fair sample of the day schools under the board which contain science and art schools and classes, the following were the numbers of scholars under instruction in the standards, under the code, and of scholars under instruction outside the standards in a science and art school or class during the school sessions ending in 1897, 1898, and 1899 respectively:—In the standards: 1897, 513; 1898, 535; 1899, 658. Outside the standards (including registered science and art students): 1897, 108; 1898, 96; 1899, 89.

In the practice of the board, which was in force during the half year to which this case relates, every science and art school or class provided by the board is carried on in the building or group of buildings in which a public elementary school is carried on, except that in a few cases a room in the neighbourhood of the school buildings is used for the science and art schools or class. In the practice of the board the science and art schools and classes are, so far as possible, carried on in separate rooms from the classes under the code, but rooms are not set apart exclusively for particular classes. In each case the science and art school or class is under the control of the principal teacher of the public elementary school. Further, in the practice of the board the principal teacher is in fact, for purposes of organisation and supervision, as much the principal teacher of a science and art school or class as he is of any class in the standards. This practice the parties other than the board allege to be contrary to the provisions of art. 85 (e) of the code. An assistant teacher under the board is appointed to a school and not to any class in a school, and the allocation of an assistant teacher to a class in the standards or to a science and art class is in the discretion of the principal teacher, but it is contended by the parties (other than the board) that such an allocation to a science and art school or class is illegal. An assistant teacher in a school, who is allocated by a principal teacher to a science and art class, may be also required and frequently is required by the principal teacher to take any class in the standards, but the parties (other than the board) deny the legality of the practice unless such assistant teacher is on the Whitehall time table as well as on the South Kensington time table. There are separate time

tables for schools under South Kensington and for those under Whitehall.

The students in science and art schools and classes were inspected by inspectors under the Science and Art Department in accordance with clause 38 of the directory, and registered under the Science and Art Department in accordance with clauses 15-18 of the directory. The scholars under the board, other than such above-mentioned students, were inspected by inspectors under the Education Department, and registered under the Education Department in accordance with arts. 8, 12, and 85 (d) of the code. With the exception of the cases mentioned in clause 18 of the directory a scholar might not during the half year to which this case relates, be registered both under the Science and Art Department and under the Education Department.

The separate registration of scholars, as arranged during the half year in question, was intended to prevent the possibility of a double grant being obtained in respect of the same scholar, both from the Science and Art Department of South Kensington, and from the Education Department at Whitehall. In the directory for 1895 it was provided that "No pupil in an elementary school receiving aid from the English or Scotch Education Department may be presented for examination by the Department of Science and Art, or registered in any subject of science unless he has on or before the 1st Nov. preceding the examinations been placed altogether in standard 7 of the English code, or has passed standard 6 of the Scotch code."

In the directory for 1896 a new regulation was made (clause 6) that "No attendance can be registered both for a grant under the code of the Education Department and for a grant from the Department of Science and Art." The result of this last regulation was that a scholar might be entered both on the Education Department register and on the Science and Art Department register, but that he could not be entered for the same attendance on both registers. In 1897 this regulation was rescinded, and the regulations contained in clause 18 of the present directory were first established.

Some science schools are officially described as schools of science. This name is applied to schools in which certain conditions laid down in clauses 56 to 73 of the directory are fulfilled, but, except as provided by the said eighteen clauses, there is and was no distinction between schools of science and science classes to which this case relates.

The Department of Science and Art, when allowing science and art schools and classes under its control to be formed in connection with school boards, required that such schools and classes should be under the control of a committee of management. The school board, or a committee appointed by the school board, may act as the committee of management. A committee appointed by the school board need not necessarily consist of or only of members of the school board, but outsiders might be members of the committee. The School Board for London was accepted in 1890 by the Science and Art Department as a committee of management for science and art schools and classes in accordance with a resolution of the board, by which it delegated its duties of supervision and management

to a sub-committee. A revised list of members of the board has since been forwarded to the Science and Art Department triennially (after the elections), and any changes which may have occurred in the interval have been notified by letter to the Education Department.

The board, having been regarded as acting under clause 7B, has not been required to send in each session the ordinary renewal form No. 168. The Science and Art Department states that the board has been regarded by them as a committee of managers supervising classes under clause 7B of the Science and Art Directory.

Evening continuation schools are and were regulated by the evening continuation school code and not by the day school code, except so far as certain articles in the latter are applied to evening continuation schools by art. 1 of the evening school code. The objects contemplated in the evening school code are stated in the explanatory memorandum. The subjects of instruction in respect of which a grant may be earned from the Education Department appear in arts. 2 and 3, and, in the schedule, art. 4 provides that instruction may be given in other subjects, but no grant was made by the Education Department in respect of it. Art. 11 contains the conditions on which a grant may be obtained. Art. 14 contains provisions for preventing in general the registration of scholars both under the Education Department and under the Science and Art Department, but expressly sanctions such double registration in certain specified cases.

The board have always obtained grants from the Education Department in respect of all their schools. Grants from the Science and Art Department have been made to them in respect of all science and art schools or classes maintained by them. Grants received from the Education Department and grants received from the Science and Art Department have in point of fact always been carried to the school fund. The board have charged no fees for instruction in science and art classes provided by them, so far as day schools are concerned, since Aug. 1891, and so far as evening continuation schools are concerned, since the 1st Sept. 1898.

The expenses incurred by the board in respect of science and art schools and classes under the Science and Art Department have always considerably exceeded the grants obtained from the Science and Art Department, and the deficiency has always been made good by the board out of the school fund and the rates levied under the Public Elementary Education Acts.

The auditor's reasons, as stated in his certificate, for disallowing the first sum of 32l. 6s. 10d. were as follows:

(1) Because Mr. Langman was employed wholly or partly in or about the instruction of classes registered under the Science and Art Department; (2) because the said sum was not wholly paid for the performance of duties which the board had power to assign to him, within the meaning of sect. 35 of the Elementary Education Act 1870; (3) because the board have no authority in law to pay the salary of a drawing instructor in a day school where the principal part of the instruction with regard to each child is not elementary; (4) because the board is not a "local authority" within the meaning of the Technical Instruction Acts 1889 and 1891.

The reasons for disallowing the second sum of 4*l.* were as follows:

(1) Because the said sum was not paid to Mr. Crick for the performance of duties which the board had power to assign to him, within the meaning of sect. 35 (3) of the Act of 1870; (2) because the said sum was paid to the teacher for the instruction of classes registered under the Science and Art Department; (3) because school boards have no power to use, expend, or apply any part of the school fund in the instruction of classes registered under the Science and Art Department; (4) because the said sum was paid or expended wholly or partly for services rendered in teaching subjects not allowed, provided for, or recognised by the Education Code; (5) because the said sum was not paid for services rendered as a teacher in an "elementary school" within the meaning of the Education Acts; (6) because the said teacher is not a necessary officer or teacher required by any school provided by the board, within the meaning of sect. 35 of the Act of 1870; (7) because a school board is not a "local authority" within the meaning of the Technical Instruction Acts 1889 and 1891.

The reasons for disallowing the third sum of 5*l.* were as follows:

(1) Because school boards have not any legal authority to use, expend, or apply any portion of the school fund in or about the instruction or examination of day schools or classes in science and art and organised day science schools registered under the Science and Art Department; (2) because the said sum was not expended in maintaining or keeping efficient any public elementary school within the meaning of the Elementary Education Acts; (3) because the said sum was not paid for or in respect of the expenses of an "entrance examination," within the meaning of sect. 2 of the Technical Instruction Act 1889; (4) because a school board is not a "local authority" within the meaning of the Technical Instruction Acts; (5) because the board have no authority in law to incur expenditure in the instruction of children who are not entitled to be placed on the register of a public elementary school owing to the fact that they are already registered under the Science and Art Department.

The questions for the decision of the Court were: (1) Whether it was within the power of the board as a statutory corporation to provide science and art schools or classes either in day schools or in evening continuation schools? (2) Whether it was lawful for them to pay the expenses of maintaining these schools or classes out of the school board rate or school fund? (3) Whether the rule *nisi* should be made absolute with regard to any and which of the disallowances and surcharges.

The Divisional Court (Wills and Kennedy, JJ.) held that all the disallowances and surcharges were rightly made, and that the rule *nisi* ought to be discharged (20 Mag. Cas. 38; 83 L. T. Rep. 595).

The applicants appealed.

Asquith, K.C. and Llewellyn Davies for the appellants.—The decision of the Divisional Court was wrong. It will be admitted that the school board can teach whatever can be taught under the code, and can pay the expenses of that teaching out of the rates. This case chiefly turns upon the Elementary Education Act 1870 (33 & 34 Vict. c. 75). Sect. 3 of that Act provides that "The term 'elementary school' means a school or department of a school at which elementary education is the principal part of the education there given, and does not include any school or department of a school at which the ordinary

payments in respect of the instruction, from each scholar, exceed ninepence a week." It appears from that definition that a part of the education in an elementary school need not be elementary education. There is no definition in this or any subsequent Act of elementary education. What may be considered to be elementary education may change and vary from time to time. There is no definition of "child" or "scholar" though a definition with a limit of age might easily have been provided if the Legislature had intended to limit the age of a "scholar." The power of saying what is elementary education rests with the Education Department, and whatever is authorised by the code may be taught as elementary education. So long as the principal part of the education is elementary as provided by the code, the rest of the education may be in any subjects whatever. The Technical Instruction Act 1889 recognised that a school board might provide technical instruction as elementary education. Instruction in subjects which are not elementary may be given by a school board both in day schools and in evening continuation schools. The Education Code Act 1890, by sect. 1 provides that: "It shall not be required as a condition of a Parliamentary grant to an evening school that elementary education shall be the principal part of the education there given, and so much of the definition of the term 'elementary school' in sect. 3 of the Elementary Education Act 1870 as requires that elementary education shall be the principal part of the education given in an elementary school shall not apply to evening schools." That clearly recognises that higher education may be given by a school board in evening schools. The Elementary Education Act 1891 provided for the free education of children between the ages of three and fifteen, and required elementary schools to find free accommodation for them. Sect. 8 of that Act shows that a school board may educate scholars above the age of fifteen. There is no definition in any of the Acts of "elementary" education or of a "child." The expression "scholar" is frequently used in the Acts, and there is nothing to indicate any limit of age beyond which a school board may not provide education out of the rates. Schools provided by a school board must be "elementary" schools, but the education which may be given at those schools at the expense of the ratepayers is not limited to elementary education. The obligation to attend school and the right to receive education is limited to "children," but a school board may provide education for "scholars"; "scholars" must be distinguished from "children," and the use of the expression "scholars" shows that education may be given to others besides children.

H. Sutton (Sir Robert Finlay, A.-G., K.C., with him) for the auditor.—The school board seek to charge the rates with certain expenses, and they must show that power to charge the rates with those expenses is given by some statute, either expressly or by necessary implication. Upon a consideration of all the Acts it is clear that a school board has no power to provide out of the rates any education except "elementary" education; the duty of a school board is to provide elementary education only. School boards are brought into existence to supply in any school district any deficiency in the elemen-

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tary education of the children in the district, under sect. 5 of the Act of 1870. The expressions "child" and "scholar" are used indiscriminately in the Acts, and no distinction is to be drawn between them. Whatever may be "elementary" education, it must be quite clear that the teaching in the science and art classes of science and art in accordance with the South Kensington Directory cannot be providing "elementary" education; that teaching is all more advanced than anything to be found in the code.

Danckwerts, K.C. and Loehnis for the corporation of London.—Before the Elementary Education Act 1870 there were two distinct votes of money by Parliament, one for the Education Department and the other for the Science and Art Department, in order to enable both those bodies to make grants for education. Those two bodies were entirely separate and distinct. The Act of 1870 was passed in order to provide for any deficiency in the supply of elementary education. The Education Department was established as the authority for creating school boards and for distributing all grants for elementary education to school boards. School boards were empowered to establish and carry on schools under the control of the Education Department, and not schools under the Science and Art Department. The business for which school boards were created was the business of providing "elementary" education, and whatever elementary education may be, it is clear that it cannot include the science and art teaching under the Science and Art Department. Sect. 13 of the Act of 1873, which Act is to be read as one with the Act of 1870, provides that "nothing in this section shall authorise the school board to expend any money out of the local rate for any purpose other than elementary education." That shows clearly that the intention of the Legislature was that nothing but elementary education should be provided out of the rates. The Technical Instruction Act 1889 does not show that a school board may give technical instruction at the expense of the ratepayers. The decision of the auditor and of the Divisional Court was right, because the instruction given at the science and art classes was not "elementary" education, because that instruction was not under the code and in accordance with the Education Acts, and because, even if the school board could provide that education, it could only do so subject to the condition imposed by sect. 13 of the Act of 1873 that they could not expend thereon any money out of the local rate.

Lord Robert Cecil, K.C. and M. M. Macnaghten for the Camden School of Science and Art.—A school board can provide only "elementary education," and this science and art teaching was not "elementary" education. A school board is bound to conform to the Education Code, and these science and art classes were not under the Education Code. These science and art classes were themselves a "department," and it is clear that the principal part of the education in that department was not elementary as required by sect. 3 of the Act of 1870; no part of the education given in that department was elementary.

Asquith, K.C. in reply.—In the Education Act there is no distinction as to the character of the

education which may be given in voluntary schools and in board schools; there is no limitation applicable to board schools which is not also applicable to voluntary schools. The definition of an "elementary school" as a school in which the principal part of the education is elementary applies equally to board schools and to voluntary schools. Sect. 13 of the Act of 1873 deals with the case of a school board acquiring an educational endowment which may be of very great value, and the condition at the end of the section says only that nothing "in this section," not "in the Act," shall authorise expenditure out of the rates upon education other than elementary.

Cur. adv. vult.

April 1.—The judgment of the court was read by

SMITH, M.B. as follows: This is an important case, for it affects the education of a large portion of the population in this country; and although the excellent arguments which have been addressed to us have ranged over a considerable area of ground, this has been occasioned not so much by reason of the magnitude of the real point in the case but because of the discussion of the numerous codes, directories, and Acts of Parliament relating to education which have come into existence since the passing of Mr. Forster's Act of 1870 (33 & 34 Vict. c. 75), intitled "An Act to provide for public elementary education in England and Wales." The title is a good clue to what will hereafter be found in the Act. If the arguments had taken place shortly after its passing, in my opinion the case would be comparatively short; and even now, notwithstanding all that has happened during the thirty years since 1870, the same question still remains, which is the great question in the case—viz., What was the true construction of the Act when it received the Royal Assent upon the 9th Aug. in that year? My brothers Wills and Kennedy in the Queen's Bench Division have upheld certain disallowances and surcharges made by an auditor upon the accounts of the School Board of London in respect of payments made by that board out of moneys obtained from ratepayers towards the cost of certain education. The learned judges have held that no Act has authorised these payments, and the School Board of London appeals. Before I come to the Act itself I must point out the condition of things in relation to two institutions which were then, and had been for some years, in operation in this country in and prior to the year 1870, for these institutions play an important part in the consideration of this case. Then there existed at South Kensington a body corporate under the name of the Department of Science and Art, which corporation was for the furtherance of science and art and generally to do any act or thing that might be conducive to the attainment of the objects for which the department was formed. Its funds were obtained by means of a Parliamentary grant, for which a distinct and separate vote was taken in Parliament. It issued periodically minutes of the matters to be taught in its schools. These minutes became known as the South Kensington Directory. There also existed a branch of the Privy Council called the Education Department. This was unincorporated, and carried on its work

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at Whitehall. Its funds were obtained by means of a Parliamentary grant for which a distinct and separate vote was also taken in Parliament. It issued periodically minutes of matters to be taught in the schools to which it made grants, and these minutes became known as the Whitehall Code. The system of education prescribed by the directory and the code respectively is radically different. Although there are some few matters in the code and directory which somewhat overlap, no objection in this case is taken to the teaching by the school board with ratepayers' money of those matters which appear in the code. It is the teaching of the education prescribed by the directory with the ratepayers' money which is objected to. After the elaborate and exhaustive judgment of Wills, J. it is wholly unnecessary, and would be mere waste of time, to again narrate in detail that which the learned judge has so clearly and adequately done as regards the essential difference between the Department of Science and Art at South Kensington with its directory and the Education Department at Whitehall with its code. It is now sufficient for me to say that the South Kensington Department and the Whitehall Department have always been, and are, separate and distinct institutions. They have a different registration of scholars, different examiners, different grants, and different inspectors; and the South Kensington Department deals by means of its directory with a high and very advanced system of education, while the Whitehall Department, by means of its code, deals with an education of a lower and of a much less pretentious character. I may say without going through the details of the South Kensington Directory that no effort of imagination can describe the system of education therein set forth as elementary education; and for the purposes of this case, but only for this case, it is to be taken by admission of the Attorney-General that the education prescribed by the Whitehall Code is elementary education within the meaning of the Act of 1870; and I am not asked in this case to say whether the code embraces more than elementary education, but I may say it appears to me to embrace elementary education up to its high-water mark. The concrete question now raised is, Can the School Board of London lawfully pay the expenses of schools and classes for teaching the education prescribed by the South Kensington directory out of moneys of the ratepayers of London? Prior to the passing of Mr. Forster's Act in 1870 no ratepayer *quâ* ratepayer was under any obligation whatever to contribute towards the expenses of any kind of education. No rates were applicable thereto. The moneys which the South Kensington department and the Whitehall department respectively received from Parliament, and which were respectively dealt with by them, were moneys obtained from the taxpayers by means of Imperial taxes and not from ratepayers by means of local rates. The Act of 1870 for the first time set up school districts and school boards therein, and for the first time made the education of children between the ages of five and thirteen compulsory, and it, for the first time, enacted that rates should be levied in order to contribute to the expense of education. It is beyond dispute that, if the School Board of London, or, indeed, any other school board (they are all corporations created by statute), is to

justify the payment of the expense of education out of the money of the ratepayers, this must be done by producing some Act of Parliament, or Order in Council having the force of an Act of Parliament, which enacts that the ratepayers' money shall be levied and applied for that purpose. Neither a code nor a directory has any such force. Now, what was the scheme which was brought into being by Mr. Forster's Act of 1870 and whereby rates were to be applied to the cost of education? And what were the requirements of the State which then called forth the Act? Was it a scheme whereby the ratepayers should be called upon to contribute to the expenses of the elementary education of the children in their districts, or was it a scheme that they should be called upon to contribute to the expenses of a high and advanced system of education such as that to be found in the directory of the Science and Art Department at South Kensington, and were persons other than children to be educated at the expense of the ratepayers? What the State then required and what the consequent scheme of the Act was, can only be found by a study of the Act itself, and to the true construction of this Act I now come. In my opinion, if it were not for the definition given in sect. 3 of the term "elementary school"—not, it will be noticed, of the term "public elementary school" which definition Mr. Asquith for the school board very happily described as his sheet anchor, and to which if he could not ride he frankly owned that he must go to the bottom (and with this I agree), there would, in my opinion, for the reasons which will appear, have been but little to argue about. To clearly understand the object and scope of this definition, which, in my opinion, has been entirely misapprehended, I will first go through the Act without the definition to see whether in any part of the Act without the definition it can be said that the Act applies to anything else than the elementary education of children; for it is to the education which is to be found in the Act that the ratepayer is called upon to contribute, and to no other. In the first place, as before stated, the Act is intitled "An Act to Provide for Public Elementary Education in England and Wales." This title is to be read as part of the Act itself: (*Fielding v. Corporation of Morley*, 79 L. T. Rep. 231; (1899) 1 Ch. 1, per Sir Nathaniel Lindley and Chitty and Collins, L.J.J.) It will be noticed it is not an Act to provide for public education in general, but for public elementary education in England and Wales, which is clearly something less than education in general. By sect. 1 it is enacted that the Act may be cited as the Elementary Education Act 1870. By sect. 3 "parent" includes guardian and any person who is liable to maintain, or has the actual custody of, any child. By sect. 5 it is enacted that "there shall be provided for every school district a sufficient amount of accommodation in public elementary schools . . . available for all the children resident in such district for whose elementary education efficient and suitable provision is not otherwise made, and where there is an insufficient amount of such accommodation, in this Act referred to as 'public school accommodation,' the deficiency shall be supplied in manner provided by this Act." It will be seen that this accommodation, whatever the word may mean,

is to be provided for children for whose elementary education efficient and suitable provision is not otherwise made. Mark the words "children" and "elementary education." By sect. 7, every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act, and every public elementary school shall be conducted in accordance with the following regulations: (1) It shall not be required, as a condition of any child being admitted into or continuing in the school that he shall attend or abstain from attending any Sunday school, and that any scholar may be withdrawn by his parent from religious observances. This is the section by which an elementary school becomes and is called a public elementary school—that is, a board school. A point was made on behalf of the school board that, as the word "scholar" was used, the education in a board school was not confined to children. I do not agree; for the word "scholar" and the word "child" will be found indiscriminately used both in the Education Acts and in the codes. By way of example, I would refer to sect. 7 of the Act of 1870, to sect. 8 of the Free Education Act of 1891, and to sect. 17 of the Act of 1870, which two last sections must be read together, and to the code of 1898, p. 18, in which infants are described as scholars. By sect. 8 of the Act of 1870, the Education Department—*i.e.*, Whitehall—is to cause returns to be made, and then to take into consideration every school, whether public elementary or not, and whether actually in the district or not, which in their opinion gives, or will when completed give, efficient elementary education to the children of the district. Again, we find the words "elementary education to children," and the department to ascertain this is Whitehall and not South Kensington. By sect. 17 every child attending a school provided by any school board shall pay such weekly fee as may be prescribed by the school board with the consent of the Education Department—here again Whitehall—with power to the school board from time to time to remit the whole or any part of such fee in the case of any child when they are of opinion that the parent of such child is unable from poverty to pay the same. This section applies to a child and no one else except its parent. Sect. 30 provides for the formation of school boards, and they are by this section made bodies corporate. Sect. 37 deals with school boards in the metropolis, and I find no distinction in the Act upon the point I am now inquiring into between the school board of London and the other school boards in the kingdom. Sects 53 and 54 enact how the expenses of a school board are to be paid. Sect. 53 is as follows: "The expenses of the school board under this Act shall be paid out of a fund called the school fund. There shall be carried to the school fund all moneys received as fees from scholars"—this means the fees the board is entitled to receive under sect 17 from every child attending school (note the words scholar and child used indiscriminately)—"or out of moneys provided by Parliament or raised by way of loan or in any manner whatever received by the school board, and any deficiency shall be raised by the school board as provided by this Act." And by sect. 54 it is provided that "any sum required to meet any deficiency in the school fund whether for

satisfying past or future liabilities shall be paid by the rating authority out of local rates." Here is to be found for the first time in the history of education in this country an enactment applying rates towards defraying the expenses of education. By sect. 67 the local authority once a year are to send to the Education Department, Whitehall, a return containing particulars with respect to elementary schools and children requiring elementary education in their district. By sect. 74, which is under the heading of "Attendance at School," it is enacted that every school board with the approval of the Education Department, Whitehall, may make bye-laws for, amongst others, the following purposes: Requiring the parents of children of such age not less than five years nor more than thirteen years, as may be fixed by the bye-laws, to cause such children (unless there is some reasonable excuse) to attend school; and by a proviso to this section it is enacted that as regards a child between ten and thirteen years of age, such child need not attend school if one of His Majesty's inspectors—that is, from Whitehall—certifies that such child has reached a standard of education specified in the bye-law. Having now gone through the Act apart from the definition of the term "elementary school" in sect. 3, can it be said with any regard to truth that this Act deals with any education other than the elementary education of children? I think certainly not. In addition to what is set forth above, it should not be lost sight of that the Act of 1870 over and over again refers to the Education Department—that is, Whitehall—which for the purpose of this case is admitted to be the authority as to elementary education, and to elementary education alone, and it is admitted that from first to last the Act of 1870 makes no reference whatever to the Department of Science and Art at South Kensington with its high and advanced system of education. That the recipients of the education mentioned in the Act are children, and children only, cannot be denied, for I would ask who else can be found pointed at throughout the Act to receive the education the Act prescribes other than children. I now take the definition in sect. 3 of the Act of 1870 of the term "elementary school." It is as follows: "In this Act the term 'elementary school' means a school or department of a school at which elementary education is the principal part of the education there given, and does not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed 9d. a week." It is argued for the school board that this definition constitutes a statutory enactment whereby a board school or a department of a board school is empowered to give the highest and most advanced education of the South Kensington Directory at the ratepayers' expense, if the principal part of the education given in such school or department of such school is elementary. As to this contention the first observation to be made is that this definition of the term "elementary school" is not an enactment providing for the giving of any education at all, and much less an enactment that a school board in a public elementary school is thereby empowered to give the education prescribed by the Directory of South Kensington at the expense of the ratepayers. This seems to me to be an answer to the school board's con-

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tention. But, if the contention really be that it is a statutory enactment such as the board contends for, what is the meaning of the last part of the definition—"and does not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed 9d. a week"? I heard no reason given as to this by the learned counsel for the school board. It is common knowledge that prior to the Act of 1870 there was in this country a vast amount of education of all descriptions, elementary and non-elementary, carried on by schools supported by voluntary contributions, and, indeed, at the present day there still exists a considerable amount of such education. These schools have come to be known as voluntary schools. It was not the object of Mr. Forster's Act to destroy these voluntary schools and thus cast upon the rates their enormous cost, which was being provided for by voluntary contributions. What Mr. Forster's Act enacted was that the school board should supply and the ratepayer should pay for the elementary education of children if, taking into consideration every school, whether public elementary or not, and whether situated in the school district or not (sect. 8), the elementary education which was then being provided was not sufficient. The object and meaning of the definition clause in my judgment is that, inasmuch as all kinds of education were then being taught in these voluntary schools, those outside schools only should come within the Act and derive the benefits by way of grants and otherwise conferred by the Act at which elementary education was the principal part of the education therein given; and, in addition, that not only those outside voluntary schools should come within the Act if they were schools at which the ordinary payments therein in respect of the instruction from each scholar did not exceed 9d. a week apiece. That voluntary schools are referred to in the Act of 1870 as "elementary schools" in my opinion is apparent from, amongst others, sect. 23, sect. 12, sub-sect. 2, sect. 9, sub-sect. 2, and sect. 7. The object, meaning, and scope of the definition was to select out of these voluntary schools those which had these two attributes—viz., if the principal part of its education was elementary, and also was a school in which the scholars paid no more than 9d. apiece a week. If there was not this definition, I do not see why all voluntary schools could not have claimed the benefit of the Act, no matter what was their teaching, if they conformed to the requirements of the Act as regards religious teaching and otherwise. This definition, in my judgment, instead of being a statutory enactment that the highest education prescribed by the directory should be taught by a board school at the expense of the ratepayers, is a definition whereby a limit is placed as to those voluntary schools which should become public elementary schools within the Act of 1870 and obtain its benefits; and, in my opinion, this definition has no such effect as that contended for on behalf of the school board. What I have above said as to the true construction of the Act of 1870 I will not repeat, for what I have already said upon the Act equally applies whether the definition in sect. 3 is taken or not. I now come to the next Education Act which was passed—namely, the Elementary Education Act 1873, by sect. 2 of which

it is enacted that: "This Act shall be construed as one with the principal Act" (that is, of 1870), "and the expression 'this Act' in the principal Act shall be construed to include this Act." In other words, the Act of 1873 is made part and parcel of the Act of 1870, which Act is to be read as if the Act of 1873 had been contained therein. Now, what do we find in this Act of 1873? Sect. 13, in my opinion, is decidedly of importance. It enacts: "A school board shall be able and be deemed always to have been able to be constituted trustees for any educational endowment or charity for purposes connected with education . . . and to have and always to have had power to accept any real or personal property given to them as an educational endowment or upon trust for any purposes connected with education; provided that (1) nothing in this section shall enable a school board to be trustees for or accept any educational endowment, charity, or trust the purposes of which are inconsistent with the principles on which the school board are required by sect. 14 of the principal Act to conduct schools provided by them." (This is the section relating to the non-teaching of religion distinctive of any particular denomination.) "And (2) every school connected with such endowment, charity, or trust shall be deemed to be a school provided by the school board, except that nothing in this section shall authorise the school board to expend any money out of the local rate for any purpose other than elementary education." Here in this section, as it seems to me, is an emphatic declaration by the Legislature, which, be it remembered, forms part and parcel of the Act of 1870, that the school board is not to expend any money out of a local rate for any purpose other than elementary education. In fact, it enacts in short and positive terms that which is the whole tenor of the Act of 1870, as I have above endeavoured to show. In my opinion, the many Acts which were subsequently passed down to and including the year 1891 have no real bearing on the point I have to decide, except that they show that the Legislature was throughout dealing with the elementary education of children and nothing else. I will very shortly go through them, for they have been referred to. In 1876 an Act was passed as to the employment and education of children. In the same year another Act was passed, called the Elementary Education Act 1876. By sect. 4 it enacted that it was the duty of the parents of every child to cause such child to receive sufficient elementary instruction in reading, writing, and arithmetic, and that in default he should be liable to a penalty. By sect. 48 "a child in this Act means a child between the ages of five and fourteen years." In 1879 an Act was passed relating to the powers of school boards in relation to industrial schools. In 1880 an Act was passed to make further provision as to by-laws respecting the attendance of children at school under the Elementary Education Acts. In 1885 an Education Act was passed foreign to this case. In 1890 an Act was passed for the purpose of making operative certain articles in the code of 1890. This Act, by sect. 1, enacted that, "it shall not be required as a condition of a Parliamentary grant to an evening school that elementary education shall be the principal part of the education there given, and so much of the definition of the term 'elementary school' in

sect. 3 of the Elementary Education Act 1870 as requires that elementary education shall be the principal part of the education given in an elementary school shall not apply to evening schools." So that, although an evening school need not have elementary education as the principal part of its education to thereafter get a Parliamentary grant (this has nothing to do with rates and moneys therefrom), yet, if the school was one at which the ordinary payment in respect of instruction for each scholar exceeded 9d. a week, an evening school, it would seem, is still left with that fetter, and will not get a Parliamentary grant. This is the first Act to which my attention has been called in which an evening school is mentioned. By sect. 3, subsect. 2 of the Act of 1890, the Elementary Education Acts 1870 to 1876, and the Elementary Education Act 1880, and this Act may be cited collectively as the Elementary Education Acts 1870 to 1890. In 1891 an Act was passed to make further provision for assisting education in public elementary schools in England and Wales. By sect. 1 a grant called a free grant was passed by Parliament in aid of the cost of elementary education in England and Wales at the rate of 10s. a year for each child of the number of children over three and under fifteen in average attendance at any public elementary schools in England and Wales not being an evening school; and by sect. 13 (1) the Act might be construed as one with the Elementary Acts 1870 to 1890, and (2) the Acts may be cited collectively as the Elementary Acts 1870 to 1891. So much for the Acts ranging from 1870 to 1891; and I can find no indication in any of them that education other than that embraced in the Act of 1870 was to be taught by a school board at the expense of the ratepayers; and the education which a school board is by statute authorised to teach at that expense, in my judgment, is the same whether it be taught in the daytime or the evening. There is one other Act to which I must make reference, for it was much relied upon by the school board. It was not one of the Elementary Education Acts of 1870 to 1891, which form a code of themselves, but is one of the Technical Education Acts, 1887 to 1891, which form a distinct code of themselves. The Act is called the Technical Instruction Act 1889 (52 & 53 Vict. c. 76). It is an Act to facilitate the provision of technical instruction. It is said that this Act contains a legislative recognition that the higher education of South Kensington, and not merely the elementary education provided by the code, can be taught by school boards and be paid for out of rates. This Act, by sect. 1, enacts that a local authority (this is not a school board, but a town or county council) may out of a local rate (this is not an education rate) supply or aid technical or manual instruction, but shall not out of the local rate supply the same to scholars receiving instruction at an elementary school in the obligatory or standard subjects prescribed by the minutes of the Education Department, Whitehall. The reason for this seems pretty obvious, because to the scholars in those standards the Education Department might well give elementary technical or manual instruction, and that the local and school board authorities were not to clash. Then comes a provision about making a local rate, by a local authority, which has nothing to do with a

school board. It is there provided (sect. 1) that the rate to be raised in any one year by a local authority is not to exceed 1d. in the pound, and yet, according to the argument of the school board, it may levy for technical and manual instruction a rate to any amount it may require. Sect. 1 (3) enacts—nothing in this Act shall be construed so as to interfere with any existing powers of school boards with respect to the provision of technical and manual instruction. As before stated, it seems to me that there may well be technical and manual instruction of an elementary kind which the school board may well teach as being elementary education. Then comes this—the conditions on which Parliamentary grants may be made in aid of technical and manual instruction—i.e., to the local authority—shall be those contained in the minutes of the Department of Science and Art—the department, as before shown, with which the Elementary Education Act of 1870 has nothing to do. I have gone far enough in this Act to show that it has nothing to do with the true construction of Mr. Forster's Act of 1870, and with just referring to the novelty of the attempt to interpret one Act by another Act passed nineteen years afterwards, upon another and different subject-matter, I will conclude by saying that the Act of 1889 is not a legislative recognition of the right of the school board to teach the directory education and make the ratepayers pay for it. I now answer the questions put to me, but I will answer (1) and (2) together. (1 and 2) I say it was not within the powers of a board as a statutory corporation to provide science and art schools or classes of the kind referred to in this case, either in the day schools or in evening continuation schools, out of the school board rate or school fund. (3) That the rule *nisi* should not be made absolute in regard to any of the disallowances and surcharges, for in my judgment, for the reasons above given, they were correctly made by the auditor. I may add that, if the school board is to have the powers it seeks, these must be obtained by legislation, for the powers it desires to have do not exist in any statute or its equivalent already passed. This appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellants, *C. E. Mortimer.*

Solicitors for the auditor, *Sharpe, Parker, Pritchards, Barham, and Lawford.*

Solicitor for the Corporation of London, *The City Solicitor.*

Solicitor for the Camden School of Art, *F. W. Hales.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 5, 11, and 18, 1901.

(Before COZENS-HARDY, J.)

COUNTRESS OF BELMORE v. KENT COUNTY COUNCIL. (a)

Highway — Presumption of dedication — Uninclosed strip.

An uninclosed strip of land about 300 yards long, 50 yards in width at its broadest part, and tapering to nothing at either end, was adjacent

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

CHAN. DIV.]

COUNTRESS OF BELMORE v. KENT COUNTY COUNCIL.

[CHAN. DIV.]

to an ancient highway. The owners of the adjoining land sought to restrain the highway authority from depositing rubbish or materials on the strip. Willows and grass had been cut by the owner of the adjoining land and her tenants, and gipsies warned off and cattle turned away. The strip was swampy, and there was no evidence that any vehicle ever went along it, but occasionally foot passengers walked along the margin instead of the high road.

Held, that there was no presumption that all the space between the hedges had been dedicated to the public, and that, even if there was such a presumption, it was rebutted by the circumstances.

This was an action brought by the Countess of Belmore and her tenant claiming a declaration that an uninclosed strip of land at Otford, in the county of Kent, between the main road and inclosed land, known as Barham Farm, was the property of the plaintiff, and for a declaration that the defendants were not entitled to use the strip of land as a place of permanent and general deposit of materials, and for an injunction restraining the defendants from using or placing on or permitting to remain on the said strip rubbish or materials.

The land in question was separated by a piece of swampy ground from the metalled part of the highway for some 300 yards, and was 50 yards wide at the broadest part, narrowing down to a point at either end. Willows and rough grass grew on the land, and had been cut by the tenant, who had put cattle there to graze, and warned off gipsies. Strangers, however, had cut grass in small quantities and carried it away.

There had been an uninclosed strip on the opposite side of the road, upon which a footpath had been constructed by the highway authority, and the adjoining owner had then inclosed up to the newly constructed footpath.

Eve, K.C. and *Wace* for the plaintiff.—There is no presumption of dedication to the public up to the fence of the plaintiff's land, and, even if there were any presumption, it is rebutted by the evidence in this case.

Vernon Smith, K.C. and *Church* for the defendants.—There is a presumption of dedication to the public of all land up to the old fence, and the dedication is not limited to the metalled portion of the road.

Eve, K.C. replied.

Cur. adv. vult.

March 18.—*COZENS-HARDY*, J.—The question in this action is whether the public have any, and if so what, rights over an uninclosed strip of land adjacent to the metalled road leading from Sevenoaks to Otford. This road was not laid out under any Inclosure Act. It seems to be an ancient highway, which was kept in repair under a turnpike trust from the middle of last century until a few years ago, when the trust expired. It is now a main road under the control and management of the Kent County Council. The defendants have begun to deposit rubbish and to lay a drain along the strip, for the purpose of rendering it suitable for public use. The strip lies on the west side of the road. It is about 300 yards long, and 50 feet wide at the broadest part, tapering off to nothing at each end. The strip is not part of the waste of the manor. The land adjoining the

strip on the west is a farm, of which the plaintiff, the Countess of Belmore, is tenant for life in possession, the co-plaintiff Kipping being her tenant. The farmhouse and farm buildings lie a short distance to the west of the strip. Pawley, who occupied the farm from 1865 till 1870, constructed a cartway from the high road across the strip. This cartway was raised some 3ft. or 4ft. and a drain was placed under it to carry off the water from the upper part into a ditch which was dug along the strip. In 1893 the plaintiff Kipping made another similar cartway to the north of Pawley's cartway. There is an old hedge between the fields and the strip. This hedge is at the top of a small bank. The land slopes down from the hedge eastwards and from the high road westwards, and until Pawley's drain and ditch were made the bottom of the strip was a very swampy place, and even now it is soft and wet except in summer weather. Willows and rough grass grow on the strip. These willows were from time to time cut and carried away by the tenants of the farm. The rough grass was occasionally cut by the tenants. There is no evidence that any vehicle ever went along the strip, and, indeed, within living memory this would not have been possible. Nor is there any evidence that any man on horseback ever went along it, except occasionally on the margin next the high road. There is no defined track or footpath on this margin, but occasionally foot passengers walk on this margin instead of on the high road. This was not done frequently, but the margin was trodden by foot passengers more often than by men on horseback. On the opposite, or eastern, side of the high road was a somewhat similar strip, which has recently been inclosed with the consent of the Kent County Council. There is now a formed footpath on the east side of the high road, and I gather that foot passengers have at all times been in the habit of walking on the grass margin on the east side rather than on the west side, probably because the surface was more level and even on the east than on the west. Thus far I have dealt with facts which are either admitted or not substantially controverted. But there are other facts in dispute, and upon these issues I must state my findings. Thomas Fishenden, son of an old tenant of the farm, and who followed his father as tenant, speaks from 1848 till 1865. He gave his evidence in a manner which completely satisfied me. He swore that his father's cattle used to be turned into the strip to graze, and that his father used to put hurdles all round the boggy places to keep the cattle from getting in, which hurdles were only taken away in the summer. I accept this evidence. There is a good deal of evidence by other tenants or their labourers that horses and cattle from the farm used to be turned out to graze on the strip. There is no doubt that horses or cattle passing along the road sometimes strayed into or were turned into the strip. The principal person who did this was a cattle dealer named Young, and he admitted that he had been ordered off by the tenants, who would not let the cattle stop. It is clear that gipsies occasionally stopped there, but they were ordered off by the tenants, and not by the road authorities. Mr. Morgan, who was road surveyor up to about 1878, seeing some cattle straying on the strip, ordered them off, saying that they had no right there without leave of the owner. On the other hand,

some cows were occasionally taken there to graze by occupiers of land in the neighbourhood, though this was not proved to be with the knowledge of the tenants. Grass was occasionally cut by passing strangers and carried away in carts, but such acts were wrongful, whether the strip was or was not part of the highway. The result of the evidence as a whole is this—as far as living memory goes the plaintiffs or their predecessors in title have used and enjoyed this strip in such a manner and to such an extent as the nature of the strip permitted, and have exercised acts of ownership inconsistent with public rights. I refer especially to the hurdles, to the roadways to the ditch, and, though I do not attach great importance to it, to the cutting of the willows. I do not find a single act done on the strip by the road authorities until the acts complained of in this action. I cannot regard the occasional placing of a heap of stones or road scrapings on the west side of the highroad instead of on the east side, where they were usually placed, as of any real importance. There is a conflict of evidence as to the fact, but, assuming it to be proved that a heap of stones or scrapings was placed there for a short time, I should hesitate to regard it as an act which the occupier of the strip was bound to protest against. The proper inference would be that it was permissive. Upon the whole, I think the evidence is insufficient for the purpose of proving dedication of the strip as a highway by user. There is not a single exercise of highway rights over the strip except at the narrow margin next the highroad—a margin varying from two to four feet in width, and to some extent obstructed by shrubs. The defendants, however, assert that there is a presumption of dedication to the public quite up to the ancient fence, and that there is no justification for limiting the dedication to that portion of the highroad which is metalled, even though highway rights have not been exercised beyond the metalled highway. On this point I have derived assistance from the judgments of Channell, J. and of the Court of Appeal in *Neeld v. Hendon Urban District Council* (81 L. T. Rep. 405). Lord Russell of Killowen says at p. 409: "It seems to me very difficult to give assent to such a general proposition as this—that, under all conditions where you find a metalled road bordered by unmetalled margins and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway. The question whether such a space is all highway would depend to a great extent, I think, on many other circumstances—such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway. It seems to me that it is not safe to say, as a general proposition, without knowing the conditions of each particular case, that in such a case as I have mentioned all the space between the hedges is part of the highway. . . . It is often impossible to discover the exact circumstances under which a fence has been erected upon any particular spot. The fence may have been put there because there was already a sort of natural boundary, or it may be

in some cases that the person who made the enclosure wished to leave a margin of ground for the use of the public if at any time the road should become foundrous. But even in the latter case I doubt whether it would be right to say that a margin left by the landowner outside a fence for that purpose is necessarily dedicated by him as a highway for all time." Now, applying the principles laid down by the late Lord Chief Justice, I think there is no presumption of dedication up to the old fence, or that, if there is any such presumption, it is rebutted by the surrounding circumstances and by the evidence. The only difficulty I have felt is as to the margin. But upon reflection I do not see my way to hold that it is part of the highway unless every highway passing through an uninclosed country must, as matter of law, be deemed to include a certain space on each side of the metalled road. I am satisfied that the margin has been used only occasionally and by a few persons, and only to such an extent and in such a manner as was inevitable by reason of the absence of any fence or other obstacle. Such user is too indefinite to form the foundation of a public right, or to establish a dedication as part of the highway. I may add that, even if the public have rights over the margin, but not beyond, the acts of the defendants cannot be justified. I must therefore make a declaration and grant an injunction in terms of paragraphs 1 and 3 of the claim, and the defendants must pay the costs of the action.

Solicitors: Paterson, Snow, Blowam, and Co ; Prior, Church, and Adams.

Tuesday, March 26, 1901.

(Before COZENS-HARDY, J.)

HEDLEY v. WEBB. (a)

Local government—Sewer—Drain—Laying sewer in land of another—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 13.

In Nov. 1899 W., the owner of a plot of land on which he had erected two semi-detached houses, laid down two sets of pipes connecting the water-closets of the houses with a sewer vested in the local authority. This connection was made partly under a road which had been conveyed to the plaintiff who claimed a declaration that W. was not entitled to drain his premises through the plaintiff's land. W. submitted that his two houses were two buildings within the Public Health Act 1875, and that from the point of junction of the pipes to the sewer was a sewer within the Act.

Held, that the erection was only one building, although it consisted of two semi-detached houses. Held, also, that a man by making a culvert wrongfully on another man's land without his consent could not make the culvert a sewer and divert the property from the owner of the land.

This was an action for a declaration that the defendant was not entitled to drain his premises through the plaintiff's premises, for an injunction to restrain him from permitting the connection to

(a) Reported by G. B. HAMILTON, Esq., Barrister-at-Law.

remain, and for an order for the removal of such connection.

The defendant, the owner of a plot of land and of half the road in front of it, in Nov. 1899 erected two semi-detached houses on his land, and laid down two sets of pipes from the water-closets of the houses which joined and connected with the sewer vested in the local authority in that part of the road which did not belong to the defendant.

On the 17th Jan. 1901 Marchant conveyed two plots and the half of the road in which the conduit connected with the sewer to the plaintiff.

Mickleth, K.C. and *E. Clayton* for the plaintiff. — The two semi-detached houses are only one building, and the culvert is not a sewer. The plaintiff cannot by wrongfully making a culvert on another man's land divert the property from the owner of the land :

Meader v. West Cowes Local Board, 67 L. T. Rep. 454; (1892) 3 Ch. 18.

Evie, K.C. and *Buckmaster* for the defendant. — The two houses are two buildings within the meaning of the Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 13. From the point of junction the culvert was a sewer and not a drain :

Kershaw v. Taylor, 73 L. T. Rep. 274; (1895) 2 Q. B. 471;

Travis v. Utiley, 70 L. T. Rep. 242; (1894) 1 Q. B. 233.

The owner of the land acquiesced in the making of the connection through his land.

COZENS-HARDY, J.—What the defendant had done was *prima facie* a trespass, but it was said to be justified in several ways. First it was said that Marchant, the plaintiff's predecessor in title, had acquiesced in the making of the connection through his land, but there was no evidence of that. Then it was said that the culvert from the pair of detached houses was not a drain, but a "sewer" within the meaning of the Public Health Act, and was vested in the local authority, and that the plaintiff had no right to interfere. The Act defined "drain" and "sewer" as follows: "Drain" means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cess-pool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed." "Sewer" includes sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act." Apart from authority, I would have thought that this was the case of the drainage of one building only. A structure might be one building whether it was occupied by one or more person or persons, and whether in flats or not. The term "one building" was not equivalent to the term "one house." A pair of semi-detached houses might be one building only. In *Kershaw v. Taylor* (*ubi sup.*), a Divisional Court held that from the point of junction the culvert was a sewer and not a drain within the Metropolitan Local Management Act 1855, but there the drainage came from two separate pairs of semi-detached houses. In *Travis v. Utiley* (*ubi sup.*), it was held

that a pipe receiving the drainage of more than one "building" was a sewer within the meaning of the Public Health Act; but in the present case the erection was only one building, although it consisted of two semi-detached houses, and this culvert, so far as it ran through the plaintiff's land, was not a sewer. But even if it was a sewer there would be a further difficulty, as to which, as at present advised, his Lordship was against the defendant. Could a man by making a culvert wrongfully on another man's land without his consent make it a sewer so as to vest it in the local authority and divert the property from the owner of the land? The observations of Chitty, J. and the Court of Appeal in *Meader v. West Cowes Local Board* (*ubi sup.*) were against the defendant on this point. Webb could not by a trespass on the plaintiff's own land make something a sewer so as to prejudice the plaintiff. I must make a declaration that the defendant was not entitled to drain through the plaintiff's premises, and order the defendant to take up and remove the drain complained of.

Solicitors: *John Bartlett; Shirley W. Woolmer.*

KING'S BENCH DIVISION.

April 1 and 3, 1901.

(Before Lord ALVERSTONE, C.J.)

ATTORNEY-GENERAL (on the relation of the Bromley Rural District Council) AND THE BROMLEY RURAL DISTRICT COUNCIL v. COPELAND. (a)

Highways—Highway authority—Pipe through bank to carry off rain waters from highway—Right to pass the waters through pipe on to adjoining land—“Drain”—Prescription—Highway Act 1835 (5 & 6 Will. 4, c. 50), s. 67.

A pipe through a bank separating a public highway from adjoining land, through which the rain waters collecting on the highway are passed from the highway on to the surface of the adjoining land and not to any proper outlet, is not a “drain” within sect. 67 of the Highway Act 1835, and therefore the highway authority have no power under that section, as against the owner of the adjoining land, to maintain such a pipe and thereby discharge the waters collecting on the highway on to the surface of his land.

The right which a highway authority have over an ancient highway is not such a dominant tenement as would give them a common law right by prescription to maintain this pipe through the bank and to pass the waters from the highway through the same on to the surface of the adjoining land; and therefore the highway authority can acquire no such right or easement by prescription even though they have for more than the statutory period exercised the right of passing the water through the pipe on to the adjoining land.

FURTHER CONSIDERATION before Lord Alverstone, C.J. in an action tried by him without a jury.

The plaintiffs were the Attorney-General on the relation of the Bromley Rural District Council and the Bromley Rural District Council, and they claimed an injunction to restrain the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

K.B.] ATTORNEY-GENERAL AND BROMLEY RURAL DISTRICT COUNCIL v. COPELAND. [K.B.]

defendant from stopping up or obstructing an ancient watercourse or flow of water passing from the public highway leading from West Wickham to Beckenham, in the county of Kent, over land of the defendant lying between such highway and West Wickham station, in the parish of West Wickham, and from causing obstruction to the highway; and they also claimed damages for the obstruction of and injury to the highway.

The Bromley Rural District Council is the highway authority for the parish of West Wickham, and the road in question was the public highway in the parish leading from West Wickham to Beckenham, and was under the highway jurisdiction of the council.

The defendant was the owner of certain land in the parish adjacent to the road, and separated therefrom by a bank and hedge. The defendant bought this land about two years before the date of the action and he had built houses thereon, and such houses were occupied by his tenants. The road was an ancient highway, and there was a fall or dip in the road opposite the defendant's land. At the point in the road at which the question in the case arose there were, prior to the year 1868, two old catch-pits, one on either side of the road, connected by a pipe or culvert under the road. This point was the lowest point of the road, there being a falling gradient on one side and a rising gradient on the other, and the land on the side opposite to the defendant's land also sloped downwards towards the road.

Prior to the year 1868 the rain and storm waters collecting on the road and running down the road in both directions towards the lowest point would there collect and pass into the catch-pits, and the water from one catch-pit would then pass through the pipe under the road into the catch-pit on the defendant's side, and thence from this catch-pit to an old cut in the bank.

In the year 1868 the catch-pits were enlarged and were connected by an iron pipe under the road, and from the catch-pit on the defendant's side a pipe was put through the bank under the hedge which divided the road from the defendant's land, and through this pipe the rain and storm waters collecting at this point of the road were passed from the catch-pits on to the defendant's land and over the surface of the same.

The learned judge was of opinion that there was sufficient evidence to show the existence of an easement for passing the water through the pipe on to and over the defendant's land, assuming that the plaintiffs were entitled to claim such an easement. It was not denied that the defendant had obstructed the flow of the water.

The plaintiffs alleged that the Bromley Rural District Council and their predecessors in title had made and maintained for many years past this pipe through the bank, and that the rain and storm waters collecting on the road had passed through such pipe on to and across the defendant's land for many years prior to the purchase of the land by the defendant and had continued so to pass at the time of such purchase, and that such waters had so flowed from the road through the pipe on to the defendant's land from time immemorial, and that there was always an ancient watercourse and natural outlet for such waters from the road over the defendant's land; and that the defendant had unlawfully obstructed the

channel and pipe and had interfered with and prevented the flow of the water from the road over his land.

The defendant alleged that there never was or had been an ancient watercourse or natural outlet for the rain waters from the road over his land, and he submitted that neither the Bromley Rural District Council nor their predecessors in title had acquired any right to a watercourse or to the flow of the water from the road on to or over the defendant's land.

Sect. 67 of the Highway Act 1835 (5 & 6 Will. 4, c. 50) provides:

And be it further enacted, that the said surveyor, district surveyor, or assistant surveyor, shall have power to make, scour, cleanse and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, flats or bridges, as he shall deem necessary, in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in inclosed lands or grounds are herein directed to be settled and paid.

Bray, K.C. and Clarke Williams for the plaintiffs.—The question is whether there can be a legal origin for this easement in favour of the plaintiffs. We contend that there is a legal statutory origin and a legal common law origin. For the legal statutory origin we rely on sect. 67 of the Highway Act 1835, which gives the highway authority power to acquire an easement, to make and maintain a drain, and to pour water through that drain on to the adjoining land. If there had been a ditch at the other side of this hedge and the defendant's predecessors had allowed this water to run down that ditch, then undoubtedly the plaintiffs would have had an easement to put a pipe through the bank into that ditch. In that case the pipe would have been a "drain" within sect. 67. It makes no difference whether there is a ditch or not, except as to the amount of compensation to be paid under the section to the owner; otherwise where there is no ditch the authority could not exercise their powers at all, and the road would remain flooded and the object of this section be defeated. We therefore have the right to make a drain through this bank and let the water pass through, and we contend that this pipe is a "drain" within sect. 67. The only case we can find on the point is *Croft v. Rickmansworth Highway Board* (60 L. T. Rep. 34; 39 Ch. Div. 272), where it was held that a well into which waste water flowed through a pipe and thence percolated into the soil was not a "drain or watercourse" within sect. 67. That case only shows that if we were merely seeking to make or cleanse a pond, or if we were draining into a pond or ditch, we should have no right to clean out that pond or ditch except in so far as this section gives us power to do it. A clear distinction is there drawn between the drain by which the water was conveyed to this pit and the pit itself; and all the case decides is that the pit for receiving the water from the drain was not a "drain." That case therefore is no authority against the plaintiffs. The plaintiffs have therefore a statutory right under this section to acquire this right against the defendant, and to put this pipe through the

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bank. That is the statutory origin of the plaintiffs' rights. Then with regard to the common law origin, where a thing like this has been going on for a great many years—and we do not know when this began—a legal origin ought to be presumed; and in dealing with the common law right we have to deal with the two halves of the road differently, because presumably the half of the road on the defendant's side belongs to the defendant, and the other half to the owner of the land on the other side. Clearly the owner of the land on the other side could claim an easement—if he proved it—to go through the defendant's land under the road and so on through the bank to the land on the other side of the bank. He may acquire that right either by virtue of his own acts, or by the acts of his tenants and occupiers, as an occupier may acquire rights for the owner, in which case both owner and occupier would be entitled:

Ivimey v. Stocker, 14 L. T. Rep. 427; L. Rep. 1 Ch. 396.

There would be nothing to prevent the owner and his occupier from acquiring the right to take the water from his side of the road over the defendant's land, and the highway authorities are in the position of occupiers of the roadway for certain purposes: (per Lord Cairns in *Rangeley v. Midland Railway Company*, 18 L. T. Rep. 69, at p. 70; L. Rep. 3 Ch. 306, at p. 311). With regard to the half of the road on the defendant's side, although an ordinary tenant cannot acquire as against his landlord, who is the owner of the adjoining land, an easement over that adjoining land, and although if the highway authority were an ordinary tenant there might be a difficulty in saying that the highway authority could acquire an easement by occupying land belonging to the owner of the servient tenement, yet this is not the case of an ordinary tenant, but a case where the highway authority have a qualified but permanent occupation which is sufficient to found an easement. Upon both grounds the plaintiffs are entitled to succeed.

G. B. Rashleigh (Dickens, K.C. with him) for the defendant.—The defendant was lawfully entitled to do what he did. We submit these four propositions: First, the Prescription Act 1832 does not apply to rights in gross:

Shuttleworth v. Le Fleming, 19 C. B. N. S. 687; 11 Jur. N. S. 840.

Secondly, an owner of land has a right to protect himself from flood water not brought there by his own act, although by so doing he injures someone else:

Nield v. London and North-Western Railway Company, L. Rep. 10 Ex. 4.

The defendant has done an act on his own land; he has stopped up this pipe, and by so doing it may be said that he has injured the highway, but he was entitled to do so to protect himself. Thirdly, a highway authority may not make use of their rights over the road in such a way as to deprive the adjoining owner of the reasonable use of his land:

Vestry of St. Mary, Newington v. Jacobs, 25 L. T. Rep. 800; L. Rep. 7 Q. B. 47.

Fourthly, the only statutory right which this highway authority have under sect. 67 of the

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Highway Act 1835 is the right to carry the water by a proper drain off the road through the land, but not in such a way as to do the defendant an injury. The statute could never have intended to give the plaintiffs a right to make a drain through this bank and let the water run on to the defendant's land without making any provision for the proper disposal of the water. It is assumed that under the operation of this section the surveyor of highways at some distant time made these drains and has a right to keep them open, but there is no record whatever to show that any such thing ever took place, and there is no authority to show that such a right can be claimed under the statute by prescription. The plaintiffs are obliged to call in aid the Prescription Act 1832 in order that they may claim the benefit of sect. 67; but I assume that the highway authority are not "occupiers of a tenement," so as to bring them within sect. 5 of the Prescription Act; and if they are not occupiers of a tenement, they do not come under the Prescription Act at all. The plaintiffs are a statutory body and can have no rights except those given by the statute, and unless such a right as is here claimed is expressly given them by the statute, they do not possess it:

Croft v. Rickmansworth Highway Board (ubi sup.)

There is nothing in the statute which gives them the right to drain the water off the road on to the defendant's land and leave it there; and the principle of that case is strongly in the defendant's favour, as it shows that the highway authority had no right to interfere with the enjoyment of the defendant's land. This pipe is not a "drain" within the meaning of the section, and therefore there cannot be a legal origin for the right claimed. The pipe was there when the district council came into possession, but unless the statute gave them the right to put it there, no prescription can give them the right. Again, the plaintiffs have no such right in the road as would enable them to acquire an easement by common law independent of statute. The public have no hereditament, no property, and no rights in the road which can be passed from one to another, and therefore they cannot acquire any easement of the kind here claimed, and the only thing in *Rangeley v. Midland Railway Company (ubi sup.)* to support such a right is the use by Lord Cairns of the word "occupation." With regard to the Acts of Parliament under which the district council claim their title, it is useful to refer to the judgment of Thesiger, L.J. in *Rolls v. Vestry of St. George-the-Martyr, Southwark* (43 L. T. Rep. 140, at p. 143; 14 Oh. Div. 785, at pp. 800-1), where he deals with the rights of the surveyor over the roads, and shows that under the Highway Act 1835 the surveyor had no rights beyond mere rights of control and management. Then under sect. 11 of the Highway Act 1862 (25 & 26 Vict. c. 61), all the property, including all easements, which belonged to the surveyor of highways passed to, and became vested in, the highway board of the then formed highway districts. Then under sect. 4 of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), power was given to the rural sanitary authority of a district coincident with a highway board to become a highway board and to exercise all the powers thereof, and, under sect. 5, all the property, including "ease-

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ments"—as in the previous Act—of the highway board or any surveyor of the parish passed to, and became vested in, the rural sanitary authority, so that if there were any "easements" in the original surveyor they passed to the rural sanitary authority. Then, lastly, under sect. 25 of the Local Government Act 1894 (56 & 57 Vict. c. 73), all the powers, duties, and liabilities of the rural sanitary authority in the district and of any highway authority were transferred to the rural district council. The easement claimed is not an easement which the surveyor of highways could have acquired, and therefore not an easement which became vested in the plaintiffs. He also referred to

Hawkins v. Butler (1892) 1 Q. B. 668;

Coverdale v. Charlton, 40 L. T. Rep. 88; 4 Q. B. Div. 104.

Clarke Williams in reply.

Cur. adv. vult.

April 3.—Lord ALVERSTONE, C.J. read the following judgment:—In this case the Attorney-General, acting on the relation of the Bromley Rural District Council, and the Bromley Rural District Council, have brought an action against the defendant in respect of the interference with the flow of water through a certain pipe which had been put through the bank of the defendant's land, and it was not denied that the defendant had obstructed the flow of the water. The only question for my determination is whether the Attorney-General on the relation of the plaintiff board or the plaintiff board themselves are entitled to an injunction to restrain the defendant from interfering with the flow of water through the pipe in question. The point of law raised is somewhat novel. It will be convenient in the first instance that I should state the facts which gave rise to it. There is in the district of the Bromley Rural District Council a road which passes from the Swan inn at West Wickham north-west in the direction of Beckenham. It is not disputed that the road was an ancient highway. The road near the point as to which the question arises passes to the south-west of West Wickham station, and runs approximately parallel to the railway, which is in a cutting some little distance to the east. I find upon the evidence before me that prior to the year 1868 there were at the point E on the Ordnance plan which was produced in evidence in this case two old catch-pits, one on either side of the road, connected by an old pipe or culvert under the road. There is a falling gradient from the south for a distance of upwards of one-quarter of a mile to the point E, about one in twenty-five, and a rising gradient from the point E towards the north-west having a fall of about one in 400. The point E is in consequence the lowest point in the road at that point, having gradients rising from it in each direction. In addition, the natural lie of some part of the land on the west is towards the road. Prior to the year 1868 the water collecting on the road and running down each gradient in both directions and collecting at the point E would find its way into the two old catch-pits, and from the western catch-pit by means of the pipe under the road to the eastern end, and then to an old cut in the bank. In the year 1868 the old catch-pit on the west was enlarged, a new catch-pit put on the east side, and the catch-pits were connected by

an iron pipe, and from the eastern catch-pit stone pipes of 12in. diameter were put in through the bank. Under these circumstances I come to the conclusion that there was sufficient evidence before me to show the existence of an easement for the passing of water through the pipe on to the land of the defendant, assuming that the plaintiffs are entitled to claim such an easement. I have now to consider whether the Bromley Rural District Council, or the Attorney-General on their relation, can enforce against the defendant the right to continue the flow of water through the pipe in question. It is urged by the plaintiffs that, inasmuch as under the 67th section of the Highway Act 1835 a surveyor of highways could make drains through adjoining grounds upon payment of compensation to the owners, this pipe through the bank was in fact a drain, and that I must assume after the uninterrupted usage of so many years there had been some arrangement between the adjoining owner and the relators or their predecessors under that section. This section formed the subject of discussion in the Court of Appeal in the case of *Croft v. Bickmansworth Highway Board* (60 L. T. Rep. 34; 39 Ch. Div. 272). That case is not decisive of the point raised before me, inasmuch as no question of principle there arose, but I think that the judgments of the Court of Appeal do show that the only rights which could be lawfully acquired by a surveyor of highways are rights which come within the words of the section. I am of opinion that this pipe through the hedge is not a drain within the meaning of that section. It is true it may be said to drain the water off from the road, but, on the other hand, it is only a means whereby water is passed from the road on to the surface of the adjoining land, and in my opinion it is not a drain such as is contemplated by that section, which I understand to be a drain or watercourse for the conveyance of water to some proper outlet. In addition to claiming by virtue of this section, the plaintiffs also base their claim upon common law prescription, on the ground that the public, as the occupiers of the road, had for more than the statutory period enjoyed the privilege of passing out the water from the pipe, and in support of their case they cited a passage from the judgment of Lord Cairns in the case of *Rangleley v. Midland Railway Company* (18 L. T. Rep. at p. 70; L. Rep. 3 Ch. 310-11) as supporting the view that a right of way is not an easement, and therefore the surface of the road was in occupation of the persons using the road. In my opinion this contention of the plaintiffs cannot be supported. In order to found a claim to an easement of this character there must be a dominant tenement to which the easement can be attached. I can find no authority for the suggestion that a right of way can be considered to be such a dominant tenement for the purpose of having such a right attached to it, and there seem to me to be great difficulties in coming to that conclusion. I think that the relators have not on either ground acquired a legal right to have this particular pipe maintained and thereby to discharge the water upon the defendant's land, and for these reasons I am of opinion that the action fails.

Judgment for the defendant.

Solicitors for the plaintiffs, *May, Sykes, and Co.*
Solicitor for the defendant, *Arthur Pearce.*

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REX v. ROBERTS; *Ex parte* KYLE.

[K.B. Div.]

Wednesday, April 17, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRENCE, J.)REX v. ROBERTS; *Ex parte* KYLE. (a)

Weights and measures—Fees for verification and stamping—Power of county council to remit—Weights and Measures Act 1878 (41 & 42 Vict. c. 49), s. 47—Weights and Measures Act 1889 (52 & 53 Vict. c. 21), s. 13.

A county council has no power to direct an inspector of weights and measures not to take fees in respect of the verification and stamping of weights and measures. No such power is conferred by reason of sect. 13 of the Weights and Measures Act 1889.

CAUSE shown against a rule nisi for a writ of *certiorari* to remove to the King's Bench Division a certain surcharge of 1*l.* 1*l.* 4*d.* made by the auditor appointed by the Local Government Board to audit the accounts of the county councils in the Eastern Counties Audit District upon the audit held by him upon the accounts of Thomas Kyle, an inspector of weights and measures for the county of Bucks.

At a meeting held on the 10th Nov. 1899, the Bucks County Council duly passed a resolution that the fees for verification and stamping of weights and measures and weighing instruments charged under sect. 13 of the 1st schedule of the Weights and Measures Act 1889 should cease to be taken on and after the 1st Jan. 1899, but that traders should continue to pay the cost of cartage and lifting of standards for the verification of weighing instruments of above 56*lb.* in weight.

In consequence of this resolution, and acting upon the instructions of the county council, the inspector of weights and measures ceased to take any fees for the verification and stamping of weights, measures, and other instruments under sect. 13 and the 1st schedule of the Weights and Measures Act 1889.

Upon the audit of the accounts for the year ended the 31st March 1900, the district auditor surcharged the inspector of weights and measures with the sum of 1*l.* 1*l.* 4*d.*, representing fees which he should have collected but for the resolution of the council and the consequent instructions given to him by the county council, but which he in fact never collected or received.

The surcharge had not been paid by the inspector, and it was submitted that it was improper and illegal as, under sect. 13 of the Weights and Measures Act 1889, there was no obligation upon him to collect any such fees or upon the county council to insist upon their being paid.

The grounds upon which the writ was sought were (1) that, under the Weights and Measures Act 1889, s. 13, there was no legal obligation on the inspector to take fees; (2) that the order of the county council directing him not to take fees was legal and binding upon him; and (3) that in any event he was wrongly surcharged in respect of fees which he had not in fact received.

By the Weights and Measures Act 1878 (41 & 42 Vict. c. 49), s. 47:

An inspector under this Act may take in respect of the verification and stamping of weights and measures such fees, not exceeding those specified in the 5th

schedule to this Act, as the authority appointing him from time to time fix, and shall at such times, not less often than once a quarter, as the said authority direct, account for and pay over to the treasurer of the local rate, or such person as the said authority direct, all fees taken by him.

By the Weights and Measures Act 1889, s. 13 (1):

An inspector of weights and measures may take in respect of the verification and stamping of weights, measures, and weighing instruments the fees specified in the 1st schedule to this Act, and no others, and no discount shall be allowed, and such inspector shall at such times, not less than once a quarter, as the local authority direct, account for and pay over to the local authority, or as they direct, all fees so taken.

In the 1st schedule to the Act there is a list of fees headed:

Fees to be taken on the verification and stamping of weights, measures, and weighing machines by inspectors of local authorities.

C. A. Russell, K.C. showed cause.—There is no power in any of the statutes which enables the county council to pass a resolution of this kind. The section now in force is sect. 13 of the Weights and Measures Act 1889. It is not contended that the inspector can take anything but the fees in the schedule; but the other side say that he need not take anything at all. Sect. 47 of the Weights and Measures Act 1878 is repealed together with the 5th schedule of that statute by the Act of 1889. I submit that the auditor was quite right to surcharge this amount, and the rule should be discharged.

Macmorran, K.C. (*McIntyre* with him) in support.—Under sect. 43 of the Weights and Measures Act 1878 the inspector is appointed by the local authority, that is now the county council. It was found that under sect. 47 there was no uniformity, and so the Act of 1889 was passed, simply to give that uniformity. The law was not altered, and I submit is the same as under sect. 47. By sect. 13 of the Act of 1889 the inspector acts as the agent of the local authority, and as such is accountable to them. [Lord ALVERSTONE, C.J.—Then what was the object of repealing the first part of sect. 47?] All the Act of 1889 did was to fix the fee, and not to fix the minimum. The section is in reality only permissive and not imperative.

Lord ALVERSTONE, C.J.—We have nothing to do with the policy pursued by the county council in this case. It may be a wise and prudent matter not to insist on payment of fees for the stamping of weights and measures, but our only duty is to construe the Act of Parliament and see whether the county council has power to remit these fees by instructing their inspector not to take them. In this case it appears that under the resolution of the county council the inspector took no fees for verifying the weights and measures. Then came the audit, and the auditor found no amounts entered as having been received on account of such fees. If the inspector had not paid over money received by him, he would certainly be surcharged, but, as a matter of fact, no fees having been collected, the auditor surcharged the inspector with the amount that he ought to have collected. The important question is, Has the county council, under the Weights

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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HAWKINS (app.) v. EDWARDS (resp.).

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be clearly distinguishable from the colour or nature of the ground whereon such figures are painted or marked. He shall cause the first of such plates to be fixed on the outside and the second of such plates on the inside of such carriage in such a position and manner that the number thereon shall be at all times distinctly and plainly visible and legible. He shall not wilfully or negligently cause or suffer any such plate to be in any manner or by any means concealed from public view or to be inverted at any time while such carriage may stand, ply, or be driven for hire.

The following are the sections of the Towns Police Clauses Act 1847 which chiefly apply to this case:

37. The commissioners may from time to time licence to ply for hire . . . within five miles from the General Post Office of the City . . . such number of hackney coaches or carriages of any kind or description adapted to the carriage of persons as they think fit.

38. Every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within the prescribed distance, having thereon any numbered plate required by this Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act; and in all proceedings at law or otherwise, the term "hackney carriage" shall be sufficient to describe any such carriage: Provided always that no stage coach used for the purpose of standing or plying for passengers to be carried for hire at separate fares, and duly licensed for that purpose, and having thereon the proper numbered plates required by law to be placed on such stage coaches, shall be deemed to be a hackney carriage within the meaning of this Act.

68. The commissioners may from time to time (subject to the restrictions of this Act) make bye-laws for all or any of the purposes following—that is to say For regulating the conduct of the proprietors and drivers of hackney carriages, plying within the prescribed distance in their several employments, and determining whether such drivers shall wear any, and what, badges, and for regulating the hours within which they may exercise their calling; for regulating the manner in which the number of each carriage corresponding with the number of its licence shall be displayed; for regulating the number of persons to be carried by such hackney carriages, and in what manner such number is to be shown on such carriage, and what number of horses or other animals is to draw the same, and the placing of check strings to the carriages and the holding of the same by the driver, and how such hackney carriages are to be furnished or provided; for fixing the stands of such hackney carriages, and the distance to which they may be compelled to take passengers, not exceeding the prescribed distance; for fixing the rates or fares, as well for time as distance, to be paid for such hackney carriages within the prescribed distance, and for securing the due publication of such fares; for securing the safe custody and redelivery of any property accidentally left in hackney carriages and fixing the charges to be made in respect thereof.

William Wills (A. A. Bethune with him) for the appellant.—This vehicle was not a hackney carriage within sect. 38 of the Towns Police Clauses Act 1847. At the time alleged the vehicle was not being used "in standing or plying for hire in a street." A construction put on the Act and bye-law such as the respondent seeks to place upon them is altogether unreasonable. In *Case v. Storey* (20 L. T. Rep. 618; L. Rep. 4 Ex. 319) it was held that a hackney carriage

whilst on the premises of a railway company by their leave, for the accommodation of passengers arriving by their trains, was not plying for hire in any street or place within the meaning of the Hackney Carriage Acts. They also referred to

Clarke v. Stanford, 24 L. T. Rep. 389; L. Rep. 6 Q. B. 357.

Hugo Young, K.C. (*Berkeley* with him) for the respondent.—A hackney carriage is a vehicle that is used from time to time in plying for hire, and it does not cease to be a hackney carriage merely by reason of it not actually being at the time plying for hire. The reason for licensing is to enable the authorities to keep control, and, if the contention of the appellant is correct, there could be no control exercised except when the vehicle was actually being used for hire. That construction of the section of the Act would reduce the provisions to a nullity and is absurd.

Lord ALVERSTONE, C.J.—The point in this case is a new one, and requires some consideration. I must say I was at first struck by the difficulty which was raised in the argument for the respondent that a hackney carriage must always be used as a hackney carriage, and that the proprietor of such carriage when he gets an order for the hire of a carriage, as in the present case, is not entitled to cover up the number. The object and purpose of the bye-law is to protect the public and to provide proper carriages and drivers, and also to provide for inspection of carriages. If a man elects to take advantage of the Act, he elects at the same time to devote his carriage to definite purposes indicated by the bye-law. In my opinion, the words used in sect. 38 of the Towns Police Clauses Act 1847, "used in standing or plying for hire," indicate the period of time during which a carriage is to be deemed a hackney carriage. I cannot construe these words in the way that is contended for in the argument for the appellants, that it is only while the carriage is actually standing or plying for hire that it is to be deemed to be a hackney carriage. The justices have, I think, taken the right view of the case. Every wheeled carriage which is in fact used from time to time for the purpose of standing or plying for hire is a hackney carriage within the section, and the words "standing or plying for hire" are not confined to the actual period of time during which such carriage may be engaged in standing or plying for hire. The appellant therefore contravened the bye-law by covering up the plate under the circumstances of this case. The appeal must be dismissed.

LAWRENCE, J.—I am of the same opinion.

Solicitors for the appellant, *T. A. Dennison and Co.*, for *H. G. Tanner*, Birmingham.

Solicitors for the respondent, *Caprons and Co.*, for *J. E. Hill*, Birmingham.

K.B. Div.]

REX v. GROOM; *Ex parte* COBBOLD.

[K.B. Div.]

Saturday, April 20, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRENCE, J.)REX v. GROOM; *Ex parte* COBBOLD. (a)*Licensing—Grant of provisional full licence—
Adjournment of meeting to October—Legality—
Alehouse Act 1828 (9 Geo. 4, c. 61), s. 3.**Where through misadventure the proper notice has
not been given of intention to apply for an ale-
house licence, under the Alehouse Act 1828, the
justices have no power to adjourn the adjourned
general licensing meeting to a day in October to
enable the proper notice to be given.**Rivals in trade who own neighbouring licensed
houses have sufficient interest to enable them to
apply for a certiorari.*

CAUSE shown against a rule nisi for a writ of certiorari to remove into the King's Bench Division to be quashed an order made at a meeting of the justices for the borough of Harwich for the purpose of confirming licences in that borough, on the 6th Nov. 1900, confirming a provisional licence granted to one White on the 23rd Oct. 1900, authorising him to apply for and hold any of the excise licences that may be held by a publican for the sale by retail of intoxicating liquor at a certain house to be constructed.

The ground upon which such writ was sought was that the licence was granted by the justices on the 23rd Oct. 1900 without jurisdiction.

The facts were as follows:—

On the 25th Sept. 1900 the adjourned general licensing meeting for the borough of Harwich was held.

An application was made on behalf of one White for a provisional full licence. When such application was called on, evidence was adduced to prove the due and proper service of the notices required, and it was found that the notice had been served two days too late upon the superintendent of police owing to the sudden illness of the person deputed to serve the notice. Thereupon the justices adjourned the meeting until the 23rd Oct. 1900 in order to give the applicant time to serve fresh notices.

Objection was taken to this course on behalf of certain brewers who appeared to oppose the granting of the licence.

On the 23rd Oct. 1900, at the adjournment of the adjourned general annual licensing meeting, the same objectors opposed the grant of the application, due notice of which had in the meantime been given. The objection taken was that the justices had no power to adjourn the meeting into October or to sit as licensing justices in that month, as such a course was in contravention of the provisions of sect. 3 of the Alehouse Act 1828.

The justices overruled this objection, relying upon sect. 11 of the Wine and Beerhouse Act 1870, and they then heard and granted the application for a provisional full licence.

On the 6th Nov. 1900 the confirming licensing authority for the borough sat, when the confirmation of the above grant was opposed by the same objectors on the same grounds. The confirming authority, however, overruled these objections and confirmed the grant of the provisional full licence.

C. E. Jones showed cause against the rule.—This writ is not granted as of right, and I contend that under the circumstances of the present case it should be refused. He referred to the judgment of Williams, J. in *Reg. v. Nicholson* (81 L. T. Rep. 257; (1899) 2 Q. B. 455). The magistrates had jurisdiction. The licence was granted under the Alehouse Act 1828 (9 Geo. 4, c. 61). It is true that sect. 3 of that statute gives a limitation as to the times of the meetings and adjourned meetings, but I submit that they have power to adjourn the meeting into October or to any time before the confirming committee meets. That power is also given by sect. 11 of the Wine and Beerhouse Act 1870 (33 & 34 Vict. c. 29). In Paterson's Licensing Acts, 12th edit., at p. 330, it is stated: "This section must be taken to extend and alter the provisions of the Alehouse Act 1828 (9 Geo. 4, c. 61) so far as respects applications for certificates. . . . This section enables the justices to adjourn an adjourned meeting as well as the general annual meeting, and they may do so to a day beyond the respective months of March in Middlesex and Surrey, and of August and September in other counties, if the applicant has through inadvertence or misadventure failed to comply with the Act." That is a correct statement of the law as it now exists, and the facts disclosed show that the failure to comply with the Act was due to misadventure—namely, sudden illness. In *Reg. v. Denbigh Justices* (59 J. P. 708) Lord Russell, C.J. and Grantham, J. held in a case where the objection was only made at the meeting, that the provision that the adjournment must be held within the time mentioned in the section was directory merely, and that the justices might therefore hold the adjournment out of the statutory time. The case of *Webber v. Birkenhead Justices* (61 J. P. 664) may be said to be against me, as Ridley, J. held that, where written notice of objection had been served, the provisions as to the time of the adjournment were imperative. But in this last case there was no question of inadvertence or misadventure. Hawkins J. in *Reg. v. Anglesea Justices; Ex parte Williams* (59 J. P. 744) stated that, an objection being taken, the justices may adjourn "to a future day," not necessarily comprised in an adjournment of the general annual meeting. This rule should be discharged.

Rawlinson, K.C. and *E. E. Wild* in support.—Sect. 11 of the Wine and Beerhouse Act 1870 does not apply to this class of case at all. The application in this case is for an alehouse licence, and the Act of 1870 only applies to licences for wine and beer houses. No part of that Act, with the exception of the provisions as to notices, applies to a full licence in an alehouse. As to the decision of Lord Russell, C.J. and Grantham, J. in *Reg. v. Denbigh Justices*, that case can be explained, for by *mandamus* the Court of King's Bench can always compel a licensing court to sit out of its proper time. But where the sitting is the voluntary act of the licensing authority, there is no power to sit out of the times laid down in sect. 3 of the Alehouse Act 1828. There is no section dealing with inadvertence or misadventure in the case of an alehouse. [Lord ALVERSTONE, C.J.—It seems that if sect. 11 of the Wine and Beerhouse Act 1870 applies, you are out of court. But if sect. 3 of the Alehouse

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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Act 1828 is imperative, that accounts for *Reg. v. West Biding Justices*; *Drake's case* (L. Rep. 5 Q. B. 33; 34 J. P. 4.) In the note to sect. 11 of the Act of 1870 in Whiteley's Licensing Laws we submit that the law is correctly stated. [Lord ALVERSTONE, C.J.—I cannot see why *Reg. v. Denbigh Justices* (sup.) was decided as it was if you are right.] *Webber v. Birkenhead Justices* (sup.) is a more recent case, and is in my favour. On the question as to whether we are persons aggrieved, we submit that we are. They referred to

Reg. v. Nicholson, 81 L. T. Rep. 257; (1899) 2 Q. B. 455.

Lord ALVERSTONE, C.J.—It is with great regret that I come to the conclusion that this rule must be made absolute. If I could have seen my way to decide against the applicants for the rule, who are merely rivals in trade of the applicants for the licence and who had taken a highly technical objection, I should have done so. But I feel bound, with much regret, to come to the conclusion that the rule must be made absolute. If we were to decide otherwise our decision would be taken to be a decision that an adjourned meeting to receive original notices could be held in October. I think that would be going too far. The Act of 1828, by sect. 3, contemplates that the general annual meeting and every adjourned meeting shall be held in August or September. Therefore *prima facie* there is a direction that the work is to be got through by the end of September. It is contended that there was power to adjourn an adjourned meeting, apart from the section dealing with inadvertence. But if it had been competent for the justices to sit in October, it would not have been necessary to give the specific injunctions that were given in *Reg. v. West Biding Justices*; *Drake's case* (L. Rep. 5 Q. B. 33; 34 J. P. 4), where it was laid down that the notice might be given twenty-one days before, and the application made at an adjourned meeting. Therefore, apart from any other section, I come to the conclusion that an adjourned meeting to receive new notices could not be held in October. But there is sect. 11 of the Wine and Beerhouse Act 1870, which allows an adjournment in the case of a failure to comply with preliminary requirements through inadvertence or misadventure. If I could have seen my way to hold that that section was attracted to the Act of 1828, I should have felt inclined to have acted under it. But if that section had been intended to apply to every licence we should have found proper words, and the words "the grant or renewal of a certificate" would not have been used. With regard to the case of *Reg. v. Denbigh Justices* (59 J. P. 708), there is, in the first place, a doubt whether the case was within sect. 42 (1) of the Licensing Act 1872; and, secondly, the fact that the proceeding was by *mandamus* might have made a difference. That seems to have been the view of Ridley, J. in *Webber v. Birkenhead Justices* (61 J. P. 664). On the question whether the applicants were persons aggrieved, there is no doubt that no real grievance arose from the omission to serve the notice; but the question is whether the applicants had an interest in the decision. A person who is an aggrieved person so as to enable him to ask for a *certiorari* is a person who had an interest in the decision given. It would be too strong

to say that such an interest did not exist in the present case.

LAWRANCE, J.—I am of the same opinion.

Rule absolute.

Solicitors: *Gibbs, White, and Strong*; *Godden, Son, and Holme*.

Wednesday, April 24, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRANCE, J.)

SQUIRE (app.) v. STANLEY BROTHERS (resps.). (a)
Factory—Making and finishing of bricks—Girl under age of sixteen—Factory and Workshop Act 1878 (41 & 42 Vict. c. 16), s. 38, sched. 1.

Bricks after being baked were taken to dipping sheds, and after being placed in a preparing solution were dipped in glass and scraped and knifed. They were then stacked, and ultimately baked with a view to setting the glaze. They were then polished, and stacked until wanted for sale.

Held, that this constituted the "finishing of bricks" within the Act.

CASE stated upon an information preferred by the appellant against the respondents charging them with unlawfully employing in a factory in which there was carried on the making and finishing of bricks two girls under the age of sixteen.

Upon the hearing of the information the following facts were proved or admitted:—

The respondents made at the factory in question plain and glazed or enamelled bricks, and also (*inter alia*) impressed glazed bricks.

Two girls, who were under the age of sixteen on the 16th July 1900, had for some time previous to that date been employed by the respondents in the factory.

In one part of the factory the dust out of which the bricks, whether plain or glazed, were made was pressed and moulded by steam into ordinary brick shape, and then taken to dust kilns to be baked, but neither of the girls were employed in any of these processes, which were all carried out by men.

The following additional processes were, however, necessary and were carried out in the premises of the factory when the respondents were glazing or enamelling the bricks: The rough or plain bricks made as above were carried from the dust kilns wherein they were baked to sheds, called dipping sheds, which were separate erections from the dust kilns, but were near them and not separated from them by any barrier or inclosure. The face of each brick was first dipped in a preparing solution or (to use the technical term) bodied. Then the prepared bricks were dried and stacked in the sheds, and the face prepared as above was afterwards dipped in glaze and scraped or knifed. The bricks so glazed and scraped were stacked, and they were ultimately carried from the sheds to ovens near the sheds and baked with the view of setting the glaze. They were then polished and finally carried to stacking sheds, where they remained until required by the respondents for the purpose of sale or otherwise.

On the 16th July 1900, and during the period of

(a) Reported by W. de B. HEMBERT, Esq., Barrister-at-Law.

K.B. Div.] MIDLAND RAILWAY COMPANY (apps.) v. PONTEFRAC T UNION (resps.). [K.B. Div.]

their employment, the girls were employed in carrying four or five or a less number of bricks from the dust kilns to the dipping sheds, where they were stacked and glazed by the dippers, also in carrying the bricks after they had been glazed from the dippers in the sheds to another place in the same sheds, where they were knifed or scraped, in carrying them from the sheds to the ovens, where the glazed bricks were baked and polished, and occasionally, but not often, in carrying the baked and polished bricks to the final stacking sheds.

One of the girls was on the day in question and for a week at a time during the period of her employment also employed in actually dipping the face of the bricks in the glaze.

It was contended on behalf of the appellant that by the combined effect of sect. 38 of the Factory and Workshop Act 1878 and the 1st schedule thereto there was an absolute prohibition against the employment in any place within the close or curtilage of a factory where bricks were made or finished of girls under the age of sixteen years, and further that the processes performed upon the rough bricks constituted a finishing of bricks within the meaning of the 1st schedule of the Act.

On the part of the respondents it was contended that there was no absolute prohibition as alleged, but only a prohibition to employ girls under sixteen in the processes of making and finishing of bricks, and that the above processes did not constitute a finishing of bricks.

The justices were of opinion that the contention of the respondents was correct and dismissed the information.

Parfitt for the appellant.

Hugo Young, K.C. and *Dorsett* for the respondents.

LORD ALVERSTONE, C.J.—I do not wish to decide more than is necessary for this case. I do not want to express any opinion one way or the other as to there being an absolute prohibition against any employment at all in a brick factory of a girl under the age of sixteen. There is a great deal to be said in favour of the view. On the other hand, one does not wish to decide an abstract question, and I think it better not to express an opinion unless it is thought I am expressing one against the decision already expressed. I am clearly of opinion that this was a factory where these girls were undoubtedly employed from time to time carrying the bricks from place to place, and that this was a finishing of bricks within the meaning of the schedule. It would be impossible, to my mind, when a brick has assumed a shape to say because it can be used as a rough brick for foundations, or for insides, or a brick for some commercial purpose, that if it afterwards goes through processes whereby it is to be made into the commercial article, which is intended to be sold, that that is not finishing a brick. All that happens here is that the body of the brick having been produced by the kiln work is taken to another part of the factory to be finished into the commercial brick, and, looking at the processes referred to, I think they are just as likely to be injurious to young people as the earlier part of the manufacture; but, be that as may, I am quite satisfied that what is described in the case as additional processes was the finishing of bricks within the meaning of the statute.

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Under these circumstances the justices clearly ought to have convicted, and the case must go back to them.

LAWRANCE, J.—I am of the same opinion.

Appeal allowed.

Solicitors: *Solicitor to the Treasury, for Weekes and Co., Birmingham; W. W. Whiteman.*

Wednesday, April 24, 1901.

(Before **LORD ALVERSTONE, C.J.** and **LAWRANCE, J.**)

MIDLAND RAILWAY COMPANY (apps.) v. PONTEFRAC T UNION (resps.). (a)

Rating—Running lines—Junction with another company's system—Signal box—Assessment of.

A signal box, at the junction of one line of railway with the line of another company, is properly assessed separately from the railway line itself, although the levers and signals are included in the assessment of the railway line.

CASE stated by quarter sessions for the West Riding of York upon an appeal by the Midland Railway Company against an assessment to the poor rate made by the overseers of the township of Methley.

The Midland Railway Company (hereinafter called the appellants) are the owners of a railway running through the township and parish of Methley, made under the authority of the North Midland Railway Act 1836, and was afterwards consolidated with other railways and became known as the "Midland Railway" by the Midland Railway Act 1844.

The property of the appellants in the township consists of 3828 yards of a double line of railway, a small roadside station known as Methley station, with the usual offices, sidings, signal boxes, and other hereditaments, and a signal box situate at a distance of 1320 yards south of the station, at a junction known as Methley junction, where trains of the North-Eastern Railway and the Lancashire and Yorkshire Railway (which companies have running powers over the lines of the Midland Railway) leave the lines and proceed upon the proper lines of the respective companies.

On the 9th April 1900 the respondents, the overseers of the poor, laid a rate for the relief of the poor of the township, whereby the appellants were assessed in respect of their property herein as follows:

	Rateable value.		
	£	s.	d.
1. 3828 yards railway	5201	0	0
2. Station sidings and land	117	0	0
3. Signal boxes (Methley)	1	10	0
Signal boxes (Methley) siding	2	10	0
4. Gasworks	17	0	0
5. Pumping station	36	0	0
6. Signal box (Brigg's sidings)	1	10	0
7. Station house	10	0	0
8. Signal box Methley junction	4	10	0

A due demand for such rate was made on the appellants.

In making the assessment of the 3828 yards of railway the respondents estimated the rateable value of a line of railway within the township by

(a) Reported by *W. DE B. HERBERT, Esq., Barrister-at-Law.*

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ascertaining the gross receipts of the appellants in respect of so much of the line as runs through the township and deducting therefrom (*inter alia*) a sum amounting to 5*l.* 10*s.* per cent. of the gross receipts in respect of stations and buildings (including signal boxes) separately assessable in the several parishes in which they are respectively situate, all of which, together with all the property of the appellants within the township, were separately assessed as hereinbefore mentioned.

The appellants duly gave notice to the respondents that they objected to the rate in respect only of the assessment upon the signal box at Methley junction, numbered 8 on the foregoing list (hereinafter referred to as the signal box), and upon the 11th April 1900 they attended upon the assessment committee of the union of Pontefract to urge their objection, but failed to obtain any relief in respect thereof.

They thereupon duly appealed to the Court of Quarter Sessions for the Riding against the rate, on the following grounds—viz.: (1) That the company were by the rate or assessment erroneously rated in respect of the signal box at Methley junction which forms part of the railway in the parish or township of Methley; (2) that the company were rated in respect of the signal box which is not separately rateable from the railway in the township or parish.

The signal box is a wooden erection 22ft. in length, 11ft. 6in. in breadth, 16ft. in height, and contains lower and upper floors, and is affixed to the soil by a framework consisting of six upright wooden piles 9in. square. It is covered by slates, and is warmed by means of an iron stove and lighted by gas. It contains upon the upper floor twenty-four levers for working the signals and points controlling the passing of the trains of the North-Eastern and Lancashire and Yorkshire Railways respectively on to and off the appellants' line, together with the telegraphic and other instruments necessary thereto, and the only purposes the erection serves are to protect the servants of the appellants engaged in working the same from the weather. The signal box is only rendered necessary in its present situation by reason of the junction of the appellants' line with the lines of the other companies hereinbefore mentioned.

Upon the hearing of the appeal it was contended on the part of the appellants that the levers within the box were physically connected with the signals and points upon the running line, that these signals and points could be worked without the instruments in the box, that the wooden erection was essential to the proper working of the levers and instruments, that therefore the signal box and its contents formed a necessary part of the running line of railway, which had already been assessed at 520*l.*, and that if the rate appealed against in respect of the signal box were to stand it would, in effect, be rated twice over. The levers and instruments themselves were, it was contended, clearly not rateable separately from the railway, and the wooden structure protecting them, having no letting value, was also not separately rateable. The justices were referred to the following cases: *London and North-Western Railway Company v. Llandudno Improvement Commissioners* (75 L. T. Rep. 659; (1897) 1 Q. B. 287); *Great Eastern Railway Com-*

pany v. Overseers of Fletton Union, decided in the Queen's Bench Division on the 6th Nov. 1882, and reported in Boyle on Rating, 2nd edit., p. 1063; *South Wales Railway Company v. Swansea Local Board* (4 El. & Bl. 189; 24 L. J. 30, M. C.).

On the part of the respondents it was conceded that the levers and signals within the box were not taken into account in the assessment in question, and they had included them in the assessment of 520*l.* in respect of the railway line, the assessment in respect of the signal box being limited to the estimated annual value of the structure alone, apart from the levers and signals. They contended that the structure was a building and was separately rateable within the parish where it was situated according to the parochial principle of rating, and that it was not a part of the running line, but in the nature of property which was convenient though not essential for the proper and efficient working of the railway within the township, and should therefore be separately assessed. It was further contended that, not being directly productive of profit to the appellants any more than station buildings and other conveniences provided by them, all of which were maintained out of the gross receipts of the appellants from the line, a deduction was made from the gross receipts in respect of these non-directly productive properties before fixing the net rateable value of the running line, such deductions being 5*l.* 10*s.* per cent. on the gross receipts; that such was a fair and reasonable deduction, and if it were held that the appellants, having had the benefit thereof, were also to escape from a separate assessment of the signal box, the result would be a loss to the parish of the benefit of the hereditaments. Evidence was given by expert witnesses called before the court on behalf of the respondents that signal boxes have been hitherto separately rated, and that the 5½ per cent. on the gross receipts was deducted in respect of stations and buildings, including signal boxes.

The appellants admitted that they had never at quarter sessions or any other appeal raised the question which is now raised.

The quarter sessions dismissed the appeal.

Balfour Browne, K.C. and *Compston* for the appellants.

Macmorran, K.C. and *Scholefield* for the respondents.

LORD ALVERSTONE, C.J.—The argument in this case is, I think, out of date. The confusion arises from attempting to say that the case of *London and North-Western Railway Company v. Llandudno Improvement Commissioners* (75 L. T. Rep. 659; (1897) 1 Q. B. 287) is in any way applicable to the circumstances of the present case. In that case the question was what is meant by "railway," and it was decided that the word included not only the rails and the land upon which they rest, but also those things without which the railway could not be used as a highway. We are not called upon to decide here what is and what is not part of the railway. The question for the rating authorities in this case is at how much they are going to assess the rateable subject-matter. Now, a signal box is a rateable subject-matter. It must be remembered that you do not assess a railway by finding what a hypothetical tenant would give for it from year to year like other things. You start with

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the gross earnings, and then break it up by making a deduction in respect of property not remunerative or separately assessed elsewhere. That deduction, I now believe, is 5½ per cent. It is argued that you cannot work a line without signal boxes, but in this respect there is no difference between water tanks, turntables, &c., and such like matters which are equally necessary to the working of the line, and which are equally the subject of rating. In my opinion, the quarter sessions acted upon well-known principles of law which ought not to be upset. I only refer to the question of the levers as it is argued that if they are not rated neither should the signal box, which acts as a mere cover for the instruments, be rated. But the answer is that the levers are calculated in the 5½ per cent. deduction, which, as I have already said, comes off the gross earnings. This appeal must be dismissed.

LAWRENCE, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: *Beale and Co.; Blundell, Gordon, and Co.*

April 16 and 25, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

WINTER v. BANCKS AND ANOTHER. (a)

Stolen goods—In possession of police—Acquittal of person charged—Demand by true owner—Delivery by police to other than true owner.

When a subordinate police officer having the possession of stolen goods, after a demand by the true owner for their delivery to him, delivers the same to a person other than the true owner, he is liable in trover although he acted upon the orders of a superior officer.

A. bought a gig. It was stolen from him, and afterwards found by the police in the possession of B. B. was indicted for larceny of the gig and acquitted. B. on his acquittal wrote to the police officer in possession of the gig demanding delivery of it to him, and A. afterwards by letter and personally applied for its delivery over to him. The police officer, acting on the instruction of his superior officer, after giving notice to A. of his intention to do so, delivered the gig to B. as the person from whom it had been taken by the police.

Held, that the police officer so delivering it was liable in trover to A., who was found to be the true owner of the gig.

Hollins v. Fowler (33 L. T. Rep. 73; L. Rep. 7 H. of L. 757) and Stephens v. Elwall (4 M. & Sel. 259) followed.

APPEAL from a County Court.

The facts appear sufficiently from the above headnote and the judgment.

E. Sutton for the appellants.—Previous to the Police (Property) Act 1897 there was no statutory provision as to what was to be done with stolen property in the possession of the police when the person charged with the larceny of it was acquitted. But it was decided very long ago that as long as the police retained possession of it the true owner had no right to compel them to give delivery of it to him; such right only arose when

it came into the possession of someone not entitled to retain it. [Lord ALVERSTONE, C.J.—The point is here whether, admitting the police cannot be sued as long as they hold their hand, they are not liable when they take upon themselves, after demand of the true owner for possession, to deliver the stolen goods to a person who is not the true owner.] All that the police did here was to deliver the stolen goods to the person from whom they had taken them. This could not put the true owner in any worse position than he was before the police took possession of the goods. Moreover, it did not amount to a conversion: (see per Collins, J. in *Consolidated Company v. Curtis and Son* (1892) 1 Q. B. 495, at p. 498). And the defendants in this case did nothing except act on the lawful instructions of their superior officer.

Trevor Lloyd for the respondents.—The defendants here did not merely hold their hand. As far as they could do so, they disposed of the stolen goods after demand for possession by the true owner. This renders them liable in trover, and the fact that they acted merely as subordinates is no defence:

Hollins v. Fowler, 33 L. T. Rep. 73; L. Rep. 7 H. of L. 757;

Stephens v. Elwall, 4 M. & Sel. 259.

E. Sutton in reply.

April 25.—Lord ALVERSTONE, C.J. read the following judgment of the court:—This is an appeal on the part of the defendant from the judgment of his Honour Judge Gwynne James, who gave judgment for the plaintiff with 4l. damages. The action was brought in trover by Mr. Winter to recover the value of a gig alleged to have been converted by the defendants—Bancks and Lings. Judgment was given for the defendant Bancks, but judgment for 4l. damages was given against the defendant Lings. It was contended on behalf of the plaintiff that the judge had rightly found that the defendant Lings had been guilty of conversion in having refused to deliver the gig to the plaintiff, and in having subsequently delivered it to a man named Broderick. It was contended on behalf of the defendant that he had not been guilty of any act which rendered him liable in the action. The material facts appear to be as follows: On the 17th May the plaintiff bought a gig at Newton fair. Subsequently to the purchase the gig disappeared, and was afterwards found in the possession of Broderick. Broderick was prosecuted for the larceny at Liverpool Quarter Sessions, and on the 17th July was acquitted. On the same day Broderick's solicitor wrote to the police officer in charge at Newton-le-Willows police-station, and to all others whom it may concern, a letter demanding possession and return of the gig. On the 18th July, the next day, the plaintiff's solicitor wrote to the sergeant in charge at Newton-le-Willows police-station claiming that the gig was still the plaintiff's property, and asking that it should not be given up to any other person than the plaintiff. On the 20th Mr. Grundy, the acting superintendent, wrote to the plaintiff's solicitor stating that it had been decided to return the gig to Broderick at twelve on Saturday, the 21st. On the 31st July the plaintiff's solicitor wrote to Sergeant Bennett, the sergeant in charge at the police-station, giving him notice of his

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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intention to commence an action on behalf of the plaintiff for the recovery of the gig. The only other material facts proved before the learned judge were that on the 18th July the plaintiff asked the defendant Bancks for the gig and he refused to give it up, and that upon the 21st the plaintiff again asked Bancks and the defendant Sergeant Lings, who was Bancks' superior officer, to deliver to him the gig, and that one of them replied, "No, I am going to give it to Broderick," and that on the same day Bancks by Lings' instructions handed the gig to Broderick. Lings had not been made a defendant when the action was commenced, but he was added as a defendant by consent at the trial as he was Bancks' superior officer. Lings further stated at the trial that in handing the gig over to Broderick he acted under instructions received by telephone from his superior officer, Inspector Grundy. Under these circumstances the learned judge found that after demand by Winter and refusal to comply with it by defendant Lings he (the defendant Lings) handed over the gig to Broderick. No application was made under the 1st section of the Police (Property) Act 1897, either by the plaintiff or the police, for an order of a court of summary jurisdiction as to the custody of the gig. The case is undoubtedly near the line. It was contended on behalf of the defendant that there was no conversion by the defendant Lings, that he acted in doing what he did under the instructions of his superior officer, Inspector Grundy, that he did not intend to deprive the plaintiff of the property in the gig, but was simply handing it back to the person from whom it had been taken prior to the hearing of the charge at the quarter sessions. The learned judge found that the gig was in fact the property of the plaintiff, and that as the defendant Lings had taken upon himself to hand the property over, after demand and refusal, he was liable in trover. After careful consideration we have come to the conclusion that the judgment was right. We think it must be taken upon the findings to which we have referred that the defendant Lings was responsible for the custody of the gig and did, in fact, hand it over at a time when it was the plaintiff's property and after the plaintiff had demanded possession. We think the case falls within the principle laid down in the cases of *Hollins v. Fowler (sup.)* and *Stephens v. Elwall (sup.)*, and that the defendant, though acting as a subordinate, is responsible. He was party to a dealing with the plaintiff's property and acted at his peril. We think, therefore, that the judgment should be affirmed and the appeal dismissed with costs.

Solicitor for the plaintiff, *William Calley*, for *W. H. Wilson*, Preston.

Solicitors for the defendants, *Ridsdale and Co.*, for *H. E. Clare*, Clerk of the Peace, Preston.

Wednesday, May 1, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRENCE, J.)

NELSON AND Co. (apps.) v. BOARD OF TRADE
(resps.). (a)

Life assurance—Life annuities—Granted by tea merchants to customers becoming widows—Life Assurance Act 1870 (33 & 34 Vict. c. 61), ss. 2, 3.

By sect. 2 of the Life Assurance Act 1870, "company" therein means "any person or persons, corporate or incorporate, not being registered under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life in the United Kingdom." By sect. 3 a company commencing business after the passing of the Act must deposit 20,000*l.* with the Accountant-General of the Court of Chancery.

*N. and Co. were tea merchants who, in connection with their business as such, had since 1897 offered to married women who had bought their tea for a certain time before the death of their husbands annuities of a certain amount so long as they remained widows. N. and Co. were not registered under the Acts relating to friendly societies, and had not deposited 20,000*l.* with the Accountant-General of the Court of Chancery.*

Held, that they were a company within the Life Assurance Act 1870, and liable to a penalty for commencing business without making such deposit.

APPEAL by case stated from the justices of the borough of Louth.

On the 29th Nov. 1900 an information was preferred on behalf of the Board of Trade against Nelson and Co., otherwise known as Rasmus Jensen (hereinafter called the appellants), for that they, being a company not registered under the Acts relating to friendly societies, and being a company who grant annuities upon human life and carry on the business of life assurance within the United Kingdom, and being established after the passing of 33 & 34 Vict. c. 61, intituled "An Act to amend the Law relating to Life Assurance Companies," did on the 19th May 1900 unlawfully make default in depositing the sum of 20,000*l.* with the Accountant-General of the Court of Chancery, and that such default had since continued and still continued, contrary to the form of the statute in such case made and provided.

At the hearing it was admitted by the appellants and found as a fact that the appellants were not registered under the Acts relating to friendly societies, and had not on the 19th May 1900 or since deposited the sum of 20,000*l.* with the Accountant-General, and that they were established after the passing of the Life Assurance Companies Act 1870 for the purpose of carrying on business under the scheme hereinafter described, which they commenced to do in Jan. 1898 and had since done.

From the documents annexed to the case, the nature and particulars of the scheme were shown to be as follows:

The appellants were retail tea merchants. In connection with their business as such they sold to customers, at the price of one penny, a "purchaser's card" for the purpose of recording the

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

K.B. Div.]

NELSON AND Co. (apps.) v. BOARD OF TRADE (resps.).

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amount of tea purchased weekly by the customer to whom the card was sold. On the front of the card was printed an intimation that the entries of the card must correspond with the books of the appellants, such books being considered the only proof of the fact of the consecutive purchase of the tea. On the back of the card was set out the scheme or arrangement under which the card and tea were to be sold. The material parts of it were as follows:

Nelson and Co. . . . will pay to every woman who shall have become a widow since Christmas 1897, and who since that date shall have purchased not less than one half pound of their tea per week for the last five consecutive weeks previously to her becoming a widow 10s. per week as long as she remains a widow, and to every woman who became a widow previously to Christmas 1897, or previously to her commencing to purchase Nelson and Co.'s tea, 10s. per week as long as she remains a widow, provided that she shall have purchased half a pound of tea per week for ten years. Customers who require only a quarter of a pound weekly and purchase the same under the above conditions, will receive 5s. per week instead of 10s. The only condition is that at the commencement of the continuous taking of the tea the husband must be certified to us by a duly qualified medical practitioner to be in good health, but a certificate of health will be dispensed with in case of customers who have purchased tea every week for the twelve months next previous to the husband's death.

In order to provide a reserve fund to meet liabilities under this scheme the appellants had on the 17th Feb. 1900 executed a trust deed under which a board of management was constituted, and by the terms of the deed the appellants' books were to be audited quarterly, and the appellants were to pay to such board one penny on every pound of tea sold.

The appellants had also published in support of the scheme a leaflet containing an announcement of its provisions as above set out, a list of widows who were receiving annuities under the scheme, and a certificate by the solicitor to the appellants to the effect that the books of the appellants had been audited for the year ending the 31st Dec. 1898, and the reserve fund of one penny on every pound of tea sold had been handed to him to hold in trust.

It was found as a fact that the widows whose names were given in this leaflet had purchased the appellants' tea in accordance with the scheme, and that they were in fact being paid by the appellants the annuities to which they had thus become entitled.

On these facts the justices held that the appellants were, on the 19th May and subsequently, carrying on the business of life assurance within the United Kingdom within the meaning of the Life Assurance Companies Act 1870, and convicted the appellants.

The Life Assurance Companies Act 1870 (33 & 34 Vict. c. 61):

Sec. 2. In this Act the term "company" means any person or persons corporate or unincorporate, not being registered under the Acts relating to friendly societies who issue or are liable under policies of assurance upon human life within the United Kingdom or who grant annuities upon human life within the United Kingdom.

Sec. 3. Every company established after the passing of this Act within the United Kingdom, and every company established or to be established out of the United Kingdom, which shall after the passing of this Act

commence to carry on the business of life assurance within the United Kingdom, shall be required to deposit the sum of twenty thousand pounds with the Accountant-General of the Court of Chancery. . . . The Accountant-General shall return such deposit to the company so soon as its life assurance fund accumulated out of the premiums shall have amounted to forty thousand pounds.

Haldane, K.C. (*Wood Hill* with him) for the appellants.—Shortly my contention is that when the whole Act is looked at it is clear that by "assurance company" is meant an assurance company carrying on assurance business in the ordinary sense, and it is not to be taken to extend to what not only covers the case of Messrs. Nelson, but might cover the case of an enormous lot of business carried on by people who as a mode of supporting their ordinary business give prizes or pensions to those of their customers or employees who conform to certain conditions. Sometimes tradesmen give a rebate on the goods purchased during the year where these amount to a certain value; sometimes they give cards with purchases, a certain number of which entitle the possessor to something or other. Here they give pensions to customers becoming widows under the circumstances set out in the case. This is surely very different from carrying on a business of life assurance or granting annuities on lives. No doubt, on the principle of *Carlill v. Carbolic Smoke Ball Company* (67 L. T. Rep. 837; (1893) 1 Q. B. 256), Messrs. Nelson, who are perfectly *bona fide* in making this offer to widows, are liable on it to widows who have fulfilled the condition. But, nevertheless, this card is not a policy of assurance, for by sect. 2 of 14 Geo. 3, c. 48, it is enacted: "That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or person's name or names interested therein, or for the whole use, benefit, or on whose account such policy is so made or underwrote" [Lord ALVERSTONE, C.J.—But the customer's name is inserted in the card.] The card as issued is blank—it is merely called a "purchaser's card"—and the books of the firm are made the only evidence of the purchases.

The Attorney-General (Sir R. Finlay, K.C.) (*H. Sutton* with him) was not called upon.

Lord ALVERSTONE, C.J.—In this case the magistrates came to the conclusion on the facts that the appellants were on the 19th May 1900 carrying on the business of life assurance in the United Kingdom within the meaning of the Life Assurance Companies Act 1870, and the question for the court is whether, on the facts stated in the case and as disclosed by the documents, Messrs. Nelson are a company granting annuities upon human life, and carrying on the business of life assurance. Now nothing turns upon the question of incorporation. It is quite clear that the statute deals also with the person, but the question is what business was being carried on? It is really a question of fact, but, the case being submitted to us, I think we ought to express our opinion upon the facts before us, inasmuch as it arises upon documents, and it is obviously a case of importance. Now the facts, as I understand them, are these: Messrs. Nelson, perfectly *bona*

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ST. JAMES' HALL COMPANY v. LONDON COUNTY COUNCIL.

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fide and with the intention of promoting their own business, devised a very attractive scheme which will in certain events give to widows annuities on the deaths of their husbands of 10s. or 5s. a week. They receive so much money for the tea; and of course it is not suggested that it is done for charity, but out of profits. A portion of the price paid for the tea is the money which Messrs. Nelson can use for the purpose of insuring the annuities to these widows. They take a card on which the name of the person is entered who has purchased the tea; a weekly record is kept of the number of pounds bought, which of course would indicate so much money paid to Messrs. Nelson by that particular woman upon the terms of the bargain or contract which is held out by Messrs. Nelson to her, and there is made and entered in the book of the branch a record which is to be *prima facie* evidence if not the only evidence of the fact of the purchase. Therefore these gentlemen are perfectly *bona fide* and properly keeping a record of their customers who may ultimately become entitled to this annuity. Some will become entitled and some will not. As Mr. Haldane says, some will drop out and will not continue buying, and others will not become widows under such circumstances that they can obtain the annuity. In addition to that they publish an attractive advertisement (I agree with Mr. Haldane that it is no part of the contract, and use it only for the purpose of seeing whether the magistrates were right in the conclusion they came to as to the nature of the business) in which they say that they are in the course of establishing a business which if, by the assistance of many customers, it reaches the magnitude which is indicated will show that there is out of the profits of the tea, after deducting salaries, rent, taxes, costs, and duty, enough to pay 10,000 widows 10s. apiece per week, with a very enormous balance of cash in hand, which would be Messrs. Nelson's profits; but it is of course available in the shape of security for the insurance if the figures are at any rate approximately right. Further, they purport to set aside a penny in the pound, and there is a trust deed, which trust deed says that 2000*l.* is held in respect of this business. In the face of these facts it is, in my mind, quite impossible to come to any other conclusion than that, in connection with this tea trade, Messrs. Nelson are carrying on what may be a very desirable scheme of insurance, in a very profitable method to them, and also a very desirable and advantageous system to people who buy tea, of granting annuities which become effective on the death of the husband. Now the words of the section to which our attention has been called are "who issue or are liable for policies of assurance on human life, or who grant annuities upon human life within the United Kingdom." Now, I do not think that the argument based upon what is a policy within the Act of George III. had any real relation to the subject. But even if it had, the latter words, "who grant annuities upon human life," are obviously applicable because this is to be an annuity for the life of the widow, to commence on the death of the husband. I think, on consideration of this section, that it points to a carrying on of a business which depends on the payment of money or the payment of annuities dependent upon the duration of human life. That is what I understand

to have been the object of the business which was contemplated by the statute, and as to which business it is provided that an amount should be deposited. I will only point out that the 20,000*l.* deposit under sect. 2 has no relation to the amount of business done. It was no doubt considered to be a sort of indication of substantial position of the person carrying on the business; and when the sum accumulated from premiums has reached 40,000*l.*, the amount deposited under sect. 2 is to be returned. Therefore it is clear that it was not intended to be a sum of money deposited with reference to the kind of business done by the company, but to be an indication of the substantial position of the people, be they companies or be they persons who are carrying on the business. I think the magistrates came to a perfectly right conclusion, and had the facts been submitted to me as a judge of fact of first instance I should have come to the same conclusion. At any rate, I am quite unable to say that the conclusion at which they arrived is wrong, and I think that judgment should be entered for the respondents.

LAWRENCE, J.—I am of the same opinion, and I am very glad to be able to come to that same conclusion. I accept what Mr. Haldane says with regard to the *bona fides* of these people, but I am bound to say I should not have gathered it from the documents before us. If the company have any prospect of doing the immense business they hope to do, according to the scheme as advertised by them, they should not find any difficulty to deposit the comparatively paltry sum of 20,000*l.*

Appeal dismissed.

Solicitors for the appellants, Collyer, Bristow, Hill, Curtis, and Dods, for H. F. V. Falkner, Louth.

Solicitor for the respondents, Solicitor of the Board of Trade.

Wednesday, May 8, 1901.

(Before CHANNELL, J.)

ST. JAMES' HALL COMPANY v. LONDON COUNTY COUNCIL. (a)

Metropolis—Places of public entertainment—Structural defect—Notice to alter—Metropolis Management and Building Act 1878 (41 & 42 Vict. c. 32), s. 11.

The powers given to the London County Council by sect. 11 of the Metropolis Management and Building Act 1878 to require, by written notice, that the owner of any theatre, music-hall, or other place of public entertainment, shall make structural alterations in the same whenever it appears to the council that such theatre, music-hall, or other place of public entertainment is so defective in structure that special danger from fire may result to the public frequenting the same, can be exercised only once in respect to the same theatre, &c., unless perhaps the owner has, since the powers were first exercised, himself so altered the structure of the theatre, &c., as to cause in the opinion of the council special danger from fire.

ACTION claiming a declaration that a certain notice served by the defendants on the plaintiffs was *ultra vires* and an injunction.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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The notice in question purported to be issued under the powers conferred upon the defendants by sect. 11 of the Metropolis Management and Building Act 1878 (41 & 42 Vict. c. 32).

The material part of sect. 11 is as follows :

Whenever it appears to the board that . . . any house, room, or other place of public resort within the metropolis containing a superficial area for the accommodation of the public of not less than five hundred square feet, which was at the time of the passing of this Act authorised to be kept open, and which is kept open, for dancing, music, or other public entertainments of the like nature, under the authority of a licence granted by any Court of Quarter Sessions, is so defective in its structure that special danger from fire may result to the public frequenting the same, then and in every such case the board may, with the consent of . . . Her Majesty's principal Secretary of State in all cases, if in the opinion of the board such structural defects can be remedied at a moderate expenditure, by notice in writing require the owner of such house, room or other place kept open for any of the purposes aforesaid, under such authority as aforesaid, to make such alterations therein or thereto as may be necessary to remedy such defects within a reasonable time, to be specified in such notice.

Avory, K.C., and C. A. S. Garland for the plaintiffs.

Dickens, K.C., and Daldy for the defendants.

The facts and arguments are fully set out in the following written judgment:—

CHANNELL, J.—This action, tried before me without a jury, was brought to obtain a decision upon the true interpretation of sect. 11 of the Metropolis Management and Building Act 1878, which section gave to the Metropolitan Board (and now the London County Council, their successors) certain powers for the prevention of danger from fire in music halls which had been licensed for the first time prior to 1878. The Metropolitan Board exercised those powers in 1885 in reference to St. James' Hall, and the plaintiff company, the owners of that hall, contend that the powers of the section must be exercised once for all. The defendants have served another notice purporting to be under the powers of the section, and the plaintiffs bring this action for a declaration that the notice is *ultra vires* and for an injunction. The plaintiffs have obtained an interlocutory injunction restraining the defendants from acting upon the notice until the trial, and I have now to say whether the plaintiffs' view of the section is right. If it is, there is no dispute that the plaintiffs are entitled to the declaration and, if they require it, to an injunction. The facts are that in 1885 the Metropolitan Board, proposing to proceed under the section, prepared a draft notice of their requirements. This draft notice was the subject of negotiation between Mr. Walter Emden (who then, as now, was the architect of the plaintiffs) on the one hand and the architect of the then board on the other. The result was that modifications of what was first proposed by the board were agreed to, and those modifications were embodied in the formal notice which was served dated the 10th Aug. 1885. The works in that notice were done by the plaintiffs at a cost, it is said, of upwards of 7000*l.* There was no appeal as the works had already been agreed, but the result seems to me to be the same in substance as if there had been an appeal

against the original proposals of the board and the award had been that the works, which in fact were in the notice of the 10th Aug. 1885, should be done. At any rate it is not disputed that there was an exercise of the compulsory powers of the section. The original proposal of the board included the pulling down of an existing staircase and the re-erection of a better staircase at the same place. The modifications agreed on included the pulling down of that staircase, but it was agreed that it should not be re-erected, the necessary accommodation being provided elsewhere. One of the things which the county council now direct is the erection of a staircase at the same spot. I do not myself regard that fact as very important, but the change of view which has apparently taken place is an illustration of the mischief of holding that the powers of the section may be exercised from time to time whenever "it appears" to the fluctuating body that there is danger, as it certainly would be hard on the owner of the building if, as soon as he has complied with the requisition of the board, he is liable to be ordered to pull down and alter that very work on a change of views of the board, or its architect. Since the works were completed in 1885 the plaintiff company have from time to time, at the suggestion of the county council, voluntarily made some alterations in such matters as the seats in the hall, and otherwise, but they have done so without admitting the right of the defendants to require them to make those or other alterations, and it seems doubtful whether any of them were structural alterations. The London County Council now require, claiming the powers to do so by the 11th section, further works, the cost of which is estimated at upwards of 4000*l.*, and they have obtained (though without prejudice to the question now raised) the leave of the Secretary of State to make the requirement. Under these circumstances it becomes necessary carefully to examine the words of the section. [Reads sect. 11.] There is also a provision for an appeal to an arbitrator appointed by the First Commissioner of Works, who may either confirm the notice with or without modifications, or refuse to confirm it, and whose decision shall be final. There is nothing in the words used which is clearly inconsistent with the contention of either party. The word "whenever" seems to be as capable of meaning "at whatever time," which is the plaintiffs' contention, as it is of meaning "so often as," which is the defendants' contention; and it is necessary to look at the rest of the section and the context to see which of the two meanings it does bear. The first observation on the section is that it relates entirely to defects in structure and not to defects arising from want of repair, or from the mode of control or management of the premises, such as keeping doors locked or the like. Further, it only gave power to the board to require alterations which could be effected at a moderate expenditure. The result of that is that, if in 1878 there was a licensed music-hall which was so defective in its structure that special danger from fire arose, and the defects were such that they could not be remedied except at an excessive expenditure, no alterations could be required to be made in that music-hall, and, subject to any power the licensing authority might have to refuse to renew the licence, the hall must continue with its defects

K.B.] MERSEY DOCKS & HARBOUR BOARD v. ASSESS. COM. OF BIRKENHEAD UNION. [H. OF L.]

That being so, it seems clear that the Metropolitan Board could not, in reference to such a hall, divide its requirements and make successive requirements, each of which could be complied with at a moderate expenditure, although the total would be excessive. That goes to show that the powers of the section must be exercised once for all; otherwise, though the expenditure on each of the successive requirements might be moderate, the total might be excessive. Again, when the 12th and 13th sections are looked at, it certainly seems that, if a music-hall first licensed after 1878 complied with the regulations of the board in force at the date it was completed, and got a certificate to that effect, it would not be interfered with. It is unlikely that the existing halls would be put on a worse footing than new halls in this respect, but to this argument it is answered that the old halls can only be interfered with when it appears to the board that there is actual danger, and, further, that they are protected by the power of the Home Secretary to veto the requirement and by the right to require arbitration. These protections are, however, given in respect of the first exercise of the powers, and, therefore, they do not go far to show that there cannot be a second exercise. Further, the condition precedent is not that there should in fact actually be danger, but merely that there should "appear to the board" to be danger, and it is these words that give rise to the question whether the board can change their views. On the whole I have come to the conclusion that the plaintiffs are right in their contention. I think that the board had only power to order alterations if such alterations not only could be done at a moderate cost, but also would when done remedy the defects. It must, therefore, be assumed that, when the works done in pursuance of the former order were completed the defects were remedied, or, at all events, that in the opinion of that board they were remedied. That board could not in the next year have said that they themselves had made a mistake, and ought to have ordered something more or something different, and, if they could not, neither can the London County Council, who succeed to their rights. The word "whenever" is fully accounted for by its not being intended to compel the Metropolitan Board forthwith on the passing of the Act of 1878 to survey all existing music-halls. They were to exercise the power given whenever they choose, but when they did exercise it their judgment was, in my opinion, to be, subject to the mode of appeal provided in the section, final not only as to the works ordered being required, but also as to the order being sufficient. I may point out that this view of the section is in accordance with what has been decided in analogous cases in other Acts of Parliament, in that a power to a local authority to order structural works (as, for instance, sewers) at the expense of a private owner, must be exercised once for all: (*Bonella v. Twickenham Local Board*, 58 L. T. Rep. 299; 20 Q. B. Div. 63; *Hornea Local Board v. Davis*, 68 L. T. Rep. 503; (1893) 1 Q. B. 756). I am, however, not prepared to hold that if the owner of an old music-hall after complying with a requisition under this section, were himself to make further structural alterations, and the effect of those alterations was to cause, in the opinion of the London County Council, danger from fire, they

might not then act in this section. That question does not arise now. If the owners of a hall should ever do this, it would probably be held that the hall as so altered was not the old hall which had been licensed prior to 1878, but a new hall coming under sect. 12, and that it must comply with the existing regulations. If, however, that was not held, it would be, in my opinion, an open question whether sect. 11 could not be applied to the case on the ground that although the hall had not lost the protection given by sect. 11, yet the powers of the board had never been exercised in reference to the defects in question. That case, however, differs entirely from the present. Here undoubtedly the Metropolitan Board did exercise in 1885 the powers of sect. 11, and, if there are any defects now, they either existed prior to the order of 1885 and ought to have been dealt with, or were occasioned by the works done in pursuance of that order. In either case the powers under sect. 11 were, in my opinion, exhausted. I therefore think that the London County Council cannot now exercise the powers. There must be judgment for the plaintiffs with costs.

Judgment accordingly.

Solicitors for the plaintiffs, *Wilkinson, Howlett, and Wilkinson.*

Solicitor for the defendants, *W. A. Blasland.*

HOUSE OF LORDS.

April 23 and 25, 1901.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVY, ROBERTSON, and LINDLEY.)

MERSEY DOCKS AND HARBOUR BOARD v. ASSESSMENT COMMITTEE OF BIRKENHEAD UNION. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Poor rate—Rateable value—"Lairages"—Receipts and expenditure—Admissibility of evidence.

There is no rule of law limiting the method in which the rating authority may arrive at the rateable value of a hereditament, and the profits derived from the occupation are a legitimate element to be taken into consideration in arriving at the value of the occupation.

Judgment of the Court of Appeal affirmed.

THIS was an appeal from the judgment of the Court of Appeal (Smith, Collins, and Williams, L.J.J.), reported 19 Mag. Cas. 425; 81 L. T. Rep. 798; (1900) 1 Q. B. 143, who had affirmed a judgment of the Queen's Bench Division (Lawrance and Channell, J.J.) upon a case stated by the Recorder of Birkenhead, on an appeal against a rate and assessments made for the relief of the poor in respect of certain "lairages" on the Birkenhead side of the river Mersey, of which the appellants were owners and occupiers.

The facts of the case submitted by the recorder, Mr. Clement Higgins, K.C., who, at the desire of the Court of Appeal, further stated the principle

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

H. OF L.] MERSEY DOCKS & HARBOUR BOARD v. ASSESS. COM. OF BIRKENHEAD UNION. [H. OF L.]

on which he based his decision, stated (*inter alia*) that some of the lairages, known as the Woodside lairages, were entirely within the township of Birkenhead, and others, known as the Wallasey lairages, were only partly situated in that township.

The lairages are buildings of brick and wood, roofed partly with felt and partly with slate, used for the reception and slaughter of cattle and sheep brought from abroad, and for the cooling and preservation of the carcases. Two of the buildings used as lairages were originally warehouses—one a warehouse of several stories and another a warehouse of two stories, erected and formerly used for the storage of general produce. Certain sloping galleries were constructed outside the warehouses with entrances thereto to enable the cattle to walk up to the various stories, and the warehouses were fitted with pens and other fittings necessary for lairages, slaughterhouses, cooling rooms, and stores. The other buildings were designed and constructed for the purpose of lairages, slaughterhouses, cooling rooms, and stores, and were fitted with pens and other fittings necessary for the above purposes and were for the most part of one story.

The premises are the only place in the neighbourhood at which foreign animals can be landed, except under penalties as provided by the Diseases of Animals Act 1894, but there are lairages for foreign animals at Deptford, Manchester, Hull, Cardiff, Bristol, Glasgow, and other places.

The premises of the said Woodside and Wallasey lairages are the part of the port of Liverpool defined as a foreign animals' wharf by an order of the Board of Agriculture, made the 4th Jan. 1896 in pursuance of the Diseases of Animals Act 1894.

The said lairages were erected and are worked and carried on by the appellants under the provisions of their statutory powers, and not as a local authority under the Diseases of Animals Act 1894. No local authority has been appointed under such Act in respect of the port of Liverpool. Only the part of the lairages which is within the township of Birkenhead is within the municipal area of Birkenhead. The lairages are carried on subject to the provisions of the Foreign Animals Order of 1896, which order was to be referred to and taken as part of the case.

In pursuance of the appellants' statutory powers, certain bye-laws have been duly passed for regulating, governing, and managing the stages, wharves, and landing places at which foreign animals are from time to time permitted to be landed on the estate of the Mersey Docks and Harbour Board, and in further pursuance of such statutory powers the appellants have prescribed a schedule of charges in respect of such animals. Such bye-laws and schedule of charges were attached to and formed part of the case.

In the course of the hearing of the appeal, the respondents tendered in evidence certain accounts, made up from the books of the appellants, showing the receipts and expenditure of the appellants in the conduct of the business of the lairages for the three years ending the 1st July 1896 and the averages thereof. The appellants objected to the admission of any evidence as to the amount of

receipts and expenditure, but the recorder held such evidence admissible and admitted the evidence tendered by the respondents accordingly.

The learned recorder found the following facts:—

1. The tenements subject to assessment are capable of separate beneficial occupation apart from their connection with the rest of the appellants' property.

2. Their value is enhanced by their proximity to and connection with the docks and rails belonging to the appellants.

3. There are tenants other than the appellants available for the occupation of the tenements for the purpose of carrying on the business of a lairage.

4. There are no similar tenements in this neighbourhood with which a comparison can be made. If the assessment ought to be based on the mere structural value of the buildings plus the value of the land and without reference to receipts and expenditure, I find as follows: Lairage in Woodside, gross estimated rental, 13,381*l.*; net annual value, 8964*l.*; lairage in Wallasey, gross estimated rental, 3728*l.*; net annual value, 2419*l.* The appellants admit that if the principle of assessment contended for by the respondents is correct the gross estimated rentals of the two hereditaments in question appearing upon the rate book are not too high, and the respondents admit that in this appeal they cannot be increased. Consequently I adopt these figures and find the true rateable value as follows: Lairage in Woodside, gross estimated rental, 19,333*l.*; net annual value, 12,622*l.*; lairage in Wallasey, gross estimated rental, 4723*l.*; net annual value, 3414*l.* The result is that as the net values are reduced the appeal is allowed and the rate must be made upon the aforesaid net values of 12,622*l.* and 3414*l.*, instead of the figures 17,400*l.* and 4251*l.* As each party to the appeal has succeeded in part, there will be no order as to costs.

The questions for the opinion of the court are: (1) Whether the accounts referred to were properly admitted; (2) whether the principle adopted in the aforesaid judgment is correct. If the answers to both the questions are in the affirmative then the gross and rateable values as found by the Court of Quarter Sessions are to stand. If the answer to either question is in the negative, and the appellants' contention is correct, then the assessments are to be as follows: Lairage at Woodside, gross estimated rental, 13,381*l.*; rateable value, 8964*l.*; lairage at Wallasey, gross estimated rental, 3728*l.*; rateable value, 2419*l.*

Asquith, K.C., *F. Marshall*, K.C., and *Horridge*, K.C., appeared for the appellants, and contended that the recorder was wrong in admitting the evidence of the receipts and expenditure. The rateable value of a shop or place of business is quite independent of the actual profits made by the occupier. This is an attempt to rate a privilege conferred by the order of the Board of Agriculture, the profits from which can only be applied in the manner prescribed by statute. In considering the rateable value of a lighthouse the dues taken in respect of it cannot be taken into account. The proper way to arrive at the rateable value is to take the structural value of the buildings, and the value of the land, and

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calculate on that the rent which a tenant would pay. They referred to

Jones v. Mersey Docks, 12 L. T. Rep. 643; 11 H. of L. Cas. 443;
London County Council v. Churchwardens of Erith, 69 L. T. Rep. 725; (1893) A. C. 562;
Guardians of Sculcoates v. Hull Dock Company, 71 L. T. Rep. 642; (1895) A. C. 136;
Cartwright v. Sculcoates Union, 82 L. T. Rep. 157; (1900) A. C. 150;
Mersey Docks v. Liverpool Overseers, 29 L. T. Rep. 454; L. Rep. 9 Q. B. 84;
Mersey Docks v. Birkenhead, 29 L. T. Rep. 27; L. Rep. 8 Q. B. 445;
Allison v. Overseers of Monkwearmouth, 4 E. & B. 13;
Rees v. Coke, 5 B. & C. 797;
Commissioners of the Port of Lancaster v. Overseers of Barrow-in-Furness, 75 L. T. Rep. 358; (1897) 1 Q. B. 166;
Verrall v. Croydon Union, 83 L. T. Rep. 379; 1 Q. B. Div. 9; *sub nom. Reg. v. Verrall*.

Pickford, K.C., A. A. Tobin, and Montgomery, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case it appears to me, for reasons which have been given by the Court of Appeal and the subsequent explanation of the learned Recorder, that this appeal ought to be dismissed with costs. I cannot help thinking that a great deal of the hesitation and confusion which has arisen upon the subject matter which your Lordships have heard debated now on the part of the appellants has arisen from the advisory character of the judgments which have been given from time to time by the various courts before whom this question has come. The thing that the Legislature has called upon the overseers to do is to solve a simple question of fact, and although it may be by no means simple in the mode in which they are to arrive at it, the question of fact is simple enough as stated—that is to say, they are to look at the rent at which the several hereditaments rated might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, deducting therefrom the probable average cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. That is the proposition put before the parish officers, which they have to answer, and they are to arrive at the value, so far as I know, unfettered by any statute as to the way in which they can do it. Now, I am not aware of any rule of law or of any statute which has limited them as to the mode in which they shall arrive at it, and it is not a question of law at all, it is a question of fact. These questions have from time to time come before the courts and have been argued as questions of law, where instead of doing what the section has directed them to do, the overseers, or those who were acting on the part of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included; and, of course, in that sense, where you are dealing with a question of fact which has

to be answered by any tribunal, it may be that the question has come up in the argument as a matter of law; but still one must bear in mind that the thing to be done is to answer a plain question of fact: What is the rent which a tenant, subject to the deductions mentioned in the statute, can reasonably be expected to give for the buildings as a tenant from year to year? The first part of the proposition is that you are to rate. What? Not the tenant's trade. Some questions arise, with which I will deal presently, as to whether you are to go into the question of profit and loss. They are excluded by the language from the statute. You are to rate the hereditaments according to their value. Therefore it would be wrong to rate the trade as if you were dealing with it as a question for income tax. You are not rating the income; you are rating the hereditaments. So that where you have buildings of a similar character with equal facilities for carrying on the trade, you have a very facile mode of coming to the conclusion what sum would reasonably be given by a tenant from year to year for such buildings. But if instead of doing that, you choose to go into elaborate calculations of how much the thing cost to erect and when erected what would be the value of it, you are only elaborating and making more complex and difficult the simple proposition which the Legislature has put before the overseers to answer. From time to time observations have been made by some learned judges saying this should have been done and the other should have been done and the other should not have been done, but that was not as pronouncing judgments upon the law of evidence as to whether or not such and such a topic was legitimate or not in arriving at the conclusion at which the Legislature has directed them to arrive, but what was the ordinary and natural means of arriving at the conclusion at which they were bound to arrive. I am the more anxious to point this out because I think that in these later days we have got rid of a good many of these sources of confusion. The advisory character, as I have said, of the judgments given by the courts has, no doubt, led to words being used not in the strict sense, but as matters of advice to the justices in determining such questions, and sometimes they have been printed in the Law Reports as if they were decisions upon the law of evidence in this country. I protest against any such view, and in this very case, although, as I say, during the last half century we have arrived at conclusions which get rid of a great deal of the confusion which at one time existed, I find that Channell, J. uses a phrase to which I am afraid that I cannot assent—namely, that wherever you can arrive at the value by comparing it with similar tenements, you are bound to arrive at it in that way. If that means that it is a facile and proper way of doing it, I should agree, but if it is laid down as a proposition of law, that it is the only means by which it can be arrived at, I venture to say that I do not assent to that view. Again, I find that Collins, L.J. in the same way says: "Hence the rule that in ordinary cases when the standard of rent is applicable, evidence of actual profits made cannot be received. But it is equally true that when no such standard of comparison exists, it is legitimate to inquire into the profits actually earned."

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Again, I am compelled to say that I cannot concur with the form in which that proposition is put. It is not a question of deciding what, according to the law of evidence, is receivable, but what is the more natural and ordinary and usual mode by which you can answer the proposition put by the Legislature to the overseers. The proposition appears to me a very intelligible one, if unclouded by all these questions which from time to time have been raised by ingenious persons (and at the expense of the parishes a good many academic questions have been discussed) you are to find out what a tenant will reasonably give, looking at all the circumstances of the particular occupation, including therein the business that might be done on the premises; and I think that I had occasion to say, in a former case, that it would be a very extraordinary thing if, although you can give evidence by expert testimony as to what kind of business might be done, you are not at liberty in point of law to ascertain what business has been done. It seems to me that no such proposition could reasonably be maintained. If, on the other hand, to go into the account of profits and losses would not be irrelevant, if you are finding out what a man's income is, for the purpose of ascertaining what a tenant would be likely to give, to suggest that it is something which in point of law you have no right to inquire into is equally absurd. If all the circumstances of the particular occupation, the mode in which the trade is carried on, and the circumstances either of restriction or of amplitude of the trade, are all legitimate subjects of inquiry, the only question of law is whether the particular tribunal has followed the line which I have indicated. Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included because the proposition is a proposition of fact, and the only mode in which you get in a question of law at all is as to the mode in which that proposition of fact has been dealt with. Let me see in that view what it is that the learned recorder has done. I must take the recorder's own statement of what he has done, and how he has applied his mind to the topics which I have stated to be legitimate topics—the topics to which he has been directed to apply his mind by the Legislature: "I did not assess the rate upon the profits of the tenant, but I used them, together with other evidence to test the values given by the appellants and respondents respectively. Having taken into consideration all the evidence before me as to the actual receipts and expenditure of the occupiers, who carried on the business, the nature of the business, and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances, I came to the conclusion that the gross values given by the respondents were too low, but I felt that I had no power in this appeal to put them up." Upon that no question arises before your Lordships. "I therefore accept these values as the nearest to the true gross values I could arrive at, and proceeded to determine the amount of the deductions to be made therefrom in order to arrive at the net annual values by a consideration

of the evidence before me, most of which was given by the appellants." Now, when we are dealing with it as a question of law, the limits to which I have pointed being whether in arriving at this conclusion of fact anything wrong has been done either by way of inclusion or exclusion, when I read that, how is it possible to say that what the recorder here has done is wrong? What abstract proposition of law can be laid down to say that the learned recorder was wrong? I have nothing to do with the question of amount. He may or may not be wrong in the particular amount at which he has arrived, but that is not a question of law. The question of law is, whether upon any of this statement of fact you can say that he has included anything which he ought not to have included, or has excluded something which he should have included? Upon that statement of fact it is hopeless to contend that either of those propositions can be made out, and I therefore move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN.—My Lords: I am of the same opinion.

LORD SHAND.—My Lords: I also concur and adopt all that has been said by the Lord Chancellor in giving judgment. The heritable property in question is in this position: that no building of the same class can be referred to to ascertain the annual value of this building. It is not like a public-house, or a railway, or canal, or docks, or anything which may have analogous buildings to which you can refer. That being the state of matters, it appears to me that the return which has been actually had from the occupation and use of the building is a legitimate element and a material element in ascertaining the valuation according to the statute. That is what a tenant would reasonably give for the premises. Upon that ground, adopting the view which Smith, L.J. took of this case, and adopting what my noble and learned friend on the woolsack has said, I am of opinion that the appeal should be dismissed.

LORD DAVEY.—My Lords: I am of the same opinion. I only desire to say a very few words upon what I understood to be Mr. Asquith's argument upon this case, or, at all events, the chief argument which he put forward. If I understood Mr. Asquith rightly, his argument was this: That he did not say as an abstract proposition that profits made from the use of the hereditament ought not to be taken into account generally, but he argued that they ought not to be taken into account in this particular case, because by statute the occupier of the hereditament was precluded from putting those profits or the produce of carrying on this business on this hereditament into his own pocket for his own advantage and the enhancement of his own wealth, but was bound to apply those profits in the particular mode pointed out by the statute in reducing the debt and so forth. Now, I think that argument is answered by the case which was decided in this House in the year 1865 in *Jones v. Mersey Docks* (*ubi sup.*), because in that case, although it is quite true that the question put to the learned Judges by the House and the question decided was whether the hereditament was rateable at all, yet in answering that question *ex necessitate* the consideration was involved of the question upon what

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basis the rating should be, because the argument used was that there was no beneficial occupation, and it was held to be rateable because there was a beneficial occupation. I conceive that in principle and impliedly, as I think has been held in subsequent cases which have come before the courts, what was really decided was that, notwithstanding the restriction upon the application of the profits resulting from carrying on that business on that hereditament, the profits so derived were a legitimate element in arriving at the value of the beneficial occupation which was to be the subject of rating. And I think that it is put beyond controversy in a passage in the judgment of Blackburn, J. in advising the House on behalf of himself and the other judges. He says this: "Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the Bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that if the phrase is to be understood in this limited sense, the trustees have a beneficial occupation, for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks, at present greatly in excess of what is necessary to maintain the docks." Every word of that is applicable. "Hereafter the charges on shipping may be reduced so as to greatly diminish the revenue derived from this occupation, possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks, as at present enjoyed by the trustees, a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent." And Lord Westbury, in moving the judgment of the House, after referring to the Parochial Assessment Act, which he quotes as saying "that 'occupation' must be of property yielding, or capable of yielding, a net annual value," and so forth, continues: "It is in this sense that I understand the words 'beneficial occupation,' wherever it is said that to support a rate the occupation must be a beneficial one. For on principle it is by no means necessary that the occupation should be beneficial to the occupiers; or, in other words, it is perfectly immaterial what becomes of the amount which is the result of carrying on the business on the hereditament after paying the expenses and other outgoings, whether it is applied for the purpose of public uses, whether it is applied for the payment of debt and other charges, as in the present case, or whether it goes into the pockets of the occupiers. What you have to look at is whether the occupation is beneficial in the sense in which the term is used in that passage; and I conceive that if the principles there laid down are adopted (although I admit that the question was not then before the House upon what principle the rate should be made), they are applicable to the case which is now before us, and, as it humbly appears to me, that is a complete

answer to the argument which Mr. Asquith addressed to us.

Lord ROBERTSON.—My Lords: I agree in what has been said by my noble and learned friend the Lord Chancellor, and by my noble and learned friends who have addressed the House. I also concur in the remarks which have just been made by my noble and learned friend Lord Davey.

Lord LINDLEY.—My Lords: So do I, and I cannot usefully add anything.

Judgment appealed from affirmed and appeal dismissed with costs.

Solicitors: for the appellants, *Bowcliffe, Bowle, Johnstone, and Gregory*, for *W. C. Thorne*, Liverpool; for the respondents, *J. E. and H. Scott*, for *Thompson, Hughes, and Mathison*, Birkenhead.

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 24 and 25, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

DICKSEN (app.) v. HOSKINS (resp.). (a)

Metropolis—Buildings—Building "used in part for purposes of trade and in part as a dwelling-house"—Public-house—Necessity of fire-resisting materials between part used as public-house and part used for residence—London Building Act 1894 (57 & 58 Vict. c. cccviii.), s. 74, sub-s. 2.

By sect. 74, sub-sect. 2, of the London Building Act 1894: "In every building exceeding ten squares in area used in part for purposes of trade or manufacture and in part as a dwelling-house, the part used for the purposes of trade or manufacture shall be separated from the part used as a dwelling-house by walls and floors constructed of fire-resisting materials."

Held, that this sub-section does not apply where certain rooms in a dwelling-house are used for the purposes of trade, or certain rooms on business premises are used for the purpose of residence; and therefore does not apply to an ordinary fully licensed public-house exceeding ten squares in area, where the trade of the public-house is carried on in the lower part of the house and the licensed occupier and his family reside in the upper part of the house—the whole house being licensed—so that the part used for residence need not be separated from the part used for business by walls constructed of fire-resisting materials.

CASE stated by the metropolitan police magistrate, sitting at Southwark Police-court.

On the 19th Oct. 1900, an appeal under sect. 150 of the London Building Act 1894, wherein Frederick Hoskins was appellant and Bernard Dicksee was respondent, was heard before the magistrate sitting at the Southwark Police-court, and upon such hearing the following facts were proved or admitted.

On the 11th July 1900 the respondent Hoskins,

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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who is a builder, served notice on the appellant, who is a district surveyor, under sect. 145 of the London Building Act 1894, of the proposed erection of a building at No. 87, Old Kent-road, together with plans showing that the proposed building was the re-erection of a licensed beerhouse on the site of an old beerhouse called the Horse Shoe.

On the 15th Aug. 1900 the appellant, as such district surveyor, served upon the respondent a notice of objection to the proposed erection of the building under sect. 150 of the London Building Act 1894, on the ground that it would be in contravention of sub-sect. 2 of sect. 74 of the Act.

This notice of objection, in specifying the particulars of work which would be in contravention of the Act, stated that:

The building will exceed ten squares in area, and will be used in part for purposes of trade and in part as a dwelling-house; but the part to be used for the purposes of trade will not be separated from the part to be used as a dwelling-house by walls and floors constructed of fire-resisting materials, and the passage, staircase, and other means of approach to the part to be used as a dwelling-house will not be constructed throughout of fire-resisting materials, and the doorways in the fire-resisting walls separating the part to be used for the purposes of trade from the passage and other means of approach to the part to be used as a dwelling-house will not be fitted with fire-resisting doors. The building, therefore, will be in contravention of sect. 74, sub-sect. 2.

Then the notice specified the particulars of work required by the Act, but which were proposed to be omitted, namely:

Floors to be constructed of fire-resisting materials between the parts to be used for purposes of trade and the part to be used as a dwelling-house, and fire-resisting doors to be fitted to the doorways in the fire-resisting walls separating the part to be used for the purposes of trade from the passage and other means of approach to the part to be used as a dwelling-house, and the passage, staircase, and other means of approach to the part to be used as a dwelling-house to be constructed throughout of fire-resisting materials as required by sect. 74, sub-sect. 2.

The building when erected will exceed ten squares in area, and will contain (1) in the basement, beer and wine cellars; (2) on the ground floor, a bar, public lobby, saloon bar, private bar, bar parlour, and a public room; (3) on the first floor, a sitting-room, three bedrooms, and a kitchen; and (4) on the top floor attics.

The old house called the Horse Shoe and the site of the new building was licensed and used, and the new building when completed will be licensed and used for the sale of wine and beer, to be consumed on or off the premises under the Beerhouse Act 1830 (11 Geo. 4 & 1 Will. 4, c. 64), and the Refreshment Houses Act 1860 (23 & 24 Vict. c. 27), and the Acts amending the same. The trade of the beerhouse will be carried on on the basement and ground floor, and the licensee and his family will reside in the upper floors of the building. The whole of the building will be covered by the justices' certificate and excise licence. The plans for the new building had been submitted to and approved by the licensing justices for the Newington Division of the county of London.

The floors separating the ground floor from the first floor and the staircase leading from the first floor will not be constructed of fire-resisting

materials, and if sub-sect. 2 of sect. 74 of the London Building Act 1894 applies to this building, the provisions of that section will be contravened.

It was contended for the appellant that sub-sect. 2 of sect. 74 of the Act applied to the proposed building, as it was to be used in part for the purposes of the trade of a beerhouse and in part as a dwelling-house.

It was contended for the respondent that sub-sect. 2 of sect. 74 did not apply to a beerhouse, and the decision in *Carritt v. Godson* (19 Mag. Cas. 267; 80 L. T. Rep. 771; (1899) 2 Q. B. 193) was relied on.

The magistrate found as a fact that the basement and ground floor of the building were intended to be used for the purposes of the trade of a beerhouse, and that the part above the ground floor was intended to be used as a dwelling-house for the licensed occupier, but he held that the case was governed by the decision in *Carritt v. Godson* (*ubi sup.*), and he accordingly allowed the appeal and overruled the objection of the district surveyor.

The question for the opinion of the court was whether the decision of the magistrate was right in law.

The London Building Act 1894 (57 & 58 Vict. c. ccciii.) provides:

Sect. 74.—(1) Every building shall be separated by an external wall or by a party wall or other proper party structure from the adjoining building (if any) and from each of the adjoining buildings (if more than one). (2) In every building exceeding ten squares in area used in part for purposes of trade or manufacture, and in part as a dwelling-house, the part used for the purposes of trade or manufacture, shall be separated from the part used as a dwelling-house by walls and floors constructed of fire-resisting materials, and all passages, staircases, and other means of approach to the part used as a dwelling-house shall be constructed throughout of fire-resisting materials. The part used for purposes of trade or manufacture shall (if extending to more than two hundred and fifty thousand cubic feet) be subject to the provisions of this Act relating to the cubical extent of buildings of the warehouse class: Provided that there may be constructed in the walls of such staircases and passages such doorways as are necessary for communication between the different parts of the building, and there may be formed in any walls of such building openings fitted with fire-resisting doors.

Sect. 5.—In this Act, unless the context otherwise requires: (23) The expression "square" applied to the measurement of the area of a building means the space of 100 superficial feet. (25) The expression "dwelling-house" means a building used, or constructed, or adapted to be used wholly or principally for human habitation. (36) The expression "fire-resisting material" means any of the materials and things described in the second schedule to this Act.

Avory, K.C. (Rowse with him) for the appellant.—The proposed building would clearly come within sect. 74, sub-sect. 2 of the London Building Act 1894. It is over ten squares in area and is intended to be used in part for purposes of trade—namely, the trade of a beerhouse keeper, and in part as a dwelling-house. It therefore comes within the express terms of the sub-section. The test really is the size; that is, if there be a building over ten squares in area and if it be used in part for purposes of trade and in part as a dwelling-house, then it comes within the sub-section. It could not be disputed that the section was in-

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tended to apply to ordinary shops above this size, if used partly for the business of the shop and partly as a residence. It would apply to all shops with bedrooms above the business part of the shop. *Carritt v. Godson* (19 Mag. Cas. 267; 80 L. T. Rep. 771; (1899) 2 Q. B. 193) is distinguishable on the ground that on the facts there stated the court seem to have drawn the inference that the whole building would in the ordinary course be used for trade. In this case the finding of fact by the magistrate as set out at the end of the case, is conclusive in favour of the appellant, unless, first, the subsection does not apply to licensed premises at all, or, secondly, that it does not apply where the upper part is used as a dwelling-house by the occupier of the trade part. The object of the Legislature was clearly to guard against the danger from fire, and there would be as much danger in the present case as in most other cases which would come within the sub-section. The magistrate was, therefore, wrong in the view he took of the case.

Danckwerts, K.C. and *W. F. Craies* for the respondent, were not called upon to argue.

LORD ALVERSTONE, C.J.—In deciding this case I do not at all wish to base my decision solely upon the judgment of my brothers Day and Lawrance in the case of *Carritt v. Godson* (*ubi sup.*), although I think that that decision was perfectly right. I do not base my decision solely upon that judgment for this reason that it is possible it may be suggested that there was an additional ground for the decision in that case, namely, the possibility of access to part of the premises by a yard into the lobby. In this case we have to decide a very important point, but I think, when understood as we understand it after the very clear argument for the appellant, a clear point as to what is the meaning of subsect. 2 of sect. 74 of the Building Act 1894. Now reading the provision of that sub-section I do not think it can be properly contended that that provision was meant to apply to the case of rooms in one dwelling-house used partly for trade and partly for residence. In answer to that, counsel for the appellant suggested that the limit is to be found only in the size, and that in every case in which the county council are satisfied that the building is intended to be used partly for a dwelling-house and partly for trade, and is above ten squares—that is, a thousand feet—ground area, it comes within the section. I think, speaking generally, that interpretation of the sub-section goes too far. Now, having dealt with what I may call the general question, I will say one word on what I understand the facts of this case to be. Here there was an ordinary house intended to be used as a beerhouse, and it makes no difference to my mind whether it was or was not going to be used as an hotel, as has been suggested. I do not think there is anything in that point. The upper floors of the building would, under all ordinary circumstances, be used for the licensed victualler or beerhouse keeper to reside in, and, although it is of no very great importance, I take it that, as far as it is a fact in the case, the licence would cover the whole house, and beer might be supplied in any place in that house. However, as I am going to base by judgment on rather broader grounds, I only mention those facts in order that it may be understood that I appreciate

those points. Now the finding in the case is that the basement and ground floor of the building were intended to be used for the purpose of the trade of a beerhouse, and that the part above the ground floor was intended to be used as a dwelling-house by the licensed occupier. I understand that finding to mean that the licensed occupier would live there; and I think it is because the argument for the appellant overlooks the real language of the section that the difficulty has arisen. In my opinion, whatever be the use of the premises, whether they are licensed premises, or ordinary shop premises, or manufacturing premises, if the state of things is that in the one tenement or dwelling-house some people sleep in rooms which are part of that tenement or dwelling-house the necessity or the obligation to have fire-proof divisions does not arise. I come to the words of the section for a moment. It begins: "In every building . . . used in part for the purposes of trade and in part as a dwelling-house." I do not think we can or ought to shut our eyes to the common and well known state of things in the year 1894, when this Act was passed. It was perfectly well known that there were shops with bedrooms over them much larger than ten squares. It was also perfectly well known that it had become a common practice to have the ground floor and basement, and sometimes the first floor, applied as a separate tenement to trade purposes, and that above the part so applied to trade purposes there was, as a separate tenement, approached by some kind of staircase, a part of the building which was used as a dwelling-house. I am satisfied in my own mind that what the London Building Act of 1894 meant to say was this: If there is a building above the specified size of which there is one part which is used for trade and another part which is used as a dwelling-house, then these parts are to be separated in a particular way. The language, however, is not apt to meet, and we should require clear language to include, the case of the user of certain rooms of a dwelling-house for the purpose of trade, or certain rooms on business premises for the purpose of residence. The reasoning in *Carritt v. Godson* (*ubi sup.*) entirely supports this view, and is an authority in favour of the view which I take. That decision would, of course, have been binding on us, but I wish it to be distinctly understood, speaking for myself, that I have arrived at this conclusion, whether it be right or wrong, on the considerations which arise on the language and purview of the section itself, quite apart from that decision, with which decision, however, I entirely concur. I therefore think that this appeal should be dismissed.

LAWRENCE, J.—I entirely agree. I only desire to say this about *Carritt v. Godson* (*ubi sup.*), that with regard to the judgments, both of my brother Day and myself, it was directed almost entirely, as I notice, to the argument of the learned counsel for the respondents and it did not go further, or profess to go further than that. We agreed with him and took the view he put forward that the building was not used partly for the purpose of trade and partly as a licensed house within the meaning of the section, and that being so, it was not necessary to go further into the case than that. The judgment was intended to meet the case that was before us. I entirely agree with

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the extension of the principle, if I may so call it, which has been stated.

Avory, K.C., for the appellant, asked for leave to appeal.

Danckwerts, K.C., for the respondent, referred to the decision of the Court of Appeal in *Reg. v. Shiel* (19 Mag. Cas. 581; 82 L. T. Rep. 587), where the court, affirming the decision of the Divisional Court, had refused to grant a *mandamus* to a metropolitan police magistrate to state a case upon this point, on the ground that the case then in question came within the decision in *Carritt v. Godson* (*ubi sup.*), and that the magistrate was right in so holding and in refusing to state a case; and he contended that leave to appeal ought not to be given in this case, more especially as the decision in *Carritt v. Godson* (*ubi sup.*) was approved by the Divisional Court in *Reg. v. Shiel* (*ubi sup.*). The court ultimately granted leave to appeal.

Appeal dismissed. Leave to appeal.

Solicitor for the appellant, *W. A. Blaaland*.
Solicitor for the respondent, *P. G. Gates*.

Friday, May 1, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRENCE, J.)

SMITH (app.) v. BOON (resp.). (a)

Light locomotive—Excessive speed—“Having regard to the traffic on the highway”—Light Locomotives on Highways Order 1896, art. 4 (1).

By the Light Locomotives on Highways Order 1896, art. 4 (1), no person shall drive a light locomotive at any speed that is greater than is reasonable and proper, having regard to the traffic on the highway.

The appellant drove his motor tricycle at a speed from eighteen to twenty miles an hour along a highway, but there was no direct evidence that any traffic was interrupted, interfered with, incommoded, or affected.

The justices found that the speed was excessive, having regard to the traffic on the highway.

Held, that the justices were right in convicting, as the words “having regard to the traffic on the highway” meant having regard to the traffic on the road, and not to the traffic in the immediate vicinity of the motor.

CASE stated on an information preferred by the respondent against the appellant charging him with driving a light locomotive at a speed greater than was reasonable and proper, having regard to the traffic on a certain highway.

Evidence was given by a police-constable that at the time and on the day in question the appellant drove his motor tricycle at considerably over twelve miles an hour, quite eighteen miles an hour, on the highway. The police-constable admitted that he “guessed” the rate of speed and stated that he saw a Carter Paterson’s van and a butcher’s cart on the highway. He admitted that no particular vehicle on the highway was interrupted, interfered with, incommoded, or affected by reason of the speed. Another witness said that he could not count twenty during the time it took the appellant to drive 300 yards. He thought the appellant was driving twenty miles an hour. He also admitted that the traffic

on the highway was neither interrupted, interfered with, incommoded, nor affected by reason of the speed at which the appellant drove his motor tricycle.

The appellant denied that he was driving at the before-mentioned speed and stated that he was driving at a speed of eight miles an hour.

There was no evidence before the justices that any vehicle or person using the highway was interrupted, interfered with, incommoded, or affected, by reason of the speed at which the motor tricycle was driven, and it was contended by the appellant that in the absence of such evidence the offence charged was not made out.

The justices found as a fact that the appellant was driving his motor tricycle at a speed of from eighteen to twenty miles an hour, and decided that such speed was excessive having regard to the traffic on the highway, and that the appellant’s contention that direct evidence of traffic being interrupted, interfered with, incommoded, or affected was necessary to support a conviction was ill-founded in law.

They therefore convicted the appellant.

Roger Wallace, K.C. (*S. Fleming* with him) for the appellant.—These proceedings were taken under art. 4 (1) of the Local Government Board Regulations relating to Light Locomotives, which prohibits the driving a light locomotive when used on any highway at any speed greater than is reasonable and proper, having regard to the traffic on the highway. There should have been direct evidence that the traffic was being interrupted or incommoded, in order to enable the justices to convict under this article, though, of course, they would have been able to summon the appellant under the other provisions of the order. In *Stinson v. Browning* (13 L. T. Rep. 799; L. Rep. C. P. 321) it was held that making a fire within 50ft. of the centre of a public carriage way is not an offence within sect. 72 of the General Highway Act (5 & 6 Will. 4, c. 50), unless it is done to the injury of the highway, or to the injury, interruption, or personal danger of persons travelling thereon. *Willes, J.* says: “The nuisance is not such *per se*, but is a nuisance only if done to the injury of the highway, or to the injury, interruption, or personal danger of persons travelling thereon.” Again, in *Hill v. Somerset* (51 J. P. 742), under the same statute it was held that it was essential to the offence that passengers should be endangered or interrupted. The magistrates here were wrong in convicting, and the conviction should be quashed.

The respondent did not appear.

Lord ALVERSTONE, C.J.—In my opinion, the magistrates were perfectly right. They find as a fact that the appellant was driving his motor at a pace of eighteen to twenty miles an hour, and there is no appeal from that finding. They also find that such speed was excessive, having regard to the traffic on the highway. Now the appellant contends that, in order to support a conviction, it was necessary that there should be some direct evidence that the traffic was being interrupted, interfered with, incommoded, or affected. It is said that there must be direct evidence that some vehicle was nearly run into or incommoded, or that some old woman must have had to step back on the footpath when crossing the road. In fact, it

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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is said that there must be something amounting to a risk of accident, if not actual accident, before there can be a conviction. I think that the words "having regard to the traffic on the highway" mean having regard to the traffic on the road, and not having regard to the traffic in the immediate vicinity of the light locomotive.

LAWRANCE, J. concurred. *Appeal dismissed.*

Solicitors: *Firth and Co.*

April 27 and May 3, 1901.

(Before GRANTHAM, KENNEDY, and
DARLING, JJ.)

WHITECHAPEL BOARD OF WORKS (apps.) v.
CROW (resp.). (a)

Electric lighting — Local authority — Boxes in street — Notice to district surveyor — London Building Act 1894 (57 & 58 Vict. c. cccviii.), s. 145.

Where a local authority within the meaning of the Electric Lighting Acts 1882 and 1888, in pursuance of those Acts, has been granted a provisional order confirmed by a statute, and under the provisions of that order has constructed in a street boxes for the purposes in connection with the supply of electric energy, such boxes are buildings, structures, or works, within sect. 145 of the London Building Act 1894, and a notice under that section must be served on the district surveyor before they are commenced.

CASE stated on a complaint preferred under the London Building Act 1894 by the respondent, a district surveyor, under the Act against the appellants, for beginning to execute a work respecting which they ought to have served a building notice, before serving such notice, contrary to the provisions of that Act.

Upon hearing of complaint the following facts were proved or admitted:

The respondent is a district surveyor under the London Building Act 1894 for a district comprising the place in which the boxes hereinafter mentioned are situate.

The appellants are the local authority within the meaning of the Electric Lighting Acts 1882 and 1888 for that district, and they are also the surveyors of highways in and for that district.

In the year 1892 the appellants were granted by the Board of Trade, pursuant to the Electric Lighting Acts 1882 and 1888, in respect of their district, a provisional order called the Whitechapel District Electric Lighting Order 1892.

That Order was confirmed by the Electric Lighting Orders Confirmation (No. 6) Act 1892, which was passed on the 27th June 1892, upon which date the order came into force.

Sects. 11 and 12 of the Order are as follows:

11. Subject to the provisions of this Order and the principal Act, and any regulations made under this Order, the undertakers may construct in any street such boxes as may be necessary for the purposes in connection with the supply of energy, including apparatus for the proper ventilation of such boxes. Every such box shall be for the exclusive use of the undertakers

and under their sole control, except so far as the Board of Trade may otherwise order, and shall be used by the undertakers only for the purpose of leading off service lines and other distributions, conductors, or for examining, testing, regulating, measuring, directing, or controlling the supply of energy, or for examining or testing the condition of the mains or other portions of the works, or for other like purposes connected with the undertaking, and the undertakers may place therein meters, switches, and any other suitable and proper apparatus for any of the above purposes. Every such box, including the upper surface of covering thereof shall be constructed of such materials, and shall be constructed and maintained by the undertakers in such manner as not to be a source of danger whether by reason of inequality of surface or otherwise.

12. Where the exercise of any of the powers of the undertakers in relation to the execution of any works (including the construction of boxes) will involve the placing of any works in, under, along, or across any street or public bridge, the following provisions shall have effect: (a) One month before commencing the execution of such works (not being the repairs, renewals, or amendments of existing works of which the character and position are not altered) the undertakers shall serve a notice upon the Postmaster-General describing the proposed works, together with a plan of the works showing the mode and position in which such works are intended to be executed, and the manner in which it is intended that such street or bridge is to be interfered with, and shall, upon being required to do so by the Postmaster-General, give him any such further information in relation thereto as he may desire. (b) The Postmaster-General may in his discretion approve of any such works or plan subjects to such amendments or conditions as may seem fit, or may disapprove the same, and may give notice of such approval or disapproval to the undertakers. (c) Where the Postmaster-General approves any such work, works, or plan subject to any amendments or conditions with which the undertakers are dissatisfied, or disapprove of any such works or plan, the undertakers may appeal to the Board of Trade, and the Board of Trade may inquire into the matter and allow or disallow such appeal, and approve any such works or plan subject to such amendments or conditions as may seem fit, or may disapprove the same. (d) If the Postmaster-General fail to give any such notice of approval or disapproval to the undertakers within one month after the service of the notice upon him, he shall be deemed to have approved such works and plans. (e) Notwithstanding anything in this order or the principal Act, the undertakers shall not be entitled to execute any such works as above specified, except so far as the same may be of a description and in accordance with a plan which has been approved, or is to be deemed to have been approved, by the Postmaster-General or by the Board of Trade as above-mentioned, but where any such works, description, and plan are so approved, or to be deemed to be approved, the undertakers may cause such works to be executed in accordance with such description and plan, subject in all respects to the provisions of this order and of the principal Act. (f) If the undertakers make default in complying with any of the requirements or restrictions of this section, they shall (in addition to any other compensation which they may be liable to make under the provisions of this order or the principal Act) make full compensation to the Postmaster-General for any loss or damage which he may incur by reason thereof, and, in addition thereto, they shall be liable to a penalty not exceeding ten pounds for every such default, and to a daily penalty not exceeding five pounds: Provided that the undertaking shall not be subject to any penalties as aforesaid if the court having cognisance of the case shall be of opinion that the case was one of emergency, and that the undertakers complied with the requirements of this

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section as far as was reasonable under the circumstances.

The undertakers shall serve a like notice and plan upon the county council in addition to those served upon the Postmaster-General, and where any street or public bridge is repairable by the county council the other provisions of this section shall with the necessary modification apply to the county council in like manner as to the Postmaster-General. Nothing in this section shall exempt the undertakers from any penalty or obligation to which they may be liable under this order or otherwise by law in the event of any telegraph lines of the Postmaster-General being at any time injuriously affected by the undertaker's works or supply of energy.

On or about the 6th Nov. 1899 the appellants began to construct in Great Prescott-street, under the public footway at or near the junction of the street with Leman-street, three boxes, which were necessary for the purposes in connection with the supply of electrical energy.

The boxes were constructed of iron and brick-work.

It was assumed at the hearing before the magistrate that in connection with the construction of the boxes the appellants fulfilled all the requirements of the provisional order, but it was understood that the respondent reserved his right to contend the contrary in any future proceedings.

The street, Great Prescott-street, is not a street repairable by London County Council, but is repairable by the appellants as the authority.

The appellants did not, before commencing the construction of the boxes, serve on the district surveyor a building notice respecting the same under the London Building Act 1894, s. 145.

On the part of the respondent it was contended that the boxes, being a building, structure, or work within the meaning of sect. 145 of the London Building Act 1894, the appellants were bound, before beginning the same, to serve upon the respondent as such district surveyor a building notice as prescribed by the section.

On the part of the appellants it was contended that the London Building Act 1894 did not apply at all to boxes constructed in streets under the provisional order, inasmuch as the order contains a complete code regulating the materials, situation, and mode of construction of such boxes, and provides complete machinery for enforcing such regulations, with which special code and machinery the London Building Act 1894 (being an Act generally applicable in the administrative county of London passed after the provisional order came into force) is inconsistent.

The magistrate found as a fact, so far as it is a question of fact, and in law, that the boxes so constructed as above were building structures or works within the meaning of sect. 145 of the London Building Act 1894, and, having regard to the provisions of sects. 72, 201, and 203 of the Act, he held that the provisions of sect. 145 were not inconsistent with the said special Act, and he accordingly convicted the appellants.

The judgment of the learned magistrate setting forth the grounds of his decision was as follows, and was to be taken as part of the case:

This is a summons taken out by the district surveyor against the Whitechapel Board of Works for not having given him notice before they began certain works—viz., the construction of boxes or chambers under the street for the purpose of electric lighting. Mr. Dickens, for

the defendants, contended that it was not necessary for them to give such notice, first, because the London Building Act 1894 does not apply, the boxes being constructed under the provisions of the Electric Lighting Orders Confirmation Act 1892 a special Act which he said is not consistent with the general Act, and therefore overrides it; and, secondly, because, even if the general Act does govern, these boxes are not "buildings, structures, or works" within its meaning. By sect. 72 of the London Building Act 1894 it is enacted that any construction under any public way shall be constructed in any such manner as may be approved by the district surveyor, and by sect. 145, where any "building or structure or work" is about to be begun, a building notice respecting it must be served on the district surveyor. In the Electric Lighting Order Confirmation Act 1892 the clauses relied on by Mr. Dickens were the 11th and 12th. Clause 11 gives power to the undertakers—i.e., the Whitechapel Board of Works, to "construct" (an expression which has a bearing on the second part of Mr. Dickens' argument) boxes in the streets. The 3rd paragraph of that clause enacts that every such box shall be constructed in such manner as not to be a source of danger by reason of inequality of surface (i.e., to the public using the streets) or otherwise. Who is to be the judge whether there is any such danger? Probably not the undertakers themselves but the duly appointed officer under the Building Act whose duties are imposed by sect. 72 of that Act. The clause 12 requires a notice of the works with plan to be served on the Postmaster-General and also upon the county council; on the Postmaster-General on account of the exigencies of the Post Office, and on the county council because if the street is repairable by them the other provisions of the section shall, with the necessary modification, apply to them in like manner as to the Postmaster-General. It appears to me that this 12th clause only deals with the notices to be given to the Postmaster-General and the county council for the purposes I have mentioned, and has nothing to do with the notice required to be given to the district surveyor where any structure is to be made under any public way that he may look after and guard the safety of the public using the way. Mr. Dickens asked: "Why give notice to the district surveyor who says he has nothing to do with the streets?" The answer to that question is the 72nd section itself. The principle which has to guide me in coming to a decision on this point is—Is there anything in the special Act of 1892 so inconsistent with the general Act of 1894 that they cannot stand together? If such inconsistency does exist, the provisions of the special Act must override those of the general Act, and it was held in the cases cited by Mr. Dickens—*City and South London Railway Company v. London County Council* (65 L. T. Rep. 632; (1891) 2 Q. B. 513) and *London County Council v. School Board of London* (1892) 2 Q. B. 606)—that such inconsistency did exist. But if the provisions of the two Acts are reconcilable, the cases of *Uckfield Rural Council v. Crowborough District Water Company* (19 Mag. Cas. 386; 81 L. T. Rep. 539; (1899) 2 Q. B. 664), and more recently the *London County Council v. Wandsworth and Putney Gas Company* (19 Mag. Cas. 568; 82 L. T. Rep. 562) show that the provisions of the general Act must prevail. I am unable to see any inconsistency here. The undertakers who are by statute given powers for interfering with the streets have to give notices (for certain purposes) to the Postmaster-General and to the county council, but that liability is quite consistent with an obligation to give notice to the district surveyor (as they would have had to do had they been doing any similar work not under statutory powers) in order that he might see that the work was properly done for the public safety. Further, upon the question of whether the Building Act applies, it is important to look at sect. 201, the exemption clause, which does not include electric

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lighting, though it specially mentions railway, dock, and gas companies, but there is a section (203) which does specially mention electric supply companies and exempts certain buildings (these boxes or chambers not being amongst the number) from the general provisions of certain parts of the Act, the inference to be drawn therefrom being that the other building of such companies were to be subject to the provisions of the Act. Upon the second point—whether these boxes or chambers (which are admittedly of varying sizes) are buildings or structures or works within the meaning of the 145th section—I am of opinion that they are. They are the artificial work of man, excavated and then specially constructed with bricks and mortar, and used for a definite purpose. I can see no reason why the terms should not apply to buildings below as well as on the surface of the ground which, indeed was the view expressed by the judges in *Thompson v. Sunderland Gas Company* (37 L. T. Rep. 30; 2 Ex. Div. 429). I find that in the case of the *Mayor, &c., of Tunbridge Wells v. Baird* (74 L. T. Rep. 385; (1896) A. C. 434) Lord Halsbury, Lord Herschell, and Lord Macnaghten speak of a convenience which the corporation had made in one of the streets, sunk to a depth of 9ft. and lighted by skylights on level with the surface of the street as a building the erection of which is complained of, construction of this underground chamber, &c. As a matter of fact and of law, then I find that these boxes or chambers come within the 145th section. I therefore impose the nominal penalty of one shilling with ten guineas costs.

Dickens, K.O. (G. J. Talbot with him) for the appellants.—We contend that by virtue of the Electric Lighting Acts and provisional orders the Whitechapel Board of Works are made the electric authority for the district, and the special provisions of those Acts and orders are not controlled by the London Building Act 1894. It is contended by the other side that these two sets of provisions—namely, the Electric Acts and orders and the London building regulations can work together. But that is a fallacy, for when you look at the Electric Acts and orders, not only do they deal with electric works, but also with the safety of the public. The reason why they are not to work together is that if they did so you would get two authorities dealing with the same matters and all the attendant difficulties arising therefrom. The way in which two statutes of this kind—namely, special and general enactments, are to be dealt with is clearly laid down by Lord Selborne in *Seaward v. Vera Cruz* (52 L. T. Rep. 474; 10 App. Cas. 68). They referred to:

Electric Lighting Act 1882 (45 & 46 Vict. c. 56), ss. 3, 4, 6 (c), (e), (g), 12, 13, 34;

Electric Lighting Act 1888 (51 & 52 Vict. c. 12), s. 4; Whitechapel District Electric Lighting Order 1892, clauses 10, 11, 12, 13, 63;

Electric Lighting Orders Confirmation (No. 6) Act 1892 (55 & 56 Vict. c. cccx.).

These enactments constitute an absolute code dealing with the subject, which has been designed to meet two points—viz., the safety of the public, and the care of the wires of the Postmaster-General. If the county council are the road authorities, notice must be given to them and they may require certain things to be done, and if any difference arises the matter is to be referred to the Board of Trade. Directly the Board of Trade gives its consent the work may be proceeded with. [GRANTHAM, J.—But in all these provisions and sections nothing is said as to who is to see

that the details are being properly carried out.] That is provided for by clause 12 of the order. [KENNEDY, J.—Then the Whitechapel Board are to be the judges of their own misdoing if such occurs.] Notice has to be given to the county council, but not to the district surveyor, who is quite a different entity. It was never contemplated that this should be a building within sect. 203 of the London Building Act 1894, for that Act was never intended to apply at all. [KENNEDY, J.—But sect. 160 shows that the district surveyor is to be in constant communication with the county council.] The other side say that two notices ought to be given, but, if that is so, the notice to the county council is quite illusory. The notice to the county council must be for some purpose, and there can be no necessity to give a notice to the district surveyor.

Avory, K.C. (Rowse with him) for the respondent.—The question here is whether there is such an inconsistency between the special Act and the general Act that they cannot stand together. If no such inconsistency exists, then the Whitechapel Board is subject to the general Act. A question might arise if the district surveyor required them to do something inconsistent with the requirements of the Board of Trade, but that has not arisen here. This is a proper matter to come under the jurisdiction of the district surveyor, and, that being so, is there anything in the special Act to prevent that happening? If the district surveyor is to supervise the carrying out what the Board of Trade has approved, there can be no inconsistency in that. Where the Board of Trade has laid down rules as to materials, surely the district surveyor can see that proper materials are used? Sect. 201 of the London Building Act 1894 shows certain buildings to be exempt from parts 6 and 7 of the Act dealing with construction, but they are not exempt from part 13 dealing with the superintending architect and district surveyor. In the case of special exemptions they are all specifically dealt with by the Act of 1894; for instance, gas companies have to give the notice, but are not subject to certain regulations, while in the case of Government buildings no notice is required as provided by sect. 202. By sect. 203, buildings for the supply of electricity are dealt with, and they are exempted from parts 5, 6, and 7, but not from part 13. The sole reason for giving notices and plans to the Board of Trade and the Postmaster-General is to enable them to supervise any question as to electricity. [KENNEDY, J.—Can it be confined to that when clause 11 of the order of 1892 is considered?] He referred to

Sion College v. Mayor of London, 20 Mag. Cas. 113; 84 L. T. Rep. 133; (1901) 1 Q. B. 617;

Uckfield Rural Council v. Crowborough Water Company, 81 L. T. Rep. 539; (1899) 2 Q. B. 664;

London County Council v. Wandsworth and Putney Gas Company, 82 L. T. Rep. 562.

There is nothing in the special Acts and orders inconsistent with the requirements of sect. 145 of the Act of 1894.

Talbot, in reply.—He referred to

Venner v. McDonnell, 76 L. T. Rep. 152; (1897) 1 Q. B. 421.

GRANTHAM, J.—In my judgment, the appellants have failed to show that the decision of the learned magistrate is wrong, and our judgment

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must, therefore, be for the respondent. There is no difference of opinion between the parties as to the principle of law that has to be applied in determining whether or not an Act of Parliament can, or does, override some of the sections or provisions contained in a previous Act of Parliament. The judgment of Lord Selborne in the case of *Seward v. Vera Cruz* (52 L. T. Rep. 474; 10 App. Cas., at p. 68) has always been accepted as the ruling authority on that question, and in that case Lord Selborne said: "Now, if anything be certain it is this—that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by the force of such general words without any indication of a particular intention to do so." The difficulty arises, however, in applying it. Does the London Building Act of 1894 revoke or alter, by construction of general words, the Electric Lighting Acts of 1882 and 1888? Is the language of the former Act, where it directs that notice is to be given to the district surveyor before commencing work, inconsistent with the powers given to the appellants by the Electric Powers Act 1882 and 1888, and the provisional order 1892 for the supply of electricity to their district? In my judgment, it is not. It is true that the appellants have power given them to provide electricity for their district, and that by statute they are obliged to lay the schemes they propose to adopt and the plans by which they propose to give effect to it before the Postmaster-General and the county council, but neither one body nor the other is bound to see how the work is done. The necessity of obtaining the sanction of the Postmaster-General is evidently for the purpose of enabling him to see that the interests of the Post Office are not prejudiced, and not in any way to provide for supervision of the work to be done. Again, when the authority that is to provide electricity for any district proposes to break up a road it is clearly necessary that the authorities responsible for the repairs of the road should be made acquainted with the proposals of the lighting authority, that they may consider whether the scheme, if properly carried out, would be inconvenient or injurious to the public; and in the same way the notice to the London County Council, as the superior municipal authority of the district, is desirable, if not necessary, that the council may be cognisant of what is going to be done in one of the districts included in its municipal area on such an important matter as the provision of electricity. Not one of these notices, however, has reference to any control of the way in which the work is to be or is being performed, or as to the compulsory supervision of the work during its construction, but the section of the Building Act in question—viz., sect. 145—requires such a notice to be given to the district surveyor as will enable him to know when the work is to be commenced and the details of the proposed work, so that he can survey the work when commenced, and see that the details are carried out in conformity with any bye-laws that may have been passed in reference to such buildings. How can it be said that it is inconsistent with or contradictory to the general provisions of

the Electric Lighting Acts under which the appellants obtained their authority to provide the electricity for their district? Which of the sections of the Electric Lighting Acts or of the provisional order is thereby repealed, altered, or derogated from? The supervision proposed may be unnecessary, may be a work of supererogation, but it does not necessarily at all conflict with the powers given by the earlier Acts. But, again, can it be said that the mind of the Legislature in passing the Building Act 1894 was not drawn to the special Acts in question, and that those who drew the Act were not fully alive to the existence and provisions of the Electric Lighting Acts, when we see that by sects. 201, 202, and 203 they expressly exempt a great number of buildings, and by sect. 203 especially exempt local authorities, or companies in the position of the appellants, having statutory powers for the supplying of electricity, from certain parts of the Act of 1894 which would otherwise apply to them. The insertion of those exceptions seems, therefore, to show that the Legislature advisedly intended that the work done under these Electric Lighting Acts, and the provisional orders obtained under those Acts, should be under the supervision of the same authority that was entrusted with the supervision of all building works in the district, and, knowing something of the way in which public authorities sometimes do their work, I do not think the general rule as to compulsory supervision at all unnecessary. For these reasons my judgment must be for the respondent.

KENNEDY, J.—I have come to the same conclusion, and I concur in that view which I was inclined to take after we first heard the case and which has been expressed by my brother Grantham, and, agreeing as I do generally in that view, I only desire to add very few words. I wish to call attention myself especially to the effect of sect. 203 read with the earlier sect. 138, which is in part 13 of the Act. Sect. 138 shows, to my mind, the clear intention of the Legislature as to the universal application which the Act is intended to have, except where exemption is made by the terms of the Act itself. It provides that, "Subject to the provisions of this Act, and to the exemptions in this Act mentioned, every building or structure, and every work done to or in or upon any building or structure shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate." That is a section, as I have said, in part 13, which is headed "Superintendent, Architect, and District Surveyor." There being, then, that general clause, we have sect. 203. Now, the effects of sect. 203 is this: It follows certain sections which begin with 201, and which are headed "Application of Act." Sect. 201 expressly exempts from the operation of parts 6 and 7 a long list of buildings. Sect. 202 exempts altogether certain Government and public buildings. Sect. 204 and 205 especially exempt other special property. Then we have 203 which refers to buildings for the supply of electricity and runs thus, so far as it is material: "When a local authority or a company has statutory powers for the supply of electricity in any metropolitan district, the building of such local authority or company used as a generating station or for works shall be deemed to be a special building to

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which the general provisions of parts 5, 6, and 7 and the 1st and 2nd schedules to this Act do not apply, and plans thereof shall be submitted to the council for approval, and the council shall have power to authorise"—and then there are certain special exemptions as to height—"and in other respects to exempt such building from any of the provisions of this Act if they think fit." It seems to me that the appellants are in somewhat of a dilemma having regard to that section and the section to which I have already referred showing the intention of those who passed the Act that it should be of universal application except where there is special exemption. If the words used in this section, "building used for works," are to be read as including these boxes, then this section expressly deals with them and treats them as special buildings so far as regards parts 5, 6, and 7, and therefore by implication does not exempt them so far as regards sect. 145, which is a section not in parts 5, 6, or 7, but in part 13. If, on the other hand, as the appellants contend, the expression "building used for works" does not include these boxes, then the section which expressly deals with the local authority having statutory powers for the supply of electricity and exempts from the operation of certain parts of the Act some of these buildings appears to me, by implication and reasoning, to leave these boxes to be subject to all the provisions of the Act. I only desire to add that to the judgment which has already been delivered, in the result of which I concur.

GRANTHAM, J.—My brother Darling desires me to say that although at the time it was first argued he was inclined to differ from my brother Kennedy and does not quite see his way to agree with us, yet, at the same time, he does not wish to differ.

Appeal dismissed.

Solicitors: *Alfred Turner and Sons; W. A. Blaaland.*

Friday, May 3, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

LAW (app.) v. GRAHAM AND BRADLEY (resps.). (a)
Factory—Bottling beer—Washing bottles—Adaptation for sale—Factory and Workshop Act 1878 (41 & 42 Vict. c. 16), s. 93.

Certain premises were used solely for the purpose of washing bottles and bottling beer. Before the bottles were filled, which was done by manual labour, they were washed inside by a rotary brush driven by a small gas engine, the bottles being held in position by hand and the outsides being washed by manual labour. Nothing was done to the beer itself, and no process of any kind, manufacturing or otherwise, was done on the premises.

Held, that the premises were not a factory within sect. 93 of the Factory and Workshop Act 1878.

CASE stated upon an information preferred by the appellant against the respondents for that they being the occupiers of certain bottling works, the same being a factory within the Factory Acts, did fail to have affixed at the entrance the prescribed extract of the Acts.

On the hearing of the information the following facts were proved or admitted:

The respondents were the occupiers of the premises referred to in the information, which they used solely for the purpose of washing bottles and bottling beer in their trade of wholesale and retail beer dealers.

Before the bottles were filled with beer, which was done by manual labour alone, they were washed by manual labour with the aid of mechanical power. The bottles were washed inside by a rotary brush driven by a small gas engine, and were held in position by hand. The washing of the outside of the bottles was effected by manual labour only.

Nothing was done to the beer itself to in any way alter its nature or character for the purpose of adapting it for sale.

No process of any kind, manufacturing or otherwise, was carried on on the premises, beyond that of washing bottles and bottling beer as already described.

The respondents had not the prescribed abstract of the Factory Acts fixed at the entrance of their premises in the prescribed form.

If the premises came within the definition of a factory under the Factory Act 1878, s. 93, sub-s. 3 (c), then the respondent had infringed the provisions of sect. 78 of the Act.

It was contended for the respondents that that their premises were not a factory within the meaning of the Act for the following reasons:—(1) That nothing was done to the beer itself "to adapt it for sale." (2) That washing the bottles and bottling the beer were not "adapting the beer for sale." (3) That no manufacturing process was carried on on the premises.

The appellant contended that washing the bottles and filling them with beer in the manner before described was "adapting the beer for sale," and was also a "manufacturing process," within the meaning of the Act, in aid of which mechanical power was used.

The justices were of opinion that, according to the tone, intent, and meaning of sub-sect. (3), something must be done to the article itself for the purpose of adapting it for sale and that even assuming filling the bottles with beer was adapting the beer for sale, the premises were not a factory inasmuch as the bottling was effected by manual labour alone, without the aid of mechanical power. They were also of opinion that no manufacturing process was carried on on the premises, as in the absence of any definition in the Act of the phrase "manufacturing process" the words must be construed in their ordinary sense: (*Spencer v. Livett*, 82 L. T. Rep. 75; (1900) 1 Q. B. 498).

They therefore held that the respondent's contention on each point was right, and gave their determination against the appellant as before stated.

The definition of a factory is contained in sect. 93 of the Factory and Workshop Act 1878, which says that the expression "factory" means "textile factory" and "non-textile factory" or either of such descriptions of factories. "Non-textile" factory means:

(1) Any works, warehouses, furnaces, mills, foundries, or places named in part 1 of the 4th schedule to this Act. (2) Also any premises or places named in part 2 of the said schedule wherein or within the close or

K.B.] *REX v. OVERSEERS OF CONNAH'S QUAY; Ex parte CONNAH'S QUAY URB. DIST. CO.* [K.B.]

curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there. (3) Also any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for the purposes of gain in or incidental to the following purposes, or any of them; that is to say—(a) in or incidental to the making of any article, or part of any article; or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or (c) in or incidental to the adapting for sale of any article and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

H. Sutton for the appellant.—These premises were within the definition of a “non-textile factory,” for manual labour was exercised for making an article—viz., bottled beer—and if it was not making an article it was adapting beer for sale. Mechanical power was used in aid of the process. In *Petrie v. Weir* (Ot. Sess. Cas. 5th Series, vol. 2, 1041) the premises consisted of a yard in which stones were dressed by manual labour, and included an engine-house where the workmen's tools were sharpened on a grindstone driven by a gas-engine. No other mechanical power was used in the premises, but they were held to be premises in which mechanical power was “used in aid of the manufacturing process carried on therein” within the meaning of the Factory and Workshop Act 1878, s. 93 (3). That case, I submit, is conclusive.

Travers Humphreys for the respondents.

Lord ALVERSTONE, O.J.—This is one of the Acts in which we have to construe language which is very near the line, and if one could find any guide from any general object of the Act, as to giving the words a very wide interpretation, then I think it would be quite possible in many cases to bring processes within these words as factories which at first sight they were not perhaps intended to apply to. We have not any real guide here, but have to take the section as it stands. I think two conditions must concur, either (a), (b), or (c), and the last words of the section. I think it is plain that bottling beer was not incidental to the making of an article, and it is not “the altering, repairing, ornamenting, or finishing of any article.” I doubt if it can be said to be incidentally adapting it for sale, but I think it is possible that if that were the only thing in the section, to take the view that where casks of beer were brought in wholesale and bottles provided, the putting the beer into bottles might be an adaptation of the article for sale by a strained meaning of the words. Then, assuming that that is satisfied, you have to construe the additional words: “And wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.” I think that, having regard to what we have seen before in the other part of the schedule and the section as to the manufacturing process, that the washing of the bottles by mechanical means fails to be fairly called a process which is used in aid of the bottling of the beer. It is true that the bottles ought to be clean, and that they wash the bottles because they are going to put beer into them, but it is not “in aid of” in the sense used in this section. Therefore, though I admit the point is near the line, I think the magistrates are right. Now,

with regard to the Scotch case I do not wish to be thought to dissent from it, because I can see in one sense that the actual condition of the tools might have a good deal to do with the dressing of the stone for sale, and whether I should have decided the Scotch case in the same way or not I need not now consider. I do not in what I have said intend to overrule the Scotch case because I think that some distinction may be drawn between that and the one now before us. I think our judgment must be in favour of the decision of the magistrates.

LAWRANCE, J.—I agree. *Appeal dismissed.*

Solicitors: *The Solicitor to the Treasury; Pyke and Parrott.*

Friday, May 3, 1901.

(Before Lord ALVERSTONE, O.J. and LAWRENCE, J.)

REX v. OVERSEERS OF CONNAH'S QUAY; Ex parte CONNAH'S QUAY URBAN DISTRICT COUNCIL. (a)

Burial expenses—Transfer of powers from burial board to district council—Poor rate—District rate—Payment—Local Government Act 1894 (56 & 57 Vict. c. 73), ss. 62, 67.

In 1882 a burial board, having been formed for three townships, borrowed money which was charged upon the poor rates.

In 1897 the C. Q. Urban District Council by resolution took over the powers, duties, and liabilities of the board.

Held, that the expenses of carrying into execution of the Burial Acts was still payable out of the poor rates.

CAUSE shown against a rule nisi for a writ of *mandamus* to the overseers of Connah's Quay to pay to the Urban District Council of Connah's Quay certain expenses under the Burial Acts.

The council was formed of three townships by order of the Local Government Board, dated the 22nd Sept. 1896.

In the year 1882 a burial board was formed for the three townships, and on the 20th Nov. 1882 the burial board, with the sanction of the vestry and of the Commissioners of the Treasury, borrowed certain sums by means of terminal annuity deeds, which constituted the repayment of the sums a charge upon the poor rates of the parish, which consisted of the three townships. The expenses of the board were from 1882 to 1897 paid out of the poor rate upon the certificate of the board.

On the 3rd March 1897 the urban district council by resolution took over all the powers, duties, and liabilities of the burial board.

In the years 1897, 1898, and 1899 a certificate was issued to the overseers of the poor to meet the accounts payable under the deeds and the expenses of carrying into execution the Burial Acts, and the certificates were duly honoured.

Upon the 4th July 1900 a certificate was issued to the overseers, directing them to pay a sum of 150*l.* to defray the expenses of carrying into execution the Burial Acts. They refused to honour this certificate or to pay the sum of 150*l.*,

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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on the ground that these moneys should be paid out of the general district rate.

By the Local Government Act 1894, s. 62 :

Where there is in any urban district, or part of an urban district, any authority constituted under any of the adoptive Acts, the council of that district may resolve that the powers, duties, properties, debts, and liabilities of that authority shall be transferred to the council as from the date specified in the resolution, and upon that date the same shall be transferred accordingly, and the authority shall cease to exist, and the council shall be the successors of that authority.

Marshall, K.C. and Jenkin showed cause.

Macmorran, K.C. and R. V. Bankes in support.

Lord ALVERSTONE, C.J.—In this case the Connah's Quay Urban District Authority has become the burial board by virtue of the operation of the powers of the Act of 1894, and they have as a burial board made a demand upon the poor law authorities to pay the money which would have been payable under the Burial Acts. As I gathered from Mr. Marshall's very clear statement, the facts are that there was a burial board from 1882 to 1897. In March 1897 there was a resolution to transfer the burial board to the present applicants under the powers of sect. 62, sub-sect. 1. It is not denied that the Burial Acts are adoptive Acts, and that they are now to be exercised by this district authority. Sect. 67 of the Local Government Act 1894 provides "Where any powers and duties are transferred by this Act from one authority to another authority (1) All property held by the first authority for the purpose or by virtue of such powers and duties shall pass to and vest in the other authority, subject to all debts and liabilities affecting the same; and (2) the latter authority shall hold the same for the estate, interest, and purposes, and subject to the covenants, conditions, and restrictions for and subject to which the property would have been held if this Act had not passed, so far as the same are not modified by or in pursuance of this Act; and (3) all debts and liabilities of the first authority incurred by virtue of such powers and duties shall become debts and liabilities of the latter authority, and be defrayed out of the like property and funds out of which they would have been defrayed if this Act had not passed." As I understand these two sections, taken together, and some other provisions of the Act which I need not specify, but which Mr. Marshall referred to, it means this, that after the passing over of the powers under the resolution which transfers the adoptive Acts, or under the machinery which transfers the adoptive Acts, the new authority is to exercise the old powers, and I think that if it was intended to charge the different class of tax or ratepayers or different properties, special words would be required. They are really adoptive Acts—that is to say, Acts that may be adopted by the local authority. I think the matter is very clear; but Mr. Marshall raises the point because a resolution was required to pass over the powers of the burial board to the urban district council, and that, therefore, it is not a transfer by the Act from one authority to another. I think that if it had been intended to exclude from the protective clauses of sect. 67 transfers which took place under sect. 62, we should have found a specific enumeration. I think sect. 67 intended when by virtue of the

operation of the Act of 1894 powers and duties are transferred, that these protective clauses should apply. I agree that we have not to consider the rights of the persons who lend the money in this case. It appears that there was money borrowed by the burial board under the earlier Acts, but I think that it is only fair to point out that the ordinary scheme of legislation would be that where duties are transferred, and under the powers of an act, the rights, powers, and obligations should continue to have the same incidence and effect in the hands of the new authority. I think this rule for a *mandamus* must be made absolute.

LAWRENCE, J.—I entirely agree.

Rule absolute.

Solicitors: *Maples, Teesdale, and Co.*, for H. G. Roberts, Mold; *Bower, Cotton, and Bower*, for Hughes and Hughes, Flint.

May 3 and 4, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

CORBETT (app.) v. BADGER (resp.). (a)

Metropolis—District surveyor's fees—Default of builder—Liability of owner—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11—London Building Act 1894 (57 & 58 Vict. c. cccxiii.), ss. 154, 157.

By sect. 11 of the Summary Jurisdiction Act 1848, in all cases where no time is specially limited complaint shall be made within six calendar months from the time when the matter of such complaint arose.

By sect. 154 of the London Building Act 1894 it is provided that certain fees shall be paid by the builder or in his default by the owner or occupier; and sect. 157 enacts that (1) at the expiration . . . (a) of fourteen days after the roof of any building surveyed by a district surveyor under this Act has been covered in . . . the district surveyor shall be entitled to receive the fees due to him from the builder employed in erecting such building . . . or from the owner or occupier of the building so erected. . . . (2) If any such builder, owner, or occupier refuses to pay the said fees they may be recovered in a summary manner on its being shown to the satisfaction of the court that a proper bill specifying the amount of the fees was delivered to him or sent to him in a registered letter addressed to his last known residence.

Bills in conformity with the section having been delivered to the builder he became insolvent. Thereupon the district surveyor delivered bills to the owner.

Held, that the six months' limit contained in sect. 11 of the Act of 1848 only commenced to run against the owner from the date when the bills were delivered to him, as it was only on that date when the matter of complaint arose.

CASE stated upon eight summonses issued on complaints by the respondent, and all dated the 8th Nov. 1900, to recover fees amounting in the aggregate to 546l. 7s. 6d. alleged to be due to him as district surveyor under the London Building Act 1894.

(a) Reported by W. DE B. HENSBERT, Esq., Barrister-at-Law.

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On the hearing of the summonses the following facts were either proved or admitted:—

The appellant in the year 1899 was the owner of certain lands known as the St. German's Estate, situate at Hither Green, Lewisham, and the respondent was, and is, the district surveyor for the district under the London Building Act 1894 (57 & 58 Vict. c. cxxiii.), and it was admitted that at all material times the appellant was the owner of buildings placed on the land for the purposes of sects. 154 and 157 of the Act.

In or about the year 1899 the appellant contracted with one John Lawrence, a builder, to erect certain houses on part of the lands, and John Lawrence did, in pursuance of such contracts, erect the houses which are described in the summonses. John Lawrence was paid by the appellant the sums for which he contracted to erect the houses. Such sums included any fees which John Lawrence was liable to pay to the respondent under the London Building Act 1894.

By the London Building Act 1894, sect. 154, it is provided that

There shall be paid by the builder or, in his default, by the owner or occupier, as the case may be, of the building or structure, in respect whereof the same are chargeable to every district surveyor in respect of the several matters mentioned in parts 1 and 3 of the 3rd schedule to the Act, the fees therein specified or such other fees not exceeding the amounts therein specified as may be directed by the council.

By sect. 157 of the Act it is enacted that

(1) At the expiration of the following periods (that is to say): (a) Of fourteen days after the roof of any building surveyed by a district surveyor under this Act has been covered in . . . the district surveyor shall be entitled to receive the fees due to him from the builder employed in erecting such buildings . . . or from the owner or occupier of the building so erected . . . (2) If any such builder, owner, or occupier refuses to pay the fees, they may be recovered in a summary manner on its being shown to the satisfaction of the court that a proper bill specifying the amount of the fees was delivered to him or sent to him in a registered letter addressed to his last known residence.

The amounts claimed by the respondent were fees to which he was entitled under part 1 of the 3rd schedule of the Act.

The roofs of the houses in respect of which the summonses were issued had been covered in prior to the end of Dec. 1899, and the respondent delivered to John Lawrence proper bills specifying the amount of the fees to which the respondent was entitled in respect of the houses, and demanded them from John Lawrence at various times (from the 17th Jan. 1900 to the 10th Sept. 1900).

On several occasions subsequent to the delivery of the bill to John Lawrence, the respondent requested payment of the fees from him, but he did not and has not since paid any part thereof although frequent promises were made by him to make the payments, and on or about the 2nd July 1900 he caused to be sent to the respondent notice of his insolvency.

On the 20th Oct. 1900 the respondent delivered to the appellant proper bills specifying the amount of the fees and demanded payment thereof from the appellant.

On behalf of the appellant it was contended that the fees in question became payable by the appellant (if at all) immediately upon John Lawrence

making default in payment thereof, and that John Lawrence made default in Jan. 1900. That the respondent's complaints were not laid within six calendar months from the time when the respondent became entitled (if at all) to receive the fees nor were they laid within six months from the time when John Lawrence made default, and were therefore not laid within the time limited for the commencement of summary proceedings by sect. 11 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), and that each of the summonses should be dismissed.

On behalf of the respondent it was contended that the respondent's complaints were laid within six months from the time when proper bills specifying the amount of the fees were delivered to the appellant, and that the date upon which the bills were delivered to the appellant was the time from which the six months period mentioned in sect. 11 of the Summary Jurisdiction Act 1848 commenced to run.

The magistrate held that the true construction of sect. 157 of the London Building Act 1894 was that the appellant became liable to pay the fees on the delivery to him of the respondent's bills on the 20th Oct. 1900, and that consequently the respondent's complaints were laid within six months from the time when the matters of the complaints arose, and he ordered the appellant to pay the amounts claimed.

Macmorran, K.C. and B. C. Glen for the appellant.—The whole question here turns upon the true construction of sect. 157 of the London Building Act 1894. Although by sub-sect. 2 the sending of a proper bill, specifying the amount of the fees is made a condition precedent, that does not extend the period within which the fees can be recovered. The time within which proceedings must be taken—viz., six months—is provided by sect. 11 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43). The matter of complaint arises when the district surveyor is entitled to recover his money. The fact that the district surveyor has to send in his bill makes no difference, and cannot extend the period of limitation. The fees that are payable are regulated by sect. 154 of the Act of 1894, and so it is known by the person liable what are the amounts payable. The magistrate held that this case was covered by the case of *Labalmondière v. Addison* (1 El. & El. 41). It was there held that where expenses in respect of a dangerous structure were recoverable from the owner under 18 & 19 Vict. c. 122, the matter of complaint was the non-payment of the expenses, and therefore the six months limited by 11 & 12 Vict. c. 43 ran from the demand for payment and the refusal, and not from the completion of the work. The present case, however, is quite different from that which was commented upon in *Pool and Forden Highway Board v. Gunning* (46 L. T. Rep. 163). There it was held that the six months' limit, within which a complaint must be preferred to recover extraordinary expenses under sect. 23 of the Highways and Locomotives Amendment Act 1878 must be reckoned from the date of the surveyor's certificate, and not from the time that payment is demanded. That case accentuates our point that in construing a statute a construction should not be taken which enables a creditor to extend the period within which he can take pro-

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ceedings to recover a sum due to him. The same principle was acted upon by the Court of Appeal in *Hornsey Local Board v. Monarch Investment Building Society* (61 L. T. Rep. 867; 24 Q. B. Div. 1). The period of limitation ought to run from the time the district surveyor was entitled to demand his money—namely, within fourteen days of the covering in of the roof. In a case like the present, where proceedings are taken against the owner or occupier owing to the builder's default under sect. 154, the time must begin to run when default is made by the builder. Once the statutory time has begun to run against the builder it begins to run against both the others, the owner and the occupier. They referred to

Tubb v. Good, 22 L. T. Rep. 885; L. Rep. 5 Q. B. 443.

Shearman (Ruegg, K.C. with him) for the respondent.—The matter of complaint cannot arise against the owner until a bill in conformity with sect. 157 (2) has been delivered to him. He referred to

Labalmondière v. Addison, 1 El. & El. 41.

A somewhat analogous case arose in *Jacomb v. Dodgson* (7 L. T. Rep. 674; 3 B. & S. 461) where expenses incurred by a board of health were recoverable summarily, and where the person upon whom the expenses were apportioned did not appeal within three months, the apportionment was to be binding and conclusive. It was there held that the six months limit for proceeding summarily only began to run from the expiration of the three months. Cockburn, C.J. said: "During these three months the local board cannot enforce their remedy, and it remains in abeyance, and to suppose it to form a portion of the six months would be to place this class of cases in a different category from all others." Here until the bill has been delivered to the owner or occupier no proceedings could be taken. In *Hornsey Local Board v. Monarch Investment Building Society (sup.)* the words in the statute (37 & 38 Vict. c. 57) are "next after a present right to receive the same shall have accrued," and as Lopes, L.J. points out in his judgment, "the words are 'present right to receive' and not 'present right to recover'; and it is to be observed that the right to receive may exist though the exact sum to be received is not ascertained." It is only after the default by the builder that the district surveyor is entitled to receive from the owner or occupier, and he cannot lay his complaint until he has gone through the procedure required by sect. 157 (2) of the Act of 1894. Bowen, J. in *Pool and Forden Highway Board v. Gunning (sup.)* says: "I think the date of the surveyor's certificate is the time at which the complaint arises." There the certificate had to be given to the authority before proceedings were taken.

Macmorran, K.C. in reply.

LORD ALVERSTONE, C.J.—In my opinion, this case is one of very considerable difficulty, but, after the best consideration I can give, I do not see my way to interfere with the decision of the magistrate. Certainly not as regards the whole, but for reasons which I will explain in a moment, it is possible that another view may be taken by the Court of Appeal. As to part of these sum-

monses, the question might have to be further investigated. Now, I do not want to decide any more than is really necessary for this case, because, as I have said, I think the matter is one of very great difficulty. I can quite conceive a state of circumstances arising where very general considerations might have to apply. The roofing of the houses in this case was completed in Dec. 1899, and I understand it is agreed by both parties that at some date after the expiration of fourteen days from Dec. 1899—which, at any rate, would not be later than the 14th Jan. 1900—the surveyor did become entitled to the fees that are now claimed. Between the 17th Jan. 1900 and the 10th Sept. he delivered the bills specifying the amount of the fees contemplated by sub-sect. 2 of sect. 157 of the London Building Act 1894 to the builder, whose name was Lawrence. On the 2nd July Lawrence became insolvent, and on the 8th Nov. 1900 the summonses were taken out against the owner. Now, it is necessary for us therefore to consider whether the six months ran from the 14th Jan. at the latest in the year 1900, or whether they ran either from the dates when the bills were given to the builder—in which case some of the summonses would be out of time—or whether they ran from the date of the notice to the owner, which, I think, if I remember rightly, was the 20th Oct. 1900, in which case none of the summonses would be out of time. The material words for our consideration, there being no specific direction in the statute, are the words in sects. 11 and 12 Vict. c. 43. They are: "Such complaints shall be made and such informations shall be laid within six calendar months from the time when the matter of such complaint and information respectively arose." I think it would be quite possible to hold that the matter of such complaint and information arose generally when there was a neglect to pay the fees after fourteen days. I mean it is quite possible to take the view that when money becomes payable at a given date or on a given event the matter of such complaint and information respectively arises then. But I think we cannot hold that the whole matter is clearly ascertained at that date. In the first place, at any rate with regards of some of the fees under this Act, and possibly with regard to the fees in this case, they are a matter of calculation which require skilled ability and training in order to arrive at them. It is quite plain, as Mr. Shearman pointed out, that some fees are for special services, and it would be required to know how much the man himself had done. Therefore I think we cannot say that at fourteen days from the roofing in the amount was ascertained or ascertainable by the person who had to pay. Under those circumstances I think that the principle, and I will say no more than the principle, which was enunciated in the judgment of Field and Bowen, J.J. in the case of the *Pool and Forden Highway Board v. Gunning* (46 L. T. Rep. 163) applies—namely, that, at any rate, at that time the amount could not be so ascertained as to enable the debtor to pay. Unfortunately, that does not, again, enable us to decide the question because we have to consider the rights of two people. As against the builder, assuming I am right, the time would run from when the bills were sent in to him, and Mr. Shearman says that inasmuch as the owner has not to pay until there is default by the

[K.B. Div.] SOUTH LONDON ELECTRIC SUPPLY CORPORATION v. PERRIN. [K.B. Div.]

builder and inasmuch as the owner does not know what he, the owner, has to pay, or may not know until a notice has been served upon him, sub-sect. 2 of sect. 157 makes it impossible to bring proceedings at all until that notice has been sent, and that, therefore, the six months ought to run from that period. In support of his contention he cites the case of *Labalmondiere v. Addison* (1 El. & El. 41), where, undoubtedly, they did decide that the six months only ran from the time of making the demand. But I think that that is obviously a case in which the principle of the decision was that the default could not be ascertained, or the failure to fulfil the legal obligation take place, until the demand. Therefore I may say I have very little doubt in coming to the conclusion that, at any rate, the six months did not run until a bill had been delivered to the builder. That would prevent us from being able to accede to the whole of the argument for the appellants, because with regard to some of the summonses it is admitted that the bills were not served upon the builder until a period less than six months before the 8th Nov., the date when the summonses were taken out. I have had still further difficulty in coming to the conclusion, but, after consideration, I feel that I must express my opinion that the time does not run as against the owner until he has received a bill under sub-sect. 2. It seems to me that we have to consider when there is a default, and I do not think that we can lay down any general principles which would exclude cases where the owner really may not know what has happened. Part may have been paid—or it does not to my mind follow that because a builder has not paid, that of necessity the whole amount may be due from the owner. But in any event I think that, *prima facie*, the evidence of the neglect and default of the builder will be a neglect and default to pay after a bill has been delivered. I cannot say on the facts before me that there was such evidence of default as would justify the six months commencing to run, the matter of complaint there being the neglect of the owner to pay after the default of the builder. Therefore I come to the conclusion with hesitation, and being quite conscious of the fact that wiser minds may take different views, that we are not able in this case to say that any of these complaints were too late. I do not wish to decide more than that, because, as I have said, I can imagine such a state of circumstances that general principles might make it wholly inequitable that any summonses should be brought against either owner or occupier. Now, I have only to deal with the principal argument which was pressed yesterday by Mr. Glen and to-day by Mr. Macmorran—namely, that it would be a great hardship upon an owner, because, in this particular case, and very likely in many cases, the whole obligation to pay these charges and expenses is thrown upon the builder, and in this case, and in many cases, he may have to pay twice over. I think, when you come to examine that, although, of course, in one sense it is a hardship, it is not a hardship which ought to lead us to put any different construction upon the Act. The fact that these fees are due from owner, builder, and occupier is known to everybody, and must be known to everybody. The owner need not enter into a contract whereby he relies upon the builder to indemnify him against these fees,

and he need not, under such a contract, pay the full amount without being satisfied that his liability as owner has been discharged by the builder having to pay these fees. I cannot see that the contractual relations between the builder and the owner ought to affect the rights of the surveyor to recover the fees. For these reasons I have come to the conclusion that we ought to affirm the decision of the magistrate in regard to all the summonses. If it shall turn out that I am wrong, then I think we ought to affirm the decision of the magistrates, so far as it relates to all summonses which were brought within six months of the delivery of the bill to the builder.

LAWRENCE, J.—I agree.

*Appeal dismissed.*Solicitors: *West, King, Adams, and Co.; H. G. Barnard.*

Monday, May 6, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRENCE, J.)

SOUTH LONDON ELECTRIC SUPPLY CORPORATION (apps.) v. PERRIN (resp.). (a)

*Metropolis — Black smoke — Nuisance — Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 24 (b).**In order to support a conviction under sect. 24 (b) of the Public Health (London) Act 1891, it is not necessary to show that any particular person or property has been affected by the black smoke.*

CASE stated on ten complaints under the Public Health (London) Act 1891, preferred by the respondent against the appellants.

The first complaint charged that at the premises occupied by the appellants the following nuisance existed after notice had been duly served on them by the respondent, to wit a chimney (not being a chimney of a private dwelling-house) that did on the 1st Nov. 1900 send forth black smoke in such quantity as to be a nuisance, and that the appellants did unlawfully make default in complying with the requisitions of the notice within the time specified, and that the nuisance was caused by the act, default, or sufferance of the appellants, contrary to the provisions of the Public Health (London) Act 1891.

The other nine complaints were in like terms, except that each stated a different date—namely, the 2nd, 5th, 6th, 7th, 8th, 10th, 12th, 13th, and 14th Nov.

At the hearing of these complaints it was proved that black smoke issued from the appellants' chimney, which was 180ft. high, on the days alleged in the complaints, at various times varying from eight minutes to one hour, and from six occasions to one occasion on each day.

No witness stated that the black smoke was a nuisance to himself.

On behalf of the appellants it was contended that in the absence of affirmative evidence that a nuisance to some person or property was created by the black smoke, the offences charged were not made out.

The magistrate on the evidence came to the conclusion that the black smoke on each of the days amounted to a nuisance, and he accordingly convicted the appellants.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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EDGAR (app.) v. SPAIN (resp.).

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By the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 24:

(b) Any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such a quantity as to be a nuisance; shall be nuisances liable to be dealt with summarily under this Act.

Cripps, K.O. (Scott Fox, K.O. and S. Fleming with him) for the appellants.—This was a conviction under sect. 24 (b) of the Public Health (London) Act 1891, and the provisions of that sub-section are not complied with merely by showing that black smoke is coming out of a chimney for a given time. Something else must be shown—namely, that such a quantity is sent forth “as to be a nuisance either to a person or to property.” There must be some evidence that annoyance has been caused or evidence of a nuisance at common law. There is a great difference between sub-sects. (a) and (b) of sect. 24, but this is a prosecution under (b). He referred to

Stanley v. Farndale, 56 J.P. 709;

Stinson v. Brouning, 13 L. T. Rep. 799; L. Rep. 1 O.P. 321;

Hill v. Somerset, 51 J.P. 742.

Avory, K.O. and Louenthal for the respondent.

Lord ALVERSTONE, C.J.—I must not be thought to say that a magistrate must convict merely because black smoke was issuing out of the chimney. On the other hand, I am clearly of opinion that it is not necessary to show that a particular individual or particular property has been affected by the black smoke. The magistrate has found as a fact that the black smoke on each of the days amounted to a nuisance. I think that the magistrate was entitled to find that this was not one isolated fact, but that on ten days out of fourteen black smoke was issuing from this chimney. If it had been on one day only he might have found that there was no nuisance, but he has found that on one day, as well as on others, the black smoke came out. It is impossible to argue that there should be no conviction. The magistrate was justified in his finding, and we cannot say that he was wrong in coming to that conclusion. I feel sure that the magistrate would not have convicted for one event, on one day, by accident; but it is quite different where the events are continuous.

LAWRANCE, J. concurred. *Appeal dismissed.*

Solicitors: *Firth and Co.; Miller, Smith, and Bell.*

Tuesday, May 7, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

EDGAR (app.) v. SPAIN (resp.). (a)

Animal—Slaughter of—“Brought to or delivered at such place for the purpose of being slaughtered”—Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92), s. 8.

The respondent, a licensed horse slaughterer, purchased a mare for 10s., for working which the seller had been fined, and sent it by his servant to his premises licensed for the slaughter of such animals. He entered it in his statutory register “ . . . bought . . . brown mare

to kill for 10s.” The mare was kept on those premises for nine days, and after being cautioned, the respondent had cut the hair from its neck.

Held, that the mare had been brought to the premises for the purpose of being slaughtered within sect. 8 of the Cruelty to Animals Act 1849.

CASE stated upon two informations preferred by the appellant against the respondent under sect. 8 of 11 & 12 Vict. c. 92, charging him that he, being a person licensed to slaughter horses under the statute, did omit to cut off the hair from the neck of a certain mare immediately upon such mare being brought to or delivered at his premises for the purpose of being slaughtered, and omitted to do so for one day thereafter; and also that he did not within three days from the time of the mare being so brought to or delivered at the premises kill or cause to be killed the mare, and omitted to do so for nine days thereafter.

At the hearing the following facts were proved or admitted:—

The respondent was a licensed horse slaughterer, and on the 22nd Nov. 1900, in a street he bought the mare in question for the sum of 10s. which was knacker price, for working which the seller had the day before been fined. The respondent's own servant led it straight to the respondent's premises, licensed for the slaughter of such animals.

In the register kept by the respondent, as the statute directs, on the licensed premises, the following entry of the transaction was made on the 23rd Nov. 1900: “Nov. 22, 1900, bought of D. Huckstep, Southwood, carrier, brown mare to kill, for 10s.”

Upon the visit of the appellant, on the 23rd Nov. 1900, to the premises of the respondent he found that the hair had not been cut off from the neck of the mare, and he informed the respondent that he had not complied with the statute in omitting to do so immediately the mare was brought on the premises, and after this caution the hair was cut off the next morning. The mare was however kept on the premises, and was not killed within three days as provided by the statute, although requested to do so by the appellant, the respondent giving as his reason for not doing so that he had already more horse-flesh meat than he could find a market for.

The respondent did not kill the mare until nine days after it had been delivered as aforesaid.

On behalf of the respondent it was proved that D. Huckstep did not sell the animal for the purpose of being slaughtered by the respondent, but that the respondent could do as he liked with it.

It was argued on behalf of the appellant that it must be assumed on the facts that the mare was brought to and delivered at the licensed premises for the purpose of being slaughtered, irrespective of the fact that there was no expressed condition made that the mare should be slaughtered, such condition, whether expressed or not expressed, being irrelevant to the issue, which was determined by the facts proved relating to the condition of the mare, the amount of purchase money, the entry in the register, the cutting off the hair, and the keeping the animal on the licensed premises until it was slaughtered.

(a) Reported by W. de B. HERBERT, Esq., Barrister-at-Law

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On behalf of the respondent it was contended that the words brought to or delivered at such place for the purpose of being slaughtered, in sect. 8, referred to a direction given by the sender, and not to the intention with which the buyer might receive the horse, and that in the absence of any direction by the sender, the statute leaves the receiver at liberty to slaughter the horse or not as he thinks fit.

The justices were of opinion that the respondent was not bound by the provisions of sect. 8 for the reasons advanced on his behalf, and they dismissed both informations.

By the Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92), s. 8:

Every person keeping or using or acting in the management of any place for the purpose of slaughtering horses or other cattle (not intended for butcher's meat) shall, immediately upon any horse or cattle being brought to or delivered at such place for the purpose of being slaughtered, cut off or cause to be cut off the hair from the neck of such horse or other cattle, and within three days from the time of such horse or other cattle being brought or delivered as aforesaid shall kill or cause to be killed the said horse or other cattle, and, until such horse or other cattle shall be killed, shall supply such horse or other cattle with sufficient quantity of fit and wholesome food and water; and if any other person keeping or using or acting in the management of any such place shall neglect or omit to cut or cause to be cut off the hair of the neck of such horse or other cattle, or to kill or cause to be killed any such horse or any other cattle within the time above limited, or shall neglect or omit to supply a sufficient quantity of fit and wholesome food and water to such horse or other cattle as aforesaid, every such person shall on conviction of any or either of the said offences be liable to a penalty not exceeding 5l.

Colam for the appellant.

The respondent did not appear.

LORD ALVERSTONE, C.J.—In this case if there was any real question as to the object with which the horse was taken to the premises of the respondent, whether it was taken there to be slaughtered or not, I think some difficulty might arise. But it is obvious in this case that the horse was sold to the respondent for the very purpose of having it slaughtered, and the very excuse given by the respondent that he had deferred slaughtering it because he could not find a market for the supply of horseflesh already on his hands, shows that he knew perfectly well the object with which the horse was sold to him. The regulations under this Act are provided in the interests of public health as well as considerations of humanity. The case must be remitted to the justices to convict.

LAWRENCE, J.—I agree.

Solicitor: S. G. Polhill.

Appeal allowed.

Wednesday, May 8, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

PICKFORD (app.) v. CORSI (resp.) (a)

Pawnbrokers—Pledge of stolen goods with pawnbroker—Conviction of pawner for larceny of goods—Liability of pawner to charge of unlawful pawning after conviction for larceny—Autre fois convict—Pawnbrokers Act 1872 (35 & 36 Vict. c. 93), s. 33.

The fact that a person has been convicted of larceny of goods which he has stolen and pawned, does not prevent proceedings from being afterwards taken against him under sect. 33 of the Pawnbrokers Act 1872, for the offence of knowingly and designedly pawning goods the property of another person; and consequently, where a person who has stolen goods and has pawned the same with a pawnbroker, has been convicted of larceny of the goods, he may, notwithstanding such conviction for larceny, be afterwards charged with and convicted under that section of the offence of unlawfully pawning the stolen goods.

CASE stated by the metropolitan police magistrate sitting at Worship-street Police-court in the metropolis.

At a court of summary jurisdiction held at the Worship-street Police-court on the 24th and 31st Jan. 1901, an information dated the 18th Jan. 1901 was preferred by the appellant against Antonio Corsi (the respondent) under sect. 33 of the Pawnbrokers Act 1872, charging that the respondent on the 5th Jan. 1901 had knowingly and designedly pawned with the appellant, being a pawnbroker within the meaning of the Pawnbrokers Act 1872, two rings, being the property of one Constance Biddulph, the respondent not being employed or authorised by the said Constance Biddulph to pawn the same.

This information was heard and determined by the magistrate and was dismissed by him.

Upon the hearing of the information the following facts were either admitted or proved in evidence:—

The appellant was a licensed pawnbroker within the meaning of the Pawnbrokers Act 1872.

On the 5th Jan. 1901 the respondent pledged with the appellant two rings for 6l. then advanced by the appellant to the respondent on the security thereof, which rings had been stolen by the respondent at the Avenue Studios, where he was employed, and which were the property of Constance Biddulph.

On the 16th Jan. 1901 the owner of the rings charged the respondent at the Westminster Police-court with stealing the two rings on a day prior to the 5th Jan. 1901. The respondent was convicted and was thereupon bound over by recognisance in the sum of 10l. to come up for judgment if called upon.

The appellant declining to give up the rings the owner, on the 16th Jan. 1901, issued against the appellant a summons under the Metropolitan Police Courts Act 1839 (2 & 3 Vict. c. 71), s. 27, for unlawfully refusing and neglecting to deliver the two rings to her. This summons was heard on the 22nd Jan. 1901 at the Westminster Police-court, when the appellant was ordered to deliver

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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the two rings to the owner on payment by her to appellant of the sum of 3*l.*, and in compliance with this order the appellant delivered the two rings to the owner and received the above sum of 3*l.* from her.

The respondent had not repaid the above sum of 6*l.* advanced by the appellant on the security of the rings or any part thereof.

It was contended for the appellant that the conviction for larceny of the rings did not prevent the respondent being proceeded against under sect. 33 of the Pawnbrokers Act 1872.

No one appeared for the respondent.

The magistrate was of opinion that the respondent, having been convicted of larceny of the rings, was not liable to be convicted of another criminal offence in respect of the same property and upon the same facts as those proved upon the conviction for larceny; that the offence under sect. 33 of the Pawnbrokers Act 1872 was a criminal offence inasmuch as a penalty is awarded, and the fact of a court of summary jurisdiction having the power in addition to imposing a penalty to award to the pawnbroker any sum not exceeding the full value of the pledge did not constitute a civil remedy merely for the purpose of recouping the pawnbroker for any loss he might have sustained.

He therefore dismissed the information.

The question of law for the opinion of the court was whether the respondent having been convicted of the larceny of the two rings as aforesaid, he was thereby discharged from liability to proceedings under sect. 33 of the Pawnbrokers Act 1872, and whether under the circumstances aforesaid the magistrate was right in dismissing the summons against the respondent.

If the court should be of opinion that the summons was properly dismissed, and that the appellant was barred from proceeding under sect. 33 of the Pawnbrokers Act 1872, then the order of dismissal was to stand; but if the court should be of a contrary opinion then the case was to be remitted to the magistrate with the opinion of the court thereon.

The Metropolitan Police Courts Act 1839 (2 & 3 Vict. c. 71) provides :

Sect. 27. And be it enacted, That if any goods shall be stolen or unlawfully obtained from any person, or being lawfully obtained, shall be unlawfully deposited, pawned, pledged, sold, or exchanged, and complaint shall be made thereof to any of the said magistrates, and that such goods are in the possession of any broker, dealer in marine stores, or other dealer in second-hand property, or of any person who shall have advanced money upon the credit of such goods, within the metropolitan police district, it shall be lawful for such magistrate to issue a summons or warrant for the appearance of such broker or dealer, and for the production of the goods and to order such goods to be delivered up to the owner thereof, either without any payment, or upon payment of such sum and at such a time as the magistrate shall think fit, &c.

The Pawnbrokers Act 1872 (35 & 36 Vict. c. 93) provides :

Sect. 33. If any person knowingly and designedly pawns with a pawnbroker anything being the property of another person, the pawnbroker not being employed or authorised by the owner thereof to pawn the same, he shall be guilty of an offence against this Act, and shall be liable, on conviction thereof in a court of summary jurisdiction, to forfeit any sum not exceeding 5*l.*, and

in addition thereto any sum not exceeding the full value of the pledge as ascertained by the court. The forfeitures when recovered shall be applied towards making satisfaction thereout to the party injured, and defraying the costs of prosecution as the court directs; but if the party injured declines to accept of such satisfaction and costs, or if there is any surplus of the forfeitures, then the forfeitures or surplus (as the case may be) shall be paid to the overseers of the poor of the parish or place where the offence is committed, for the use of the poor thereof.

Avory, K.O. (C. L. Attenborough with him) for the appellant.—The question is whether a person is liable to be convicted of the offence under the Pawnbrokers Act of unlawfully pledging goods of another person after he has been convicted of the larceny of the same goods. The property in the rings did not pass by the larceny to the respondent, and therefore when he pawned the rings he was pawning the property of another person, so that the case comes expressly within the statute. I do not dispute that this offence under sect. 33 was a criminal offence, but the next question is, Could the defendant plead *autrefois convict*, and is the matter *res judicata*? He could not plead *autrefois convict* because, although it is a criminal offence, it is not the same criminal offence, and it is not an offence necessarily involved in the former offence. These two considerations cover the two cases of *autrefois acquit* and *autrefois convict*. It is a conclusive answer to the plea *autrefois convict* or *res judicata*, that it is not the same criminal offence which forms the subject of inquiry. The man who steals goods does not necessarily pawn them; the pawning is a separate and subsequent transaction. The case of *Fancett v. Bierman* (14 Times L. Rep. 148) throws some light on the point. There the question was raised whether under this section (sect. 33) the pawnbroker was the proper person to take proceedings. The magistrate held that the pawnbroker was not the party injured within the meaning of the Pawnbrokers Act, and that he had no right to take proceedings under this section, but that it was only the owner of the property who could take such proceedings. The court overruled that contention, and said that the pawnbroker was the person injured within the meaning of this section. That case therefore decides that there were two separate offences, one committed against the owner of the property and a second offence committed against the pawnbroker. The object of this Act is the protection of pawnbrokers, and the object of this particular section is to give the pawnbroker a remedy against any person who deceives him by pawning property which does not belong to him, the necessary consequence being that the pawnbroker ultimately has to give up the property, and may or may not get back from the owner the amount which he has advanced. [Lord ALVERSTONE, C.J.—If your contention is not right the remedy given to the pawnbroker under the section of getting something back out of the fines would be taken away.] That is so, as the latter part of the section clearly shows. The object is to give the pawnbroker a remedy, and also to give him some recompence for the money which he has lost, and which the Legislature recognises he must lose on property pawned belonging to somebody else. The magistrate thought that because the same evidence was called to

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prove the one offence as was called to prove the other, therefore the defendant was entitled to be acquitted. That was the confusion in his mind, and it is very clearly expressed in the recent case of *Reg. v. Ollis* (19 Mag. Cas. 680; 83 L. T. Rep. 251; (1900) 2 Q. B. 758). There a man was indicted for false pretences and acquitted. A second indictment for false pretences was preferred against him, and evidence which had been given on the first trial was repeated at the second trial, and the question was whether that evidence was admissible. Darling, J. there says (19 Mag. Cas. at p. 686; 83 L. T. Rep. at p. 256; (1900) 2 Q. B. at p. 780): "It seems to me, therefore, that by the admission of this evidence the defendant was not *bis vexatus*, for I feel sure that those words are not to be understood as meaning that a man is not to be more than once annoyed by the same evidence. I think they mean that he is not to be by legal process twice exposed to the risk of being found guilty of the same crime, or the same tort, or liable twice to pay the same debt, be it to the State or to his fellow citizen. To hold otherwise seems to me to rule that evidence which has been given once shall never be produced again against the same defendant; yet it is plain that up to a certain point the evidence must often be the same, although the defendant is accused of wrongs done to two distinct persons, and that in different suits or forensic proceedings." So here, up to a certain point the evidence is the same; but the evidence necessary to convict the defendant of larceny does not involve proving that he has pawned the article. He may be convicted of larceny without any proof that he has pawned. He was guilty of the offence of larceny before he committed the other offence, which is a separate and subsequent offence. The magistrate was wrong, and the defendant ought to have been convicted of this second and subsequent offence.

The respondent did not appear.

Lord ALVERSTONE, C.J.—In my opinion the learned magistrate ought to have entertained this case. I think the ground of our decision may be shortly put in the way in which it has already been put in the argument for the appellant—namely, that this was a statute which was passed, not only for the protection of owners of goods, but also for the protection of pawnbrokers, and that the offence charged is the offence specified in the section, of knowingly and designedly pawning goods which are the property of somebody else. It would seem strange that, because in this particular case, which is very likely the great majority of such cases, the goods had been stolen before they were pawned, and the person stealing them had been convicted of the larceny, therefore the pawnbroker should lose his right to such remedy as the section gives him, and should lose that right by virtue of the fact that the ownership of the goods had been proved not to be that of the person who pawned them. I think that it would require express words in the statute to make it an answer in such cases to an offence under sect. 33 of the Act, which is a different offence to the larceny, to say that there had been a previous conviction in respect of the depriving another person altogether—namely, the owner—of his property in the goods. I think the distinction is between the evidence given to establish one offence and partly the same evidence which

may be given to establish a different offence of greater or less degree. I think, in this case, the learned magistrate ought to have admitted the evidence and dealt with the charge.

LAWRANCE, J.—I agree.

Appeal allowed. Case remitted to the magistrates to be dealt with.

Solicitors for the appellant, *Attenborough and Son*.

April 22 and May 8, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRANCE, J.)

REX v. JUSTICES OF SUNDERLAND. (a)

Licensing—Agreement with borough corporation as to lapse of licence—Members of corporation voting as justices on grant of new licence—Interest—Bias.

The corporation of the borough of S. entered into an agreement with D. and D., brewers, that if the latter bought for 10,000l. certain lands which the corporation had acquired under an improvement scheme, and carried out the improvements contemplated by the corporation, the latter would allow the licence of the L. Hotel, which was situate on the said lands, to lapse, and would covenant not to apply for a renewal thereof, and would repay the 10,000l. to D. and D. if the latter failed to obtain a new licence for certain other premises belonging to them in P.-road, within the borough of S. On the licensing committee of justices were several members of the corporation. At the licensing sessions the committee, after having refused four applications by other persons for licences for premises in P.-road, granted D. and D.'s application for a licence for their premises there. This grant was afterwards confirmed by the justices, of whom a majority were members of the corporation. There was evidence to show that the justices in refusing the other applications had considered the merits of each application.

Held, that there was not sufficient evidence of interest or bias to invalidate the licence.

THE facts in this case are thus stated in the written judgment of Lord Alverstone, C.J.: In this case a rule nisi for a *certiorari* was granted on the application of Mr. Foster and certain other gentlemen, inhabitants of Sunderland, calling upon the justices for the county borough of Sunderland to show cause why a writ of *certiorari* should not issue to bring up a certain order of the 27th Sept. 1900, confirming a provisional licence which had been granted to Duncan and Dalgleish Limited, a brewery company, on the 26th Sept. 1900. The grounds of the motion, as stated in the rule, were: (1) Bias of the justices in wrongfully using their positions as justices in carrying into effect an agreement with Duncan and Dalgleish Limited; (2) the wrongfully granting a full licence at Pallion to sell intoxicating liquors in lieu of the licence of the Londonderry Hotel, on payment by the applicant of the sum of 10,000l. to the borough funds of Sunderland. The facts of the case, as disclosed by the affidavits, were as follows: At some time in the year 1899, the corporation of Sunderland

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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purchased some property with a view to street improvements, and, among other properties, a fully-licensed house in High-street, Sunderland, known as the Londonderry Hotel. Attempts had been made by the corporation since they acquired the property to make arrangements for the pulling down and rebuilding of the hotel on some part of the site acquired by them for the purpose of the improvements, but these attempts had apparently not produced any result. On the 8th Aug. 1900 a resolution of the council was passed that the council should consent to the transfer or lapsing of the licence of the Londonderry Hotel, and that the premises should be demolished, and the highways committee be instructed to negotiate accordingly. The chairman of the highways committee was Alderman Atkinson Gibson, and between the 8th and 22nd Aug. he entered into negotiations with Duncan and Dalgleish Limited, which resulted in an agreement of the 22nd Aug., which recited the intention of the company to apply at the adjourned general annual licence meeting for a full licence to sell on or off the premises to be erected in Pallion-road, Sunderland, and that upon such application the company was desirous of offering to surrender an existing licence of the same nature. The agreement then provided that, in the event of the application being granted, the company should pay the corporation the sum of 10,000*l.*, and that the corporation would, upon the opening of the proposed new premises in Pallion-road, close the Londonderry Hotel as a licensed house and not apply or suffer any application to be made for the renewal of any licence thereof. The agreement further provided that should the grant and confirmation of the licence be revoked by proceedings in the High Court of Justice, expressly instituted for that purpose, the corporation should repay the sum of 10,000*l.* On the 23rd Aug., the day after the agreement was made, the general annual licensing meeting of the borough of Sunderland was held, and at that meeting there were present among others the mayor (Mr. Dix), Messrs. Reed, Sanderson, Pratt, Burns, and Gibson, and at that meeting a notice was served by the solicitor for Mr. Foster and the other gentlemen on whose behalf the rule was moved, objecting to their adjudicating on any application for a licence for Pallion, on the ground that they were members of the corporation which was primarily interested in the granting or refusing of licences in that district. No application was made on behalf of Duncan and Dalgleish Limited at that meeting, but there were four other applications made for full licences for houses at Pallion, all of which were refused. The adjourned meeting was held on the 25th Sept. At that meeting Duncan and Dalgleish Limited, in pursuance of notice given by them, applied for a provisional licence for an hotel to be erected at Pallion. On that occasion the six gentlemen, Dix, Reed, Sanderson, Pratt, Burns, and Gibson, were again present, and a similar objection was taken on behalf of Mr. Foster and the other gentlemen above mentioned. The licensing committee granted a provisional licence, and on the 27th Sept. the confirming authority—that is to say, the justices of the county borough of Sunderland—confirmed the grant. There were present at the confirming meeting of the 27th thirteen magistrates, of whom seven were members of the corporation,

and six of such gentlemen were Messrs. Dix, Reed, Sanderson, Pratt, Burns, and Gibson above mentioned.

E. Shortt for the justices.—The rule was obtained as I understand on two grounds—namely, bias and interest on the part of those justices who were members both of the corporation and of the licensing and confirming authority. The charge of bias is founded on the fact that the licensing authority rejected various applications for licences in Pallion-road before granting the application of Messrs. Duncan and Dalgleish. The gentlemen in question have filed affidavits denying bias, and stating that in all these applications they acted on the evidence before them. This being so there is no evidence of bias:

Reg. v. Justices of Stockport, 60 J. P. 552.

As to the charge of having a personal interest in the grant of this licence, any personal interest these members of the corporation had was merely as ratepayers. This is not a sufficient personal interest to prevent them from voting on the grant of the licence, or to make that licence bad. It will be said that they had a greater interest than other ratepayers in granting the licence, as they were personally interested in the development of the corporation property. Such interest was only an interest as the representatives of the ratepayers:

Reg. v. Taylor, 14 Times L. Rep. 185;

Reg. v. Rand, L. Rep. 1 Q. B. 230.

This is a very different case from *Reg. v. Bowman and others* (78 L. T. Rep. 230; (1898) 1 Q. B. 663). There the grant was made conditionally upon the applicants paying a certain amount to the corporation funds. Even there the court did not hold that this gave the justices of the borough a personal interest in the grant; it only held that it showed that they had taken into consideration matters extraneous to the application, and therefore had not in any proper sense heard the application at all.

Tindal Atkinson, K.C. (*Montague Lush* with him) for the Corporation of Sunderland.—I adopt the argument for the justices, and wish merely to point out that this is not a transfer of the licence of the Londonderry to Messrs. Duncan and Dalgleish's premises. It is the grant of a new licence:

Lacey v. Lacey, 19 Mag. Cas. 178; 80 L. T. Rep. 473; (1899) A. C. 222.

Dickens, K.C. and *H. Lloyd* for Duncan and Dalgleish Limited.

C. A. Russell, K.C. (*Blacklock* with him).—As the affidavits show, it was the original intention of the corporation to sell the land on which the Londonderry Hotel stood without any licence—to allow the licence to lapse altogether—and finding the site unsaleable on these terms they resolved that there should be what is in effect, if not in law, a transfer of the licence to Messrs. Duncan and Dalgleish on condition that this firm would take over the site at a very large price. On these facts we contend that the justices, who were members of the corporation and who were more especially members of the very committee who had the disposal of the site upon their hands, were disqualified to vote as to the grant or transfer of the licence to Messrs. Duncan and Dalgleish's premises. I base this contention on three grounds. In the first place

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they had a direct personal interest in granting the licence—an interest quite independent of their interest as ratepayers—the interest which men have who wish to bring a transaction (whether for their own or their clients' benefit) for which they are responsible to a successful issue. These gentlemen did not want their improvement scheme to turn out a failure. Interest does not necessarily mean pecuniary interest:

Reg. v. Myers and others, 34 L. T. Rep. 247; 1 Q. B. Div. 173.

In the second place, I say, in this matter these justices were for the same reasons judges in their own cause. On this ground again they were disqualified to act:

Reg. v. Haynes, 12 Times L. Rep. 323.

Lastly, there is, I submit, evidence, and strong evidence, of bias. The refusal of several applications for licences for premises in Pallion-road in which the corporation had no interest followed by the grant of this licence for premises in Pallion-road in which the corporation had a direct interest is proof that the justices, who were members of the corporation, were consciously or unconsciously biased in their decisions. As to the difficulty created by *Reg. v. Sharman* (1898) 1 Q. B. 578, that does not arise here as the rule is not only for a *certiorari*, but also for a *mandamus*.

Tindal Atkinson, K.C. in reply.

May 8.—Lord ALVERSTONE, C.J.—In the argument before the court it was contended that both the order originally granting the licence, and the order confirming it, were bad, and that, therefore, the confirmation order must be quashed upon the grounds mentioned in the rule. We have to consider whether the existence of the agreement with the corporation and the circumstances under which that agreement had been arranged, are sufficient to disqualify the gentlemen in question from sitting as members of the licensing committee or confirming authority. It was contended on behalf of the gentlemen on whose application the rule had been granted that the six gentlemen in question had such an interest in the matter as to prevent them from being impartial, and to cause them to be in fact biased in favour of the application of Duncan and Dalgleish Limited. The case is not without difficulty, and no doubt it would be better that under such circumstances the tribunal which had to adjudicate upon the matter should not include gentlemen who had been concerned in bringing about the agreement of the 22nd Aug., but in our opinion, both upon the authorities and upon the principles which had been laid down in similar cases, we cannot hold that there is such evidence of bias as to make their action invalid. The grounds upon which persons in such a position were disqualified from acting were, we think, correctly stated by Mr. Russell in his argument in support of the rule—(1) pecuniary interest; (2) that a man may not act as judge in his own case; (3) that the circumstances were such as to show that a member or members of the tribunal was or were in fact biased, or did not act impartially. The first two grounds were not relied on, nor could they be upon the facts. No doubt the magistrates, as ratepayers of Sunderland, would be interested in the agreement of the 22nd Aug. being carried into effect; but we are clearly of opinion, and the

contrary was scarcely contended, that such an interest would not make it illegal for them to act, but would be an interest similar to that which was the subject of discussion in *Reg. v. Rand* (*sup.*). The real ground upon which the rule was attempted to be supported was the third, that of bias in fact. In considering this it was necessary to keep in view the issue which was raised on the application of Duncan and Dalgleish Limited; it was, substantially, whether a licence was necessary for the Pallion district, as no question arose on the application of the company of rival or competitive interests. It was, indeed, attempted to be alleged by the affidavits in support of the rule that the licensing meeting had decided at the meeting of the 23rd Aug. that no further licences were necessary for Pallion. The affidavits in opposition to the rule showed that this was not the case; but, on the contrary, that the applications had been considered upon their merits, and that the ground of opposition in one particular case was the proximity of the premises, to which it was proposed a licence should be granted, to a church and the residence of one of the inhabitants of Pallion. It was further suggested that no evidence was adduced before the magistrates that there was any necessity for licensed premises in Pallion. Upon the affidavits we think it is established that this suggestion is not well founded, but that the licensing committee on more than one occasion had to consider whether the circumstances of Pallion made the licensing of premises desirable or not. It was sworn by all the persons to whose action objection was taken—and we see no reason to doubt the truth of their statements—that they approached the consideration of the application with perfectly unbiased minds and gave their decision according to conviction, after hearing the evidence. The case was not without authority. A similar question was raised in the case of *Reg. v. Justices of Stockport* (*sup.*), in which the action of a gentleman named Torkington was attacked upon similar grounds; and the court there decided that such opposition was not sufficient of itself to justify them in holding that there was in fact bias. We think it right to add that we are satisfied upon the affidavits, including that of the town clerk, that the allegation which was made in the affidavit upon which the rule was granted, that there had been a promise by the members of the corporation to directly or indirectly support Duncan and Dalgleish's application, is not well founded. For the above reasons we are of opinion that the rule of *certiorari* must be discharged. It would not, therefore, be necessary to consider the application for the *mandamus*.

LAWRANCE, J.—I concur.

Solicitor for the justices, C. W. P. Barker.

Solicitors for the corporation, J. E. and H. Scott, for Wm. Bell and Sons, Sunderland.

Solicitors for the objector, Hickin, Smith, Capel-Cure, and Co.

Solicitors for Duncan and Dalgleish, Limited, Johnson, Weatherall, and Sturt.

[Div.]

NOTT v. NOTT.

[Div.]

PROBATE, DIVORCE, AND ADMIRALTY
DIVISION.

DIVORCE BUSINESS.

Saturday, May 18, 1901.

(Before Sir F. JENNE, President, and
BARNES, J.)

NOTT v. NOTT. (a)

Appeal—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), ss. 5, 7—Order of justices—Variation—Joint income of husband and wife—Voluntary allowance.

In making an order for maintenance against a husband, under the Summary Jurisdiction (Married Women) Act 1895, the justices making the order must take into account the means both of the husband and wife, and it is immaterial that the means of the wife simply consist of a voluntary allowance made by a relative.

THIS was an appeal by the husband, Albert Nott, from a decision of the Green-lane (Liverpool) justices refusing to reduce an order for maintenance.

The appellant, on the 29th May 1900, was found guilty of persistent cruelty to his wife, Kate Nott, under sect. 4 of the Summary Jurisdiction (Married Women) Act 1895, and an order was made against him for the payment of 1l. a week to her as maintenance.

At that time the husband was employed as a traveller for a firm of cattle medicine and disinfectant merchants, and was paid by commission. His earnings varied greatly, sometimes being nothing and sometimes as much as 10l. a week.

Shortly after the order of the magistrates was made the appellant was dismissed from his situation in consequence of his domestic troubles. He was afterwards employed as travelling agent for an insurance company; but his salary was only 30s. a week and commission, out of which he had to pay his own travelling expenses. He had never been able to do sufficient business to earn any commission.

The payment of 1l. a week fell into arrear, and on the 12th Nov. Nott was summoned for nonpayment and sent to prison for one month. In consequence of his imprisonment he lost his insurance agency, but was afterwards reinstated.

Another summons was taken out on the 30th Jan. 1901 in respect of further arrears, whereupon the husband applied, under sect. 7 of the Act of 1895, to the justices to reduce the order from 1l. to 10s. a week.

The justices refused the application, but adjourned the summons of the wife pending this appeal to the High Court.

It appeared that the wife had an income of 91l. a year, but the justices declined to take this into consideration, since it was a voluntary allowance, and gave as their reasons for refusing to reduce or vary the original order that the husband had not fully disclosed his income in examination-in-chief, but had concealed the fact that he had on one occasion obtained a small sum when acting as an official at a dog show. They were also of opinion that his education and natural

abilities were such that he might easily obtain a good livelihood.

Barnard for the appellant.—The magistrates ought to have taken into account the voluntary allowance made to the wife. The question has been before the courts on several occasions, though generally in cases where the allowance is one made to the husband. The practice of courts of summary jurisdiction in matters of orders for maintenance is the same as that of the High Court in allowances of alimony. He cited

Clinton v. Clinton, 14 L. T. Rep. 257; L. Rep. 1 P. & D. 215;

Bonsor v. Bonsor, 76 L. T. Rep. 168; (1897) P. 77.

If the order of the magistrates remained unchanged, the applicant would only have 10s. a week upon which to live and to pay his travelling expenses. The magistrates evidently acted upon trivial incidents which had no bearing upon the case.

There was no appearance on the part of the respondent.

The PRESIDENT.—I think we can deal with this case at once. It is desirable, whenever it is possible, to avoid sending cases back to the justices, and it will not be necessary to do so on the present occasion. After an order has been made by justices, under the Act of 1895, it is possible to get an alteration if the circumstances of the parties are changed. Now, what are the facts here? The husband appears to earn about 30s. a week, and the wife has a voluntary allowance of 91l. a year, therefore, after deducting that portion which she receives for house-rent, her income is about the same as that of her husband. The joint income of the parties being about 3l. a week, the wife's proportion, by the principle of this court, should be 1l. a week. But there is the question of the children to be taken into account. The question whether a voluntary allowance should be taken into account has been considered in *Bonsor v. Bonsor* (*ubi sup.*), in which I held that the whole actual income of the parties, from whatever source it came, must be taken into account. It does not appear that the justices ever considered the wife's income at all, but simply that of the husband. They ought to have considered both. Under the circumstances the order of 1l. a week is too large, and should have been reduced. The justices appear to have been influenced by considerations which were unimportant and outside the question altogether. The husband has offered to pay the sum of 10s. a week, and we are of opinion that the order should be varied to that amount.

BARNES, J. agreed.

Solicitor: *Hands*, for *Sefton*, Liverpool.

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GRAHAM v. WROUGHTON.

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Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, June 12, 1901.

(Before RIGBY and COLLINS, L.JJ.)

GRAHAM v. WROUGHTON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Local government—Surface drain—Additional user—Nuisance from sewage—Connection with sewer—Notice—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 21.

G. was the owner of a house and grounds, and on her property and adjoining her garden was an old disused quarry, into which a covered drain had for many years conveyed surface or rain water and slops from some of the houses in the neighbouring village. Recently an inhabitant of one of these houses had discontinued the use of a cesspool and, without any notice to the local authority, discharged fecal matter from a water-closet into this drain, thereby causing an intolerable nuisance to the plaintiff.

The local authority had made no bye-laws or regulations as to the notice to be given by the owner of a house under sect. 21 of the Public Health Act 1875, but there was no evidence that they had dispensed with the notice.

Held (by Byrne, J.), that though the defendant had lawfully caused his drain to empty into the sewer for the purpose of carrying off surface and slop water, he was not entitled, under sect. 21 of the Public Health Act 1875, to add to this the fecal and other solid matter from the water-closet, and the plaintiff was entitled to an interim injunction restraining him from doing so.

Kinson Pottery Company v. Corporation of Poole (81 L. T. Rep. 24; (1899) 2 Q. B. 41) followed.

Held (by the Court of Appeal), that, even if the defendant had a right to send fecal matter into the sewer, he had not performed the preliminary conditions as to notice to the local authority and otherwise contained in sect. 21, and therefore the injunction was rightly granted.

THIS action was brought by Mrs. Graham, the owner of a house called Green Bank, at Wetheral, in Cumberland, against Dr. Wroughton, Mr. Platt, and Mr. Hendry claiming an injunction restraining the defendants from continuing to discharge solid sewage matter upon her land from houses in their occupation through a drain passing under the highway on to her land.

The drain in question had existed for many years, and was a covered drain running along one side of the high road in the village, and it emptied itself into an old disused quarry, the property of the plaintiff and adjoining her garden.

This drain had been used solely for conveying surface or rain water and slops from some of the houses in the village adjoining the high road; but lately some of the inhabitants whose houses adjoined the road, including the three defendants, had discontinued the use of cesspools, which was the system of drainage prevailing in the village, and built water-closets,

which they connected with a communication they already respectively had with the drain and discharged the fecal matter into this drain, and so caused an intolerable nuisance to the plaintiff from the smell arising from the old quarry.

The plaintiff moved for an interlocutory injunction, and the application was heard on the 3rd May.

Levett, K.C. and Lushington for the plaintiff.

Norton, K.C. and Alexander Glen; Maughan and Stokes for the defendants.

BYRNE, J. referred to the facts, and continued:—This old drain was, until about the year 1886, a horseshoe-shaped drain obviously intended and meant for carrying off surface water, and not intended for carrying off fecal matter and things of that kind. The mere carrying off of surface water and other matters that were allowed to go in, caused in itself a nuisance; and at the present time it is admitted that the matter which passes into the quarry is of such a nature as to create an intolerable nuisance. This is not an information brought by the Attorney-General, and I have nothing to do with the question of public nuisance; but what this lady complains of is the use the defendants have recently made of this drain, which was, and was intended to be, used in its origin only for surface water and which has for some years past been used for the purpose of carrying off liquid slop water and other matters of that kind, including what passes from lavatories and kitchen sinks and other sinks, that pass down this drain. With reference to one of the defendants, Mr. Hendry, there are questions of fact to be determined, and it is undoubted that for some years past he has had a communication with this drain, which in the year 1886 was made into a covered 6in. drain. He has had a connection from a water-closet to it, and on an interlocutory motion I could not grant an interlocutory injunction against him to restrain him from doing what he has been doing for so many years. There will be questions of fact on the trial which may or may not result in an injunction being granted against him also. But the question is whether I ought to grant an injunction against the other two defendants, connections between whose water-closets and the drain have been made within the last few months. The parties are anxious that I should determine this point on the interlocutory motion, because possibly it may save them time, trouble, and expense hereafter. Now, the matter stands in this way: When Dr. Wroughton became tenant of his house, which he holds on a yearly tenancy, it contained bath, lavatory, sink, and an outside privy, with no water-closet, and consequently whatever did pass into the drain was only liquid matter, liquid matter of a more or less offensive kind, but nothing in the shape of refuse from a water-closet passed into it. And the circumstances as to the other defendant, Mr. Platt, are similar. Now, it is endeavoured to justify the discharge of solid sewage matter into this drain by sect. 21 of the Public Health Act 1875, which provides that "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to

(a) Reported by W. C. BIRN, Esq., Barrister-at-Law.

do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications. Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of the section shall be liable to a penalty not exceeding 20l., and then power is given to the local authority to close the communication between the drain and sewer. Now, I will assume that the original connection with the drain from those houses was lawfully made for the purposes of carrying off such liquid matter as was carried down the drain prior to the date of the erection of the water-closets. Then, further, the drain in question is, within the definition of the Public Health Act 1875, undoubtedly a sewer. It is said, first, that no connection has been made between the drains and the sewer by what has been done in reference to these water-closets, because it has been merely a question of making a small drain pass into the old drain which carried the liquid matter into the sewer. I cannot accept that. It appears to me that it is none the less causing the drains to empty into the sewer because you join your new drain to an old drain which already empties into the sewer. Passing that by, I think that the question that really arises in the present case is this: Are private owners, who have lawfully (and I must take it for the present purpose that they have lawfully) caused their drains to empty into this sewer for the purposes for which it was used prior to the erection of those water-closets, justified now for the first time in causing these drains to carry off faecal solid matter coming from the water-closets? Really it resolves itself into a question of whether, if a sewer is used for the purpose of carrying off any kind of sewage, that necessarily involves a right to use that sewer for the purpose of carrying off all other kinds of sewage. Now, the argument which has been extremely well and forcibly urged on me by counsel for the defendants is that there is no authority which shows that, where a sewer has been used for one kind of sewage, the persons entitled so to use that sewer may not pour sewage of any description into the same drain. I do not know whether they would limit it so as to say that if it were drainage from houses they might do so. I do not know, nor is it perhaps material to consider, because all they contend for, for the present purpose, is that, if they have a right to allow any portion of household drainage to go into the sewer, they are entitled, in addition, to send into that sewer (with notice to the local authority and with their permission) household sewage of any description. A case has been recently before the Divisional Court of *Kinson Pottery Company Limited v. Corporation of Poole* (81 L. T. Rep. 24; (1899) 2 Q. B. 41). In that case the appellants, the Kinson Pottery Company, were summoned by the sanitary authority of a borough for non-compliance with a notice to abate a nuisance caused by turning slop and scullery water from twelve houses, owned by the appellants, into a drain constructed beside a highway to receive the surface water of the highway which emptied into an open ditch. According to the plan deposited with the sanitary authority when the

houses were built by the appellants' predecessor in title, the houses should have been drained into cesspools, but cesspools to receive slop and scullery water had not been constructed. No sewer had been constructed by the sanitary authority, by means of which the houses could be drained. The houses were separately occupied, and were not within the same curtilage. The justices made an order to abate the nuisance, by disconnecting the drains of the houses from the surface-water drain and making cesspools for the houses. On a case stated, it was held that the sanitary authority were not bound under the Public Health Act 1875, s. 15, to provide a sewer to drain the appellants' houses; that the surface-water drain, though for some purposes "a sewer" within the meaning of sect. 4, was not a sewer into which the appellants were entitled to empty their drains; that the nuisance was caused by the want of a structural convenience within the meaning of sect. 94; and therefore the defendants, as owners, were liable. Now, there, what had been allowed to pass into the drain was surface water, and in the present case more than surface water—namely, liquid refuse from the houses—has been allowed to pass into the drain; but, with that exception, the reasoning of the learned judges seems to form a complete guide in the present case. The justices were of opinion that the drain in question, being constructed by the respondents for the sole purpose of receiving the surface water from the highway, could not lawfully be used by the appellants to carry off scullery and slop water from their houses, and that the appellants had created the nuisance in the open ditch into which the surface-water drain discharged. It also appeared that the respondents, as the highway authority for the borough, had previously to 1892 laid down, at the side of the highway upon which the appellants' houses abutted, a drain for a distance of 123 yards or thereabouts, for the purpose only of receiving the surface water from the highway, which surface water was by means of the drain conveyed to and emptied into an open ditch by the side of another highway, about 49 yards distant from the appellants' houses. Darling, J. said: "I agree that for certain purposes the surface-water drain was a sewer, but it is contended that therefore the appellants have a right to turn into it any refuse they please, and then it is for those who own the sewer to deal with the state of things so caused. In my opinion that is not the law. Sect. 21 of the Public Health Act 1875 entitles an owner to cause his drains to empty into the sewers of a local authority on giving notice, and complying with the local authority's regulations; but that does not entitle an owner to empty all kinds of filth into a small roadside drain and leave the local authority to deal with it as best they can, and, moreover, here no notice was shown to have been given. To hold otherwise would lead to an absurd result; and, whether notice had been given or not, I do not think that the appellants had a right, under the general law, independently of the permission referred to in the case, to turn into the surface-water drain even rain water, and still less had they a right to turn into it slop and scullery water, as to which no permission had been given." Channell, J. said: "It is contended that this surface-water drain was a sewer, and I think it was for some purposes. It was intended to carry

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off mere surface water, yet it was a 'sewer' within the words of the definition contained in sect. 4 of the Public Health Act 1875. But to entitle the appellants to succeed it would be necessary to go further and show that it was a sewer which the appellants had a right to use as they did. If they had any such right, it could only be by sect. 21, which requires notice to be given. I do not wish to say, if notice had been given in pursuance of that section, there would have been a right to empty the sloop and scullery water into this surface-water drain, for I agree that it is unnecessary to decide that question; but here no notice was given. I think the appellants cannot lawfully empty sewage into a mere water sewer." In the present case there was a drain which, when it came into the control of the present authority, had been used for a surface-water drain, and had either before or after it came under their authority been allowed by them, either expressly or tacitly, to be used for carrying off other liquid and deleterious matter, some of which, at all events, might come within the general name of sewage, though it was not sewage within the meaning applied to it in ordinary parlance; but nothing more had been allowed, so far as the evidence before me goes, and no notice was given under sect. 21 of an intention to cause the drain to empty this other matter into the sewer. The case then resolves itself into this: If a public authority, being the owner of a sewer, has allowed that to be used for certain specific purposes, one of those purposes being the carrying off of liquid drainage matter, does that justify its use for those other matters to which I have referred? I think in principle the case of *Kinson Pottery Company Limited v. Corporation of Poole* (ubi sup.) really is a governing authority in the present case, and I think it would be drawing too refined a distinction (which I am not justified in doing) if I were to say it was not such a governing authority. I think, therefore, that, as against two of the defendants, the plaintiff is entitled now to the injunction which she asks. Of course I shall allow a reasonable time for putting matters in order.

From this decision Dr. Wroughton appealed.

Alexander Glen and Maughan for the appellant.—It is admitted that the appellant lawfully used this drain for the purpose of carrying away the surface and sloop water for many years. He therefore had the right to use it for carrying away faecal matter, and, if a nuisance is caused, it is the duty of the local authority to take such steps with regard to the place where it is discharged as will prevent the nuisance. The appellant incurs no liability in that respect. There is no authority to the contrary. This sewer vested in the local authority under sect. 13 of the Public Health Act 1875 as it is not within the exceptions. The appellant therefore lost all right to interfere with the sewer:

Ferrand v. Hallas Land and Building Company, 69 L. T. Rep. 8; (1893) 2 Q. B. 135, 140;

Brown v. Mayor, &c., of Dunstable, 80 L. T. Rep. 659; (1899) 2 Ch. 378.

There is nothing in the Act which enables the plaintiff to say that sect. 21 applies only to any particular class of sewage or refuse. The respective responsibility with respect to drains and

sewers of householders and local authorities is discussed in

Kirkheaton Local Board v. Beaumont, 52 J. P. 68;

Molloy v. Gray, 24 L. Rep. Ir. 258;

Ainley v. Kirkheaton Local Board, 60 L. J. 734, Ch.

Kirkheaton District Local Board v. Ainley, Sons,

and Co., 67 L. T. Rep. 209; (1892) 2 Q. B. 274;

Fordom v. Parsons, 71 L. T. Rep. 428; (1894)

2 Q. B. 780;

Wheatcroft v. Local Board of Matlock, 52 L. T.

Rep. 356;

Falconar v. Corporation of South Shields, 11 Times

L. Rep. 223.

A water drain may be used as a sewer unless it comes within sect. 13:

London and North-Western Railway Company v.

Rural District Council of Runcorn, 78 L. T. Rep.

343; (1898) 1 Ch. 561;

Croydsdale v. Sunbury-on-Thames Urban District

Council, 79 L. T. Rep. 26; (1898) 2 Ch. 515;

Sykes v. Sowerby Urban District Council, 82 L. T.

Rep. 177; (1900) 1 Q. B. 584.

The local authority had power to make a new drain if this was not adapted for this purpose: (Public Health Act 1875, s. 24). Neither of these cases was cited in *Kinson Pottery Company v. Corporation of Poole* (81 L. T. Rep. 84; (1899) 2 Q. B. 41), which was relied on in the court below. In that case plans had been deposited with the local authority showing that the houses would be drained into cesspools, but in fact they were drained into a drain intended to receive surface water only. But the decision is inconsistent with the other authorities, and is also quite a different case from this one. Sect. 21 of the Public Health Act 1875 gives the plaintiff an absolute right to cause his drains to empty into the sewers of the local authority:

Eastwood Brothers Limited v. Honley Urban District Council, 84 L. T. Rep. 169; (1901) 1 Ch. 645.

The section provides that such notice as may be required by the local authority must be given, and that their regulations must be complied with. But no regulations have been made by this local authority, nor any rule as to the notice they require. Therefore no notice was necessary. A third party has no right to raise the objection that proper notice was not given to the local authority. The remedy of the plaintiff is to complain of the nuisance to the local authority under sect. 93 of the Public Health Act 1875, who must cause it to be abated (sect. 94), and, if the local authority does not do its duty, complaint must be made to the Local Government Board under sect. 299 of the Act. This action therefore cannot be maintained. Besides, the condition as to notice does not apply here. The appellant made no new communication between the drains and sewers. The putting up of the water-closet and its connection with his existing drain was not connecting the drain with the sewer; it had been connected long before, and, when a drain is once made, anything may be sent into it which its size allows:

Metropolitan Board of Works v. London and North-Western Railway Company, 44 L. T. Rep. 270; 17 Ch. Div. 246, 249.

They also referred to

Public Health Act 1875, ss. 4, 15, 16, 19, 23, 27;

Public Health Acts Amendment Act 1890, ss. 16, 17.

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Levett, K.C. and S. Lushington for the plaintiff.—This is not a drain within sect. 21. The onus is on the appellant to show why he should be allowed to increase a nuisance on the plaintiff's land. He has no statutory right under sect. 21 to commit such a nuisance. It is not necessary that any formal rule as to giving notice to the local authority should exist. If there is no such rule, the common law applies, and reasonable notice must be given. If notice had been given here, the local authority could, and probably would, have refused to allow the connection with the water-closet. The word "sewer" has an extended meaning, but the authorities show that there is a distinction in the Act between surface-water drains and sewers. This is supported by the judgment of Channell, J. in *Kinson Pottery Company v. Corporation of Poole* (*ubi sup.*). If the defendant has any statutory right to increase the nuisance on the plaintiff's land, he has not given the necessary notice.

Glen in reply.

RIGBY, L.J.—I think this appeal must fail. I think that the order made is quite right, and that no grounds have been shown upon which we can set aside the judgment.

COLLINS, L.J.—I am of the same opinion. The argument in this case has travelled over a wide area upon the question of sewers and drains under the Public Health Act, but I think that, when we come to the narrow point which has actually to be decided, it will not be necessary to deal in any detail with the cases referred to. The point arises shortly in this way: In the village of Wetheral, to which this case relates, there is, for anything that appears to the contrary, an adequate system of sewage so far as faecal matter is concerned. It seems that the practice was to deal with that matter by privies and cesspools, though in one case there was a private water-closet; but, for anything that appears to the contrary, the general scheme which now exists there is perfectly adequate. There is also running along the highway a drain which, it is admitted—or, at all events, it is not denied, and the evidence is in favour of it—was originally simply a highway drain and belonging as such to the highway authority, which was not the local authority now in question. That drain was subsequently, as far back as 1886, improved at the expense of the vestry, then the highway authority, and persons occupying houses along that highway had, no doubt, with possibly the tacit assent of the highway authority, connected their houses with it for the purpose of sending down slops and that class of water. That state of things continued until the present local authority came into existence and took over the control of the highway in 1894; and so things went on until 1900, when the appellant in this case, without any notice whatever to the local authority, made a water-closet and connected it with a communication which he already had with the highway drain, and which had been used for passing soap-suds and that class of liquid down the drain. He now contends that he is justified in doing what he did by virtue of the Public Health Act 1875. But the matter which he sends from his water-closet passes directly through the channel I have described into a disused quarry which is part of the plaintiff's premises, and immediately adjoins her garden

and bowling-green. The effect of that is to create, as the learned judge says, an intolerable nuisance. It is true that the plaintiff had to submit to an inconvenience which may have amounted to a nuisance from the accumulation of soap-suds and that class of liquid in the quarry, but what the appellant has done is to make that a nuisance of a very aggravated character—namely, by the passing down of faecal matter from his water-closet directly into the quarry at the bottom of the garden. Supposing he had done that without the communication with the drain of the local authority, no one would question that he had committed a tort for which an action at the suit of the owner of the garden would lie against him. But he says: "I do not deny for a moment that a nuisance in which I have taken a part is created on the land of the plaintiff, but I am entirely discharged from any personal liability in respect of the matter inasmuch as the channel by which I have conveyed that nuisance on to the land of the plaintiff partly consists of this highway drain which I say is a sewer of the highway authority." In order to get the immunity that he claims under the Act of Parliament, he must at least show that he has conformed to the conditions of the Act of Parliament. He claims to have done so, and says that he comes within sect. 21 of the Public Health Act 1875. That section provides: "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications." He says: "True it is I did not consult this local authority upon the matter at all. I knew, or might have known because it was in evidence, that in that small community other persons had tried to make these communications and assent had been refused. I did not ask them. I had no reason to suppose that they would assent to it. The statute obliges me to give them notice. I did not do it, and yet I claim immunity under the statute for creating an intolerable nuisance on the land of the plaintiff." That seems a strong order, and, in order to bring himself within the section, he has first of all to show that the channel into which he has sent this faecal matter is a sewer of the local authority. The contention on behalf of the appellant goes to this whole extent, that if a highway drain had been made simply for the purpose of collecting rain water to be used for drinking purposes afterwards, and although there was an efficient system for dealing with faecal matter in the neighbourhood, that the appellant might nevertheless pass his faecal matter down into this channel which existed for the purpose of collecting, and it may be distributing, rain water for drinking purposes. That seems an extravagant construction of the statute, and one which I should shrink from unless driven to it by the absolute wording of the section. Although there may be drains which come within the definition of a sewer under the Act, I think that it was not this class of sewer to which

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the provisions of the Public Health Act 1875 apply, enabling any person to pass the faecal matter of his household into it. I do not think it is necessary to decide that as a matter of law in this case; and I should certainly be very reluctant to throw any doubt upon the views taken by the learned judges on this question, because that does not arise in this case for this reason, that, even if this were a sewer into which the appellant had a right under the conditions of the statute to pass faecal matter, he has not performed those conditions, and therefore it seems to me that he has no defence to this action. On those grounds I think that the appeal should be dismissed with costs.

Solicitors for the plaintiff, *Ullithorne, Curry, and Jennings*, agents for *P. B. Hodgson*, Carlisle.

Solicitors for the defendant *Wroughton, Fulger, Robinson, and Mills*, agents for *Leavers*, Carlisle.

Solicitors for the other defendants, *Chester and Co.*, agents for *I. H. Mawson*, Carlisle, and *Wright, Brown, and Strong*, Carlisle.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Thursday, April 18, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

PROPERTY EXCHANGE (No. 1) LIMITED (apps.)
v. WANDSWORTH BOARD OF WORKS (resps.) (a)

Metropolis—New street—Paving expenses—Apportionment of—Strip of land added to old highway—Cost of paving added part—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 105—Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), ss. 77, 112.

An old public highway of 16ft. in width, which, prior to and since 1855 had existed as a formed road, with some houses on the south side thereof, and had been repaired by the district board of works, was widened in 1898 by the addition thereto on the north side of a strip of land of 24ft. in width, thereby making the width of the whole road 40ft., and there were buildings on both sides of the roadway. The board resolved to pave the road as a "new street" under the *Metropolis Management Acts*, and they apportioned the expenses of paving the added part amongst the owners of houses and lands on the north side only, exempting the owners on the south side.

Held, that the added part of 24ft. was the "new street" within the meaning of the *Metropolis Management Acts*, and that the expenses of paving the added part were properly apportioned on the owners on the north side only, as the houses and lands on the south side of the roadway abutted on the old highway, and not on the "new street."

Richards v. Kessick (59 L. T. Rep. 318) and *White v. Fulham Vestry* (74 L. T. Rep. 425) followed.

CASE stated by Mr. John Rose, metropolitan police magistrate, sitting at the South-Western Police-court, after the determination by him of a

complaint against the Property Exchange (No. 1) Limited (the appellants) made by the Board of Works for the Wandsworth District (the respondents).

On the 11th July 1900 a summons to appear at the police-court was issued at the instance of the respondents (therein named the plaintiffs) to the appellants (therein named the defendants) for the appellants to answer a claim by the respondents, the particulars of which annexed to the summons were as follows:

69l. 11s. 3d., being the sum apportioned by the plaintiffs on the 31st day of January 1900, in respect of certain premises of which you are the owners or occupiers, and being the proportion payable in respect of such premises towards the expense of paving a new street called *Totterdown* (on the north side thereof), *Tooting*.

At the hearing of the summons on the 8th Aug. 1900 the facts of the case were stated and agreed on by the parties as follows, and were taken as evidence:

The street or roadway known as *Totterdown* has at present buildings erected on both sides.

The row of houses on the south side, belonging to a Mr. Melhuish, were erected before the year 1855, and probably as far back as 1825.

The houses or walks on the north side consisted of the following premises, namely: (a) the flank and flanking fence of the company's premises known as 29, St. Cyprian-street; (b) the flank and flanking fence of premises known as 28, St. Cyprian-street; (c) a yard and premises belonging to the London General Omnibus Company, opening into *Totterdown*; (d) a passage entrance to rear of houses in High-street; and (e) the flank and flanking wall of premises in High-street, in the occupation of Mr. Greig, with side entrance opening on to *Totterdown*.

The company's house and premises are known as 29, St. Cyprian-street, and were purchased by the company in the year 1899, and erected in or about the year 1898.

There were no windows or apertures on the *Totterdown* side of the main building of the company's house, but there were three windows and a fanlight in St. Cyprian-street, and at present all ingress and egress thereto was from St. Cyprian-street, and the premises were continuous with other houses situate in St. Cyprian-street.

In and for many years prior to 1855 *Totterdown-road* was a formed road used for wheeled and foot traffic from the entrance from the High-street, and it was then well known as "*Totterdown*," opening at High-street at one end and used for every description of traffic, and at the other end leading into meadows open daily for foot passengers.

Totterdown was a public thoroughfare known only by the name of "*Totterdown*," and had been repaired when required by the board since 1855.

In or about the year 1898 *Totterdown-road* was widened from the width of 16ft. to the width of 40ft., and a new street known as St. Cyprian-street was at the same time made running into *Totterdown*; but save and except this widening and the building of certain houses and flanking on the north side thereof, *Totterdown*, as above described, had not altered in character or position or in any other way since the houses on the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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south side were erected; the neighbourhood has, however, become more thickly populated.

In or about the year 1898 the lands on the north side of Totterdown were laid out for building purposes, and a new street, known as St. Cyprian-street, running nearly at right angles into Totterdown, was made.

The company have paid their due proportion of the expenses for paving St. Cyprian-street.

That portion of Totterdown now proposed to be adopted by the board, being of the width of 24ft. or thereabouts, is bounded on the north by the land and messuages as above described and shown on a plan attached to the case; and on the south by a space of 16ft., being the old highway known for many years prior to 1855 (and still known) as Totterdown.

The amount of 36l. 5s. 6d. was claimed by the board from the company, in accordance with their notice of the 7th Oct. 1899, as being the proper proportion of the rate payable by them, and in calculating such amount the board took into consideration that a due proportion would be paid by the owners of the houses on the south side of Totterdown.

In Dec. 1899 a summons was taken out by the board against a Mr. Melhuish, an owner of one of the houses on the south side of Totterdown, to recover the sum of 19l. 1s. payable by him under the apportionment made as previously mentioned, and such summons was heard by the same metropolitan magistrate in the South-Western Police-court, and the summons was dismissed on the ground that Totterdown as to so much thereof as formed the site of the old street before the recent widening took place, was not a new street within the meaning of the Metropolis Management Acts.

On the 14th Feb. 1900 the company received notice from the clerk of the board demanding the sum of 69l. 11s. 3d., being in respect of a new apportionment made in consequence of the decision of the magistrate in the summons against Mr. Melhuish last mentioned, which in effect exempted the owners of the houses (three) on the south side of Totterdown from the expenses of paving the space on the north side of the old site.

The sum of 12l. 1s. 10d. was in fact paid by the company to the board on account of the expenses charged under the notice of the 7th Oct. 1899, and a cheque for this amount had been drawn in favour of the company and a form of receipt submitted to the company, but the company have not yet taken up the cheque, and it was still retained by the board, though the board had offered to repay the above sum of 12l. 1s. 10d.

The works referred to in the notice had not yet been commenced.

Counsel for the company contended: First, that, upon the true construction of sect. 105 of the Metropolis Management Act 1855 and sects. 77 and 112 of the Metropolis Management Act 1862, the portion of Totterdown now proposed to be adopted by the board—that is, the northern portion of 24ft. or thereabouts—was not a new street within the meaning of the Acts or either of them; that the resolution of the board of the 31st Jan. 1900 apportioning the estimated expenses of paving such alleged new street was invalid and not binding on the company so as to fix the liability for contributing for the same at the sum of 69l. 11s. 3d. or any part thereof, on

the ground that the road or street now known as Totterdown or any part thereof is not a new street within the meaning of the above-mentioned Acts, and having regard to the magistrate's decision respecting the southern portion of Totterdown above mentioned. Secondly, that the resolution of the board fixing a new apportionment after the magistrate's decision in the case relating to the southern part of Totterdown was invalid on the ground that the company had paid or offered to pay the sum of 36l. 5s. 6d. demanded under the first apportionment, and that the board were not enabled under their powers to make a fresh apportionment annulling the first apportionment and in substitution thereof. Thirdly, that the apportionment was invalid inasmuch as it was not within the power of the board whilst treating Totterdown in its entirety as it existed at present to make an apportionment for the pavement of it longitudinally; that, if Totterdown was to be regarded in its entirety for the purpose of judging whether it was or was not a new street, the owners of the houses on both sides (which would include the owners of houses on the south side) ought to bear their due proportion of the expense. Fourthly, that the decisions in the cases of *Richards v. Kessick* (59 L. T. Rep. 318) and *White v. Fulham Vestry* (74 L. T. Rep. 425) did not apply, and, in so far as any principle or doctrine covering the present case may in terms appear therein, that such principle or doctrine ought not to be applied in the circumstances appearing in this case.

In support of the above contention and submissions of law, the following cases were cited before the magistrate: *Robinson v. Local Board for Barton* (47 L. T. Rep. 286; 21 Ch. Div. 621, at p. 633; *Whitechurch v. Fulham Board of Works* (13 L. T. Rep. 631, at p. 633; L. Rep. 1 Q. B. 233, at p. 240; *Vestry of Mile End v. Whitechapel Union*, 34 L. T. Rep. 178; 1 Q. B. Div. 680; *Great Clacton Local Board v. Young and Sons* (71 L. T. Rep. 877; (1895) 1 Q. B. 395); *Vestry of Paddington v. North Metropolitan Railway and Canal Company* (1894) 1 Q. B. 633; *Vestry of St. Giles, Camberwell v. Crystal Palace Company* (66 L. T. Rep. 840, at p. 842; (1892) 2 Q. B. 33, at p. 40); *St. George's Local Board v. Ballard* (72 L. T. Rep. 345; (1895) 1 Q. B. 702).

Counsel for the company therefore submitted that the summons should be dismissed with costs.

On the 25th Aug. 1900 the magistrate gave his decision as follows, his decision being annexed to the case:

Totterdown is in appearance a side street leading out of High-street, Upper Tooting. On the south side, the roadway to the width of 16ft. is an old public highway which before and since 1855 has been repaired by the board of works, and fronting it on the south side is a row of seventeen cottages built about seventy-five years ago. On the north side, a new roadway 24ft. in width was in 1898 added to the old highway, and some buildings were then erected. In 1899 the board of works resolved to pave Totterdown as a new street under sect. 105 of the Metropolis Management Act 1855, and took proceedings in this court to recover the expenses of paving from owners of the cottages on the south side. After argument and a view of the place, I decided that the southern side of Totterdown—namely, the old highway and old cottages—formed an old street, and that therefore the southern side of Totterdown could not be treated as a

"new street" under the Act, and that the resolution, order, and apportionment were invalid. The board of works have since made another order and apportionment under sect. 105 for the paving of the new roadway on the north side of Totterdown as a "new street," and are proceeding to recover the expenses from the owners of the houses and land on the north side of the new roadway. The learned counsel for the defendants argued that Totterdown must be regarded altogether—namely, as a street 40ft. wide with houses on both sides—and that the expenses of paving should be charged on the owners on both sides. The question is whether the modern addition to the old highway can be treated separately as a "new street" within sect. 105 of the Metropolis Management Act 1855. Houses are necessary to form a street within the Act, as the section itself shows. "Houses built on one side will do": (see *Richards v. Kessick*, 52 J. P. 756, per Willa, J.). "There must be a sufficient number of houses or buildings to constitute a street according to the ordinary sense of mankind," said Lord Esher, adding, "how many more than one there must be I will not undertake to say. If there were only two, half a mile from each other, I should say it would not suffice. The whole thing must be looked at, the number and character of the buildings and their position": (*Vestry of St. Giles, Camberwell v. Crystal Palace Company* (1892) 2 Q. B. at p. 40). Whether there is a sufficient number of houses to make a new street for the purposes of the Act is a question of fact for the magistrate, per Wright, J. in *Vestry of St. Mary, Battersea v. Palmer* (75 L. T. Rep. 362, at p. 365; (1897) 1 Q. B. 220, at p. 225), and see *Allen v. Fulham Vestry* (80 L. T. Rep. 253; (1899) 1 Q. B. 681). I can therefore treat a roadway with houses on one side only as a street. I have already done so with respect to the south side of Totterdown, and decided that, although a street, it was not a "new street." Now as to the north side, the buildings and roadway are "new," but are the numbers, character, and position of the buildings on that side such as to form a "new street" in the ordinary, popular, and natural sense of the words? The houses are few in number, they are not contiguous, and they do not front the roadway in question, but the road is short, the houses are near to each other, and in my opinion they form a "new street" in the ordinary, popular, and natural sense of the words, the resolution, order, and apportionment are valid, and therefore the defendants are liable under it, and I make an order directing the appellants to pay the amount claimed by the respondents.

The question for the decision of the court was whether the decision of the magistrate was right; if so, his order was to stand.

The Metropolis Management Act 1855 (18 & 19 Vict. c. 120) provides:

Sect. 105. In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved, as hereinafter mentioned, or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall wall and sufficiently pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall on demand pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement, such amount to be determined by the surveyor for the time being of the vestry or board; and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated

expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the said vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses.

Sect. 250. In the construction of this Act . . . the word "street" shall apply to and include any highway (except the carriage-way of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage.

The Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) provides:

Sect. 77. Where any vestry or district board shall, under the powers given by the 105th section of the firstly-recited Act, have paved or be about to pave any new street, the owners of the land bounding or abutting on such street shall be liable to contribute to the expenses or estimated expenses of paving the same, as well as the owners of houses therein, provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the costs of paving at the points of intersection of streets, and all other incidental costs and charges shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced or during its progress or after its completion, &c.

Sect. 112. In the construction of the recited Acts and this Act . . . the word "street" shall be deemed to apply to and include the subject-matters specified in the 250th section of the firstly-recited Act, and also any mews and a part thereof; the expression "new street" shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out; the word "pave" shall apply to and include the formation of the roadway or footway of any street.

W. L. Richards for the appellants.—The question is whether the magistrate was right in holding that this modern addition to an old street could be treated separately and held to be a "new street" within the Acts. First, having regard to the decision of the magistrate that the 16ft. of Totterdown is an old street, it must be held that the whole street should be treated as one, and that the whole street—the modern addition included—is an old street. Secondly, if the widened or added part of 24ft. should be treated as a new street, then the frontagers on both sides should pay their share of the expenses as to the new portion. Thirdly, on the materials before the magistrate there was no evidence to justify him in finding that Totterdown, in so far as it consisted of the new portion, was a new street, and we contend that it was not a new street within the meaning of the Acts. Fourthly, the second apportionment was invalid because the first one was never rescinded, and was acted on by the payment of money under it. In *Vestry of Mile End v. Guardians of Whitechapel Union* (34 L. T. Rep. 178; 1 Q. B. Div. 680), where a new street was

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directed by the vestry to be paved over half its breadth only, and the vestry had apportioned the cost on the frontagers on that side only, it was held that the apportionment was wrong, and that the frontagers on both sides ought to have been charged. The spirit of the Act is that both sides which take a benefit should at some time or other pay. [Lord ALVERSTONE, C.J.—In that case the whole street was a “new street”; here there is a part old and a part new. If the whole be found to be a new street and the vestry have paved part, then there must be apportionment on both sides.] In *Vestry of Paddington v. North Metropolitan Railway and Canal Company* (1894) 1 Q. B. 633 it was held that the expenses of flagging a footway on one side of a road or street should be borne by the owners on both sides of the street. So, in *Great Clacton Local Board v. Young and Sons* (71 L. T. Rep. 877; (1895) 1 Q. B. 395), the expenses of paving a footpath on one side were held to be properly apportionable on the owners on both sides of the street, and the case shows that you cannot divide a road longitudinally. Coming to the sections of the Act, sect. 105 speaks of the paving throughout the whole breadth of the carriage-way, “or any part of such breadth,” so that the section contemplates that the whole street or any part of the street may be paved, and that the owners on both sides should pay; and sect. 112 of the Act of 1862 speaks of “a part of any such street.” The cases cited against the appellants are *Richards v. Kessick* (59 L. T. Rep. 318); *White v. Fulham Vestry* (74 L. T. Rep. 425), and *Vestry of St. James and St. John, Clerkenwell v. Edmondson and Son* (83 L. T. Rep. 501; (1901) 1 Q. B. 264). *Richards v. Kessick* (*ubi sup.*) was under a different Act—namely, the Public Health Act 1875—and the definition of “street” in sect. 4 of that Act is very different from the definition of “new street” in these Acts. *White v. Fulham Vestry* (*ubi sup.*) is distinguishable on this ground that in that case the whole road was new since 1855. The frontagers on one side had paid their share in 1870, and it was only fair that the frontagers on the other side should pay in 1894. In the present case the 16ft. of this road is and always has been an old street. This road should have been dealt with as a whole. When the added part was thrown into the old highway, then the whole became one street, and the magistrate ought to have so looked at it:

Vestry of St. James and St. John, Clerkenwell v. Edmondson and Son (*ubi sup.*).

Paving is done for the benefit of owners on both sides of the street, and therefore, as the frontagers on both sides get the benefit of the paving, they ought both to be made to pay; and the south side of this road being an old highway, was not paved under the Act of 1855. Lastly, the resolution for the first apportionment having been acted upon could not be rescinded, and therefore the second apportionment was invalid:

Bishop v. Wandsworth Board of Works, 82 L. T. Rep. 766.

[Lord ALVERSTONE, C.J. referred to the case of *Cook v. Ipswich Local Board* (24 L. T. Rep. 579; L. Rep. 6 Q. B. 451).] He also referred to sect. 98 of the Act of 1862, which has been repealed by the London Building Act 1894.

Mattinson, K.C. (*J. C. Earle* with him) for the respondents.—We do not dispute that if the whole roadway were a “new street” within the meaning of these Acts, and if a part only of this new street were paved, the expenses would properly be apportioned on the frontagers on both sides of the street. The case of *Vestry of Mile End v. Guardians of Whitechapel Union* (*ubi sup.*) would seem to be an authority for that proposition. That is in no way disputed, but the question here is, when did this become a new street and what is the new street? Is it the 24ft. which was added, or is it the whole 40ft. of the roadway? What was the position in the year 1897, the year before this 24ft. was added to the road? In 1897, as the magistrate has found, this road was, and had been for many years, a formed road for all kinds of traffic, and this old part was not a new street within the meaning of the Acts, but was, in fact, an old highway. The owners of the land on one side of this old highway added to the highway this strip of land, which is made into a street, and therefore the added part, and not the whole roadway, is the “new street” for these purposes. For the appellants to succeed in their contention it would be necessary for them to show that there cannot be a new street contiguous to an old highway; but there is no authority for that proposition. *Richards v. Kessick* (*ubi sup.*), is precisely the same case as this, and the principle there laid down absolutely covers this case. It is no answer to that case to say that it was under a different Act, as the definition of “new street” in sect. 112 of the Metropolitan Management Act 1862 imports the definition of “street,” and the definition of “street” in the Public Health Act 1875 is exactly the same. That case shows that if you have a strip of land added to an existing highway and houses are erected on the side of the strip of land, then the added part becomes the “street.” [LAWRENCE, J. referred to *Evans v. Newport Urban Sanitary Authority* (61 L. T. Rep. 684; 24 Q. B. Div. 264).] *White v. Fulham Vestry* (*ubi sup.*), goes a step further, and the very point to be decided here was decided there. That case clearly shows that the “new street” here was the added part, and that in such cases you must separate the old part from the added or new part. The decision of the learned magistrate was therefore right in limiting the liability to contribute to the paving of the added part to the frontagers on the north side. He referred to sect. 6 and the following sections of the London Building Act 1894, which deal with the formation and widening of streets.

W. L. Richards in reply.

Lord ALVERSTONE, C.J.—In this case I do not at all go back from the opinion which I formed and expressed in the case of *Clerkenwell Vestry v. Edmondson and Son* (*ubi sup.*) that a good deal may be said for the view that where streets are altered and practically new streets are made out of old highways it might not be unreasonable to treat them for all purposes as new streets, and to treat the property on either side as property abutting on the new street, and the owners of such property liable for the expenses. But, in my opinion, at any rate in this court, the decisions to which we have been referred are too strong for us to take any such view. It appears that there was an old highway called Totterdown,

an old street 16ft. wide, repairable by the inhabitants at large before the year 1855. To that old highway persons on one side have added 24ft. and made the width of the whole 40ft. Under those circumstances the board attempted to apportion the expenses connected with paving that added part on the frontagers on both sides, and, the magistrate having decided that to be wrong, the board are now charging upon the frontagers of the north side the proper cost of repairing the new street—if I may so call it without begging the question—on the north side. We are clearly of opinion that there is nothing in the point urged for the appellants that, because some money had been paid under the apportionment held to be bad, these subsequent proceedings cannot be taken. We think that does not prevent subsequent proceedings being taken to set the matter right and to reapportion the expenses. It appears from the case that the money was at the disposal of the appellants, who naturally did not desire to take it while this question was open. Therefore the only question for our consideration is whether or not the appellants can contend that the apportionment ought to be made upon the frontagers on both sides of the street; or, to state the question a little differently, ought the frontagers on the south side of the street, who had next to them the 16ft. of the old highway, be made to contribute to the expenses connected with the 24ft. of the street on the north side? It is not disputed that if persons are fronting a new street, then, although the paving may only be done in part of it, both sets of frontagers are liable to pay. That was decided in the case of *Vestry of Mile End v. Guardians of Whitechapel Union* (*ubi sup.*), and that proposition counsel for the respondents in no way disputes. What he says is that where there is in fact an old highway and where there is added to that old highway by the act of the frontagers on one side of it a strip of land which is made into a street, then the added part, and not the whole, is a new street. I think both the authorities to which our attention has been called lay down that principle. The first case is *Richards v. Kessick* (*ubi sup.*), and although that case did not arise under the Metropolis Management Acts, but arose under the Public Health Act 1875, so far as the facts go they are practically identical. There there had been an old highway and the highway was widened by a strip of land which was thrown into the highway, and the liability to repair it under the Public Health Act was very analogous to what it would have been under the Metropolis Management Acts; that is to say, that the street could be paved and metalled by the direction of the authority, and the expenses apportioned on the frontagers. The street was so paved and metalled and the expenses were apportioned and made payable by certain persons under that Act, and there the Queen's Bench Division (consisting of Field and Wills, JJ.) decided that for the purpose of the Public Health Act the street—it was not called a new street but the street—was the part which had been added to the old highway. Counsel for the appellants did not at all deny that that case in principle had a considerable bearing upon this matter, but he said it was under a different Act. I quite agree that it was under a different Act, but we shall have to consider whether there

is any real distinction in principle between the two Acts to prevent our considering that judgment seriously or to prevent our being bound by it. Then the matter came again before Hawkins and Williams, JJ. in the case of *White v. Fulham Vestry* (*ubi sup.*), where the facts were very much the same as in the present case, with the exception of one different incident on which great reliance has been placed. There the old road had been made since 1855 and there had been made a new street, and the frontagers on the one side of that street had paid their contribution under the Metropolis Management Act. Then later the street was widened by a new strip, and the court there decided that the added part was a new street for the purposes of the 105th section of the Metropolis Management Act of 1855, and that the expenses were to be apportioned among the frontagers who were upon the other side of the new street. Now, we have been pressed by the counsel for the appellants to say that the sole ground of that decision was that the frontagers on the south side, or the narrow part of the road, had already paid contributions under the Act of 1855. That they had paid contributions is perfectly true; but when we look at the principle of that case and the principle which was adopted in *Richards v. Kessick* (*ubi sup.*), which that case followed, it seems quite clear that the court in both cases considered that the "new street" as it was in the one case under the Metropolis Management Acts, and the "street" simply as it was in the other case under the Public Health Act, was the added part. I cannot see any reason why we should come to a different conclusion with regard to what is, and what is not, a new street in this case simply because the part to which the new strip has been added was an old highway as distinguished from being a new street made under the Metropolis Management Act 1855. In both cases we have to consider what is new, and for the purpose of the section apportion the costs upon the persons whose houses or land abut upon the new street. If I am right in the conclusion I have come to in following these two decisions, which, of course, are binding upon us, the case is at an end, because it was not contended that, if the houses or land abut upon the new street, and if the authority are to draw a distinction between the old portion of the street and the new portion, that distinction was not drawn. I think the learned magistrate was quite right in coming to the conclusion in this case that he must follow the authorities and hold that the only new street here was the added part, and therefore the expenses must be apportioned among the persons whose houses or land abutted on the north side of the widened road. With regard to the case, my brother Lawrence has called attention to, the case of *Evans v. Newport Urban Sanitary Authority* (*ubi sup.*). I have no doubt that there the whole point turned upon whether or not the frontagers could resist payment because some portion of the road on either side had been an old footpath, and it was decided that that was not an objection which would prevent the expenses being properly apportioned. If any different view of the case is to be taken—I do not say it is to be taken—it must be taken by some court other than a court of first instance. I think, for the reasons I have

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mentioned, the decision arrived at by the learned magistrate was quite right.

LAWRANCE, J.—I entirely concur, for the reasons just given. *Appeal dismissed; leave to appeal.*

Solicitor for the appellants, *Frederick Du Bois*.
Solicitors for the respondents, *W. W. Young and Son*.

Tuesday, May 7, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRANCE, J.)

SOUTH-EASTERN AND CHATHAM RAILWAY
COMPANY (apps.) v. LONDON COUNTY COUNCIL
(resps.). (a)

Smoke—Locomotive emitting black smoke—Railway Clauses Consolidation Act 1845 (8 Vict. c. 20), s. 114—Regulation of Railways Act 1868 (31 & 32 Vict. c. 119), s. 19.

Certain locomotives belonging to the appellants emitted black smoke for three minutes on various occasions.

Evidence was given that the coal used was smoky coal, and that it was unnecessary for a locomotive to emit smoke for longer than one minute, but no evidence was given that the locomotives were not constructed on the principle of consuming their own smoke.

Held, that an offence had been committed within sect. 114 of the Railways Clauses Consolidation Act 1845 as amended by sect. 19 of the Regulation of Railways Act 1868.

CASE stated on five informations laid by the respondents. They were all in the same form, and charged that the appellants did (upon the day and at the place in each of the informations respectively mentioned) use upon their railway (at the place in the information mentioned) a locomotive steam engine using coal or other similar fuel emitting smoke, and not then constructed on the principle of consuming and so as to consume its own smoke, and which did not then consume its own smoke.

By sect. 114 of the Railway Clauses Consolidation Act 1845 (8 Vict. c. 20) it is provided as follows:

Every locomotive steam engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke, and if any engine be not so constructed, the company or party using such engine shall forfeit 5*l.* for every day during which such engine shall be used on the railway.

By sect. 19 of the Regulation of Railways Act 1868 (31 & 32 Vict. c. 119) it is provided:

Where proceedings are taken against a company using a locomotive steam engine on a railway on account of the same not consuming its own smoke, then if it appears to the justices before whom the complaint is heard that the engine is constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke as far as practicable at the time alleged in the complaint through the default of the company or any servant in the employment of the company, such company shall be deemed to be guilty of an offence under the Railway Clauses Consolidation Act 1845, s. 114.

The respondents did not call any evidence to show that the engines in question were not con-

structed on the principle of consuming and so as to consume their own smoke, but called an inspector in their employ as a witness, who stated that he had seen the five engines when hauling trains up a rising gradient between the certain points emit black smoke in each case for three minutes on the dates charged in the informations.

The same witness gave it as his opinion that the coal which he had seen in the tenders of the engines complained of as they were passing was "North Country coal," and that the North Country coal was a "smoky" coal in the sense that it made more smoke than Welsh coal, but not so much as Staffordshire coal. The witness had had several years' experience in the coal trade, and had special knowledge of different kinds of coal.

The respondent then called a second witness, who had been in the employment of the Midland Railway Company as an engine driver and stoker for upwards of twenty years. He had not seen the occurrence spoken to by the last witness, or the appellants' engine or coal; but stated as his opinion that it was as a general rule unnecessary for a locomotive to emit smoke for a longer period than one minute.

The appellants called no evidence, but contended that the only offence, the commission of which was charged in the information, was the offence described in the aforesaid sect. 114 of the Railways Clauses Consolidation Act 1845, and that there was no evidence in support of such charge. Secondly, that if the information should be held to charge commission of the offence mentioned in sect. 114 as amended by sect. 19 of the Regulation of Railways Act 1868, then there was no evidence that the engines had at the time and places failed to consume their own smoke as far as practicable or that such failures arose through any default on the part of the company or any servant of the company.

The respondents contended that the statement of their witnesses was evidence that the engines had at the times and places failed to consume their own smoke as far as practicable and also that such failure had arisen either through the default of the company, or through the default of a servant of the company, and that the commission of such offence was respectively charged in the information.

The magistrate was of opinion that the respondents contention was correct and convicted the defendants in each case.

James Fox (C. A. Cripps, K.C. with him) for the appellants.—It has been held, under sect. 114 of the Railway Clauses Act 1845, in the case of *Manchester, Sheffield, and Lincolnshire Railway Company v. Wood* (2 El. & El. 344) that where an engine is properly constructed, but through the carelessness of the persons using it, smoke is emitted and not consumed, there is no liability to the penalty imposed by the section. That liability only arises when the engine is so made as not to consume its smoke when sued with proper care and under ordinary circumstances. The amending section, sect. 19 of the Regulation of Railways Act 1868, does not make the emitting of smoke or black smoke an offence. There was no evidence here of any default on the part of the company or its servants, and such evidence must be given before a conviction can be obtained.

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Avory, K.C. (Dumas with him) for the respondents.—The whole question here is whether there was any evidence from which the magistrate could infer that the engines failed to consume their own smoke through the default of the company or its servants. That there was black smoke is *prima facie* evidence, but apart from that there is ample evidence. If the engine was constructed so as to consume its own smoke, then the fact that black smoke was issuing shows that the default must be either in the coal or the stoking.

Fox in reply.

Lord ALVERSTONE, C.J.—I am of opinion that we cannot interfere in this case. I do not assent to the major proposition submitted on the part of the county council that the mere fact of smoke issuing is sufficient of itself without any evidence to show that there was default of the company or default of a servant, but I do think the statute meant under ordinary circumstances no smoke should come out. In this case it appears that between certain stations twice on the same day, and on the next day and in another place on two consecutive days, smoke, and it appears to have been black smoke—although I do not know that very much turns on that, except for one point I will mention in a moment—issued for three minutes. The magistrate had before him the evidence of not only the issue of black smoke, which would point to a smoky coal being used, but of an expert who said that it was not necessary for an engine to smoke so long a time, and the company elected to leave the case there. They gave no explanation. Even if gradients could enter into consideration, they have given no explanation at all. Therefore the magistrate had before him evidence, either that it was caused by smoky coal, which might or might not be a default of the company, or that it was caused by something which according to the evidence called before him was unnecessary, and the company called no evidence to rebut it, or gave any explanation. Under these circumstances I do not think the magistrate was wrong in acting on the evidence, however slight it may have been, which satisfied his mind. We cannot say there was no evidence on which he could come to that opinion. I think this appeal should be dismissed.

LAWRANCE, J.—I agree. *Appeal dismissed.*

Solicitors: J. W. Watkin; W. A. Blawland.

Tuesday, May 7, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRANCE, J.)

IGOE (app.) v. SHANN AND OTHERS (resps.). (a)

Licensing—Premises licensed before the 10th Aug. 1872—Break in licence—Exemption as to value—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 45.

A beerhouse, originally licensed in 1868, had its licence renewed down to 1886.

On the 8th Oct. possession was given to a new tenant who did not then obtain any licence or transfer.

On the 10th Oct. the current licence expired, and on the 12th Oct. the new tenant obtained from the justices a licence for which she had applied

pursuant to sect. 14 of 9 Geo. 4, c. 61. That licence was continuously renewed to the 21st Sept. 1900.

In 1900 the justices refused to renew the licence on the ground that the premises were not of the value required by sect. 45 of the Licensing Act 1872.

Held, that although there had been a break in the licence of two days the qualification as to value in sect. 45 did not apply, as the house had been licensed 1868.

CASE stated by quarter sessions.

The appellant was and is the tenant and occupier of the Council inn, Council-street, Hulme, Manchester, and was licensed in respect thereof for the sale of beer by retail to be consumed on or off the premises.

On the 9th Aug. 1900 notice of the objection to the renewal of the appellant's licence was served upon him, and the grounds of objection, so far as the same are material to this case, were that the premises were not of the necessary annual value.

At the general annual licensing meeting for the city of Manchester, held on the 23rd Aug. 1900, the justices then and there present adjourned the consideration of the objection until the 6th Sept. 1900, and on that day the same was partially considered and evidence heard, and again further adjourned until the 21st Sept. 1900 when the justices refused to renew the licence of the appellant upon the ground that the premises were not of the necessary annual value.

The Council inn was originally licensed for the sale of beer by retail to be consumed on or off the premises in the year 1868, and the licence was continuously renewed down to the year 1886.

At the general annual licensing meeting for the City of Manchester, held in Aug. 1886, the renewal of the licence to Edwin Wade, the then licensee, was objected to, and the consideration of the objection adjourned until some day in September of that year, when the renewal of the licence to him was refused. He continued to carry on business and to sell beer by retail in the house until the 8th Oct. 1886, upon which day he yielded up possession thereof to Jane Jackson, who became the new tenant and occupier thereof, but did not then obtain any licence or transfer of a licence to continue the business. The licence for the current year expired in the course of law on the 10th Oct. 1886. Jane Jackson commenced to carry on business and to sell beer by retail therein on the 8th Oct. 1886, but not under a justice's licence, and she continued to do so. On the 12th Oct. 1886 Jane Jackson, pursuant to 9 Geo. 4, c. 61, s. 14, applied to the justices for the city sitting in special sessions for the licensing purposes mentioned in the section for a grant of a licence to her, which was granted, and the licence was thenceforward continuously renewed until the 21st Sept. 1900.

The annual value of the premises on the 21st Sept. 1900 exceeded the sum of 15*l.* but was less than the sum of 30*l.*

The premises are situate within the City of Manchester, the population of which, according to the last Parliamentary census, exceeded 100,000.

It was contended before the Court of Quarter Sessions on behalf of the appellant that, inasmuch

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as the house was on the 10th Aug. 1872 licensed for the sale of intoxicating liquors for consumption thereupon, the qualification in respect of annual value prescribed by sect. 45 of the Licensing Act 1872—viz., 30*l.*—did not apply thereto, but that the qualification in respect of the annual value which did apply thereto was that prescribed by 3 & 4 Vict. c. 61. s. 1—viz., 15*l.*

It was contended on behalf of the respondents that the licence held in respect of the house at the time of the passing of the Licensing Act 1872 having lapsed in 1886, the house thereupon ceased to be qualified to receive any other or new licence except upon the conditions as to annual value required by the Licensing Act 1872, s. 45, and that upon the true construction of that section of the Licensing Act 1872, the conditions therein prescribed as to annual value applied to all licensed premises of which the licence had not been in existence continuously from the 10th Aug. 1872 down to the application for the renewal thereof, or to which a licence other than that existing on the 10th Aug. 1872 had been granted since that date.

The Court of Quarter Sessions decided that the value qualification prescribed by sect. 45 of the Licensing Act 1872 did apply to the house, and dismissed the appeal upon the ground that the house was not of the necessary annual value as required by the last-named statute.

The question for the opinion of the court was whether or not the decision of the Court of Quarter Sessions was right.

Joseph Walton, K.C. (Randolph with him) for the appellants.—The point raised by this case is whether the provisions of sect. 45 of the Licensing Act of 1872, which provides that certain premises shall not be qualified to receive a licence unless certain conditions as to value are satisfied applies to this particular inn. In this case there is no doubt that there was a two days' break. By sect. 45 of the Licensing Act 1872 it is enacted that: "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act 1869 authorising the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or rating as a qualification for receiving any such licence." This section only applies to on-licences in three classes. The first class consists of houses licensed under the Wine and Beerhouse Acts which were licensed on the 10th Aug. 1872. The second class are alehouses which had a licence on the 10th Aug. 1872 under 9 Geo. 4. With regard to the first class there were existing statutory requirements as to value, but not as to the second class. The third class are those premises which were not licensed at all. The final words of sect. 45: "Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorising such sale" unless certain conditions are fulfilled, only apply to premises which were not licensed at the passing of the Act. It is said that there were two days' break from the 10th Oct. to the 12th Oct. 1886. This section, however, says nothing about a break or continuity. It applies to the state of things existing on the 10th Aug. 1872. It disqualifies certain premises,

and it excepts from that disqualification premises which on the 10th Aug. 1872 had a licence. [Lord ALVERSTONE, C.J.—The breaking of the licences does not seem to be dealt with at all.] This disqualification applies to the premises and is not a personal one.

Byrne for the respondent.—This sect. 45 is a limiting one. It is intended to prevent justices from granting any licence to any person after the date unless it can be shown in a town or city of over 100,000 inhabitants that the public-house is of the annual value of 30*l.* All that is done by the section is this that an existing licence on the 10th Aug. 1872 shall be saved, and that is all. It does not touch or say anything about a beerhouse being then and before that date licensed. It leaves those houses alone. The licence that existed in 1872 ceased to exist, and so the saving provided by the section disappeared. The language is silent as to this house altogether, and there are no words dealing with a case of this description. That being so, you must look back at the Beerhouse Act 1840 (3 & 4 Vict. c. 61). He referred to

Freer v. Murray, 71 L. T. Rep. 444; (1894) A. C. 635.

The house itself cannot have any licence or any privilege apart from the existing licence. The Beerhouse Act 1840 deals with the licence in respect of the premises, but the licence belongs to the individual and not to the house, and so soon as the individual ceases to hold the licence, the house ceases to be a licensed house.

Lord ALVERSTONE, C.J.—The only point we have to decide in this case is, where premises have been licensed substantially continuously, I say substantially continuously, because I will call attention to the break in a moment, from the year 1868, whether an objector who gives notice against a renewal under sect. 42 of the Act of 1872, can raise the point as to the annual value which is required for certain premises under that Act. Now we must take it that in this case there was a break of two days, and I assume for the purposes of my judgment that Mrs. Jackson got a new licence in respect of the premises on the 12th Oct. 1886. She has had that licence down to 1900; the refusal in this case was upon a renewal. Now we have no question here as to general jurisdiction so as to raise any points which arose in the *Wakefield* case. We have simply to consider the question upon a particular objection as to the annual value of this particular house. If Mr. Byrne is right in saying that the provisions of sect. 45 apply to the licence granted to a person, and that once a licence has ceased to that person in respect of any particular premises, they become new premises for the purpose of licensing, of course the justices would be right, and his argument would be well founded. But we have to consider what the language of the statute says. Now for reasons which it is not for us to consider, the statute (and the language of it I do not think is at all difficult to construe, but only requires some amount of intelligence) thought fit to draw a distinction between premises which were in fact licensed under the Beerhouse Act prior to the date of the 10th Aug. 1872, when this Act came into force, and others. Accordingly premises to which at the time of the passing

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of this Act, no licence under the Acts recited in the Wine and Beerhouse Act 1869, authorising the sale of beer and wine for the consumption thereon was attached, were not to be subject to the provisions now in force. It was a curious way of doing it. They might have saved the existing provision with regard to existing houses, but they have thought that they have done it by saying that houses which have got no licence shall not be subject to the existing conditions. Then they went on to put the other class which were subject to the new conditions, and the Act said, "premises not at the time of the passing of this Act licensed for the sale of intoxicating liquor, shall not be qualified to receive a licence unless the following conditions are satisfied." In my opinion, when the section is looked at reasonably, though at the first look of it is put in an awkward way, because it exempts new houses not licensed in order to authorise the justices to give any effect to this objection, the house must come within the class that is mentioned in the second sub-section—that is to say, "premises which were not at the time of the passing of this Act licensed for the sale of intoxicating liquor shall not be qualified to receive a licence." Therefore, I think that when the section is read to endeavour to give it an intelligible meaning, it was to draw a distinction between the class of premises which were licensed at the time of the passing of the Act and the class that were not. This particular objection cannot be raised as an objection to a renewal, but if the licence is going to be refused it must be done upon the general grounds of the magistrate's discretion. The special grounds raised by the objection do not prevail, having regard to the language of sect. 45. I think this refusal must be reversed.

LAWRANCE, J. agreed.

Appeal allowed.

Solicitors: *Hockin and Co.; E. B. Wheatly, Son, and Daniel for Cobbett, Wheeler, and Cobbett, Manchester.*

Monday, May 13, 1901.

(Before Lord ALVERSTONE, C.J., LAWRENCE and PHILLIMORE, JJ.)

GOULDER v. ROOK; BENT v. ORMEROD; LEE v. BENT; BARLOW v. NOBLETT. (a)

Adulteration—Arsenic in beer—Liability of retailer—"Not of nature, substance, and quality demanded"—Sufficiency of certificate—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 3, 6, 18, 20.

Beer in the course of its brewing became contaminated with arsenic owing to the presence of that substance in one of the ingredients used. The beer having been purchased from the brewer by the retailer, he sold the same to a customer, being unaware and having no reason to suspect that the beer contained arsenic.

Held, that there being evidence to support the finding of the justices that the beer was not of the nature, substance, and quality demanded by the purchaser, a conviction was proper under sect. 6 of the Sale of Food and Drugs Act 1875.

Semble, that the accidental accumulation of

deleterious matter, or its presence, does not of necessity make the article different in nature, substance, and quality from that demanded.

The certificate of the analyst, under sect. 18 of the Sale of Food and Drugs Act 1875 ought to contain in it sufficient materials to enable the justices to form a judgment on its face that an offence has been committed.

The certificates stated: "We are of opinion that the said sample contains arsenic"; and "We are of opinion that the said sample contained a serious quantity of arsenic."

Held, that the certificates were bad.

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CASE STATED upon the hearing of a certain information and complaint preferred by the respondent against the appellant under sect. 6 of the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) that the appellant did sell to the prejudice of the purchaser a certain article of food, to wit, beer, which was not of the nature, substance, and quality of the article demanded by such purchaser, the same containing arsenious acid to the extent of not less than one-eighth of a grain per gallon.

The following facts were either proved or admitted by both parties:—

The appellant is a retailer of beer, and the respondent is an inspector under the Sale of Food and Drugs Acts for the city of Manchester.

The sample of beer taken by the purchaser contained arsenious acid to the extent of not less than one-eighth of a grain per gallon, the analyst's certificate being as follows:

Sample marked No. 1269 B.—City of Manchester.—To Mr. A. T. Rook.—I the undersigned, Public Analyst for the City of Manchester, do hereby certify that I received on the 21st day of Nov. 1900, from Inspector Holland, a sample of beer marked No. 1269 B. for analysis (which then weighed), and have analysed the same and declare the result of my analysis to be as follows: I am of opinion that the said sample contained the parts as under of foreign ingredients, viz., arsenious acid to the extent of not less than one-eighth of a grain per gallon. No change had taken place in the constitution of this sample that would interfere in any way with the analysis. As witness my hand this 30th day of November 1900.—C. ESTCOURT, F.I.C., at Manchester.

The appellant did not mix the arsenic in the beer herself, and did not know of its existence in the beer, nor could she be expected to know of or suspect the existence of such an admixture.

Arsenic was an ingredient injurious to health, and the quantity of arsenic in the beer was such as to render the same injurious to health, but did not form one of the constituents of beer.

The arsenic had been unknowingly mixed with the beer by the brewer through having been improperly introduced in the manufacture of some substance used in brewing.

On the part of the appellant it was contended that the proceedings were wrongly brought under sect. 6 of the Sale of Food and Drugs Act 1875, but ought, if any, to have been brought under sect. 3 of the Act, and that there was no offence under sect. 6 aforesaid, the article sold being really beer into which, through no fault of the appellant and without her knowledge, the arsenic had been introduced, and that sect. 6 did not apply to such accidental contaminations.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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On the part of the respondent it was contended that the proceedings were rightly brought under sect. 6, and that an offence had been committed under that section.

The magistrate found as a fact that the beer sold by the appellant as aforesaid was not of the nature, substance, and quality of the article demanded by the purchaser, and he thereupon convicted the appellant.

By the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 3:

No person shall mix, colour, stain, or powder, or order or permit any other person to mix, colour, stain, or powder any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, or stained, or powdered, under a penalty in each case not exceeding fifty pounds for the first offence; every offence shall be a misdemeanour for which the person, on conviction, shall be imprisoned for a period not exceeding six months with hard labour.

And by sect. 6:

No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases, that is to say: (1) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce in a state fit for carriage or consumption, and not fraudulently to increase the bulk, or conceal the inferior quality thereof. (2) Where the drug or food is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent. (3) Where the food or drug is compounded as in this Act mentioned. (4) Where the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation.

F. Moulton, K.C. (M. Lush with him) for the appellant.—In this case the summonses were taken out under sect. 6 of the Sale of Food and Drugs Act, which makes it an offence if the article is not of the nature, substance, and quality of the article demanded, and ignorance is no defence. I contend that in a case of what we may call contamination, where the article sold is the article asked for, but where there is a contamination making it injurious to health, then it is a case which comes under sect. 3, where want of knowledge is a defence. Sect. 6, which makes knowledge immaterial, applies to the case of a man who is in the position of vendor of an article, and sells an article not of the nature, substance, or quality demanded, and the reason why the Legislature dispenses with any question of knowledge is that if a person puts himself in the position of selling an article, he ought to ascertain that the article he sells is the one demanded. [Lord ALVERSTONE, C.J.—But that argument would apply to watered milk.] No; because a person who sells milk ought to be able to distinguish between milk and watered milk, or, if he sells butter, between butter and margarine. He referred to Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 3, 4, 5, 6. The adulteration under sect. 6 is adulteration where something has been substituted for a portion of the article sold and

forms part of the bulk, such as the case of milk where water has been put into it. It is intended to meet what I may call trade adulteration—that is, adulteration for a purpose, such as an intention to sell not the article demanded, but an inferior article. If sect. 6 has the application which it is now sought to place upon it, it must cover every case which would come within sect. 3. [Lord ALVERSTONE, C.J.—But you must show that what has been done here is excluded from sect. 6. The fact that offences under both may overlap is not sufficient.] What we say that the Legislature has done is, that in a case of accidental contamination a man is allowed to show that he had no knowledge, or he could not reasonably have acquired that knowledge, but when the adulteration comes under sect. 6, where it changes the nature, substance, or quality, then want of knowledge was not permitted to be proved. Sect. 3 deals with the case where a man really sold the article, but the article was contaminated; sect. 6 where he did not sell the article owing to some change which made it not the article. The difference is between contaminated beer and that which is not beer. He referred to Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 8, 24, 25.

Lawson Walton, K.C. (Byrne with him) for the respondent.—Sect. 3 deals solely with mixing so as to affect the wholesomeness of the article and with the intent that it shall be sold. So far as the mixing is concerned, there is no relief, but under sect. 5 there is a relief of the seller who does not know the article is so mixed. In this case there has been no mixing within sect. 3. I say that sect. 6 is amply sufficient to cover a case of this sort. The wholesomeness of an article is clearly one of its most important qualities if it is sold as an article of food or drink. What is really contended for by the appellant is that you may make a thing as poisonous as you like and escape from the operation of sect. 6. [PHILLIMORE, J.—Is it not really that the section is directed to substitution and not to addition?] There is good reason why the operation should not be limited. Sect. 6 is intended to meet the case of a seller who is selling an article of food without protecting himself by getting a warranty from the wholesale dealer, when he would be protected by sect. 25. Cases can come within both sects. 3 and 6. The object of the statute is to ensure pure food. He referred to

Betts v. Armstead, 58 L. T. Rep. 811; 20 Q. B. Div. 771;

Parker v. Alder, 79 L. T. Rep. 381; (1899) 1 Q. B. 20.

Moulton, K.C. in reply.

BENT v. ORMEROD.

Case stated upon the hearing of an information and complaint preferred by the appellant against the respondent, under sect. 6 of the Sale of Food and Drugs Act 1875, that the respondent did sell to the prejudice of the purchaser a certain article of food—to wit, beer—which was not of the nature, substance, and quality of article demanded by such purchaser, the same containing arsenic.

The following facts were proved:—

The appellant is a superintendent of police and an inspector for the Sale of Food and Drugs Act

K.B.] GOULDER v. ROOK; BENT v. ORMEROD; LEE v. BENT; BARLOW v. NOBLETT. [K.B.]

in the Salford Hundred of the county of Lancaster, and the respondent is a licensed victualler who keeps the Wellington inn in Bolton-road, Pendlebury.

On the 5th Dec. 1900 an inspector of police for the county, acting under the instructions of the appellant, purchased from the respondent at the Wellington-inn six quarts of fourpenny beer for analysis.

Upon the making of the purchase all the provisions in that behalf of the Sale of Food and Drugs Acts were complied with.

Upon analysis the sample of beer taken by the purchaser was found to contain arsenic, the analyst's certificate being as follows:

County of Lancaster.—Sale of Foods and Drugs Acts 1875 to 1899.—To Mr. Superintendent Bent.—We, the undersigned public analysts for the county of Lancaster, do hereby certify that we received on the 7th day of December 1900 from P.O. Chipchase a sample of beer for analysis (which was then marked No. 848), and have analysed the same, and declare the result of our analysis to be as follows: We are of opinion that the said sample contains arsenic. Observations: No change had taken place in the constitution of the sample that would interfere with the analysis.

By the agreement of the parties no question was or is to be raised as to the form or sufficiency of the certificate.

The county analyst was called and proved that the beer contained arsenic to the extent of one-ninth of a grain per gallon at least.

Arsenic does not form one of the constituents of beer, and the quantity of arsenic in the beer was such as to render the same injurious to health.

No evidence was given as to the constituent parts of pure beer, but it was admitted by the respondent and the justices found as a fact that pure beer does not contain the quantity of arsenic contained in the sample sold to the inspector.

The respondent did not mix the arsenic in the beer and did not know of its existence in the beer, nor could he be expected to know of or suspect the existence of arsenic in the beer, nor could he with reasonable diligence have obtained that knowledge.

The arsenic had been introduced into the beer by the brewer using glucose or invert sugar, a substance often used in brewing, which improperly contained arsenic.

The brewer did not know when he used it that the glucose or invert sugar was contaminated with arsenic.

On the part of the appellant it was contended that the proceedings were rightly brought under sect. 6 of the Sale of Food and Drugs Act 1875, and that an offence had been committed under that section.

On the part of the respondent it was contended that the proceedings were wrongly brought under sect. 6 of the Act, and ought, if any, to have been brought under sect. 3, and that there was no offence under sect. 6, the arsenic having been introduced into the beer through no fault of the respondent and without his knowledge, and that he could not with reasonable diligence have obtained that knowledge, and that sect. 6 did not apply to such a case.

The justices found as a fact that the beer sold by the respondent as aforesaid was not of the nature, substance, and quality of the article

demanding by the purchaser, in that there had been mixed with it an ingredient prejudicial to the purchaser, and they dismissed the information.

J. Walton, K.C. (Pickford, K.C., E. Sutton, and Mellor with him) for the appellant.—The point raised here is the same as in *Goulder v. Rook*. As I understand this Act it creates two different kinds of offences. One is under sect. 3, and that is of knowingly, with the intent that the food may be sold, mixing it with some injurious ingredient. The other is under sect. 6, which is selling to the prejudice of the purchaser any food which is not of the nature, substance, or quality demanded by such purchaser. That is an offence whether done knowingly or unknowingly. An offence may fall under both sections, as I think was pointed out by Phillimore, J. in *Dickins v. Randerson* (84 L. T. Rep. 204; (1901) 1 Q. B. 442). It was argued in that case that, as the drug in question was a compounded drug, proceedings ought not to have been taken under sect. 6, but under sect. 7, and for this purpose some observations of Wright, J. in *Houghton v. Taplin* (13 Times L. Rep. 386) were invoked, and Phillimore, J. said: "We think that these observations have been misunderstood. In any case it is quite clear from the definition clause that a compounded drug is none the less a drug, which shows that proceedings can be taken under sect. 6, though it may be that in the case of a compounded drug they can also be taken under sect. 7." [Lord ALVERSTONE, C.J.—Overlapping is no answer.] That is so. He referred to

Hoyle v. Hitchman, 40 L. T. Rep. 252; 4 Q.B. Div. 233.

M. Lush (Moulton, K.C. with him) for the respondent.—If the view taken by the other side is right, it is perfectly obvious and necessary that every single case that comes under sect. 3 should be an offence under sect. 6. We find here two groups of sections, the first group consists of 3, 4, and 5, dealing with cases like this, where there has been some injurious ingredients mixed in the article of food. The other class of cases are dealt with by sect. 6, where either the vendor, or somebody through whom the vendor has got the article, is selling an adulterated article of food by substituting some other substance for what the buyer was intending to buy.

J. Walton, K.C. in reply.

LEE v. BENT.

Case stated on an information charging the appellants with an offence under sect. 6 of the Sale of Food and Drugs Act 1875.

The respondent having purchased from the appellants a quantity of beer, and having complied with all the requirements of the Sale of Food and Drugs Act 1875, caused part thereof to be analysed by the public analysts.

The public analysts duly delivered their certificate as follows:

... We ... certify that we received ... a sample of beer for analysis ... and have analysed the same and declare the result of our analysis to be as follows: We are of opinion that the said sample contains arsenic. Observations: No change had taken place in the constitution of the sample that would interfere with the analysis.

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At the hearing of the information the certificate was tendered as evidence on behalf of the respondent, but it was contended on behalf of the appellants that it was bad on the following grounds: That the certificate was not in the form prescribed by sect. 18 of the Act of 1875, and as set forth in the schedule thereto; that it did not state the constituent parts of the sample analysed.

One of the analysts who signed the certificate gave oral evidence on behalf of the respondent.

It was proved to the satisfaction of the justices that the sample contained arsenic to such an extent as to be injurious to health, and that absolutely pure beer does not contain arsenic.

The justices were of opinion that the certificate complied with the requirements of the Acts on the ground that it contained such statements as enabled them to come to a conclusion themselves that the sample was adulterated with arsenic. They therefore admitted the certificate.

They found as a fact upon the evidence brought before them that the article purchased contained arsenic to such an extent as to render it injurious to health, and was not of the nature, substance, and quality of the article demanded by the purchaser—to wit, beer—and they convicted the appellants.

It was contended on behalf of the appellants that the giving of a certificate by the public analyst in the form set forth in the schedule to the Sale of Food and Drugs Act 1875 was a condition precedent to the institution of proceedings under sect. 6 of the Act, and that the certificate set forth above was not in the form set forth in the schedule nor to the like effect, and that the information was therefore bad and should be dismissed.

By the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 18:

The certificate of the analysis shall be in the form set forth in the schedule hereto, or to the like effect.

By sect. 20:

When the analyst having analysed any article shall have given his certificate of the result, from which it may appear that an offence against some of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty therein imposed for such offence before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser in a summary manner.

And by sect. 21:

At the hearing of the information in such proceedings the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness, and the parts of the articles retained by the person who purchased the article shall be produced, and the defendant may, if he think fit, tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly.

M. Lush (F. Moulton, K.C. with him) for the appellant.—The point raised by this case on behalf of the appellant is that under the statute the certificate is bound to state what the ingredients are, and what the proportion is of the foreign substances. As it stands it discloses no offence. He referred to Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 18. In *Fortune v. Hanson* (74 L. T. Rep. 145; (1896) 1 Q. B. 202) the certifi-

cate was held bad where it said: "The sample contained the percentage of foreign ingredients as under: Five per cent. of added water." That case goes a good deal further than the present one. In *Newby v. Sims* (70 L. T. Rep. 105; (1894) 1 Q. B. 478) the certificate said: "I find the sample contained an excess of water over and above what is allowed by Act of Parliament. I estimate the excess at 13 per cent. of the entire sample. In my opinion the sample was not a sample of genuine rum." It was there held that the certificate ought to have stated the proportion of water mixed with the rum, and so was insufficient, and a conviction could not be supported.

J. Walton, K.C. (*Pickford, K.C., E. Sutton, and Mellor* with him) for the respondent.—In this case evidence was called, as of course it may be under the statute. With regard to *Fortune v. Hanson*, which has been cited by the other side, the analyst did not merely state the fact, but he stated that the sample contained 5 per cent. of added water, that is to say, 5 per cent. of water more than milk without adulteration should contain, and therefore the analyst expressed an opinion which is not a matter of fact at all, but a matter which was for the justices to decide. The analyst should have said that the milk contained such a percentage of water. Practically the certificate should state what is the result of the analysis, as *Kennedy, J.* points out in *Fortune v. Hanson*. The same principle is adopted in *Newby v. Sims*. In *Bakewell v. Davies* (69 L. T. Rep. 832; (1894) 1 Q. B. 296) it was held that the certificate given by a public analyst of the result of an analysis made by him need not set out the constituent parts of the sample analysed, and where the case is not one of adulteration it need only state the result of the analysis. [*PHILLIMORE, J.*—But the certificate here is open to the same objection as in *Newby v. Sims* (*sup.*), namely, that the analyst has taken upon himself to decide what is natural, and has not given the magistrate the materials to decide that point.] In *Bridge v. Howard* (75 L. T. Rep. 300; (1897) 1 Q. B. 80), which was a case of adulterated milk, the certificate stated that the sample submitted contained 6 per cent. of added water, and went on to say: "This opinion is based on the fact that the sample contained 7.97 per cent. solids not fat, whereas genuine milk contains not less than 8.5 per cent. solids not fat." That was held to be good. The certificate of the analyst is not conclusive evidence; it is not evidence of an offence at all. The analyst must certify the result of this analysis, but at the most his certificate is merely evidence, and although it may not contain facts sufficient to convict, yet it may be a good certificate. It must not contain a judgment. In this case the certificate says that the beer contains arsenic; that must mean arsenic in some appreciable quantity. [*LORD ALVERSTONE, C.J.*—That is just my difficulty.] The certificate, however, here is a good one, and, although standing alone it may not be enough to allow the justices to convict, that cannot make it bad.

BARLOW v. NOBLETT.

In this case the facts were the same, and the case in the same form as *Lee v. Bent* (*sup.*), except that in the certificate the words were:

We are of opinion that the said sample contains a serious quantity of arsenic.

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M. Lush (F. Moulton, K.C. with him) for the appellant.—The addition of the words "serious amount," which is the only distinction between the certificate in this case and the one in *Lee v. Bent*, cannot get over the difficulty pointed out by Hawkins and Kennedy, JJ. in *Fortune v. Hanson* (74 L. T. Rep. 145; (1896) 1 Q. B. 202). I submit that in this case the section has not been complied with.

J. Walton, K.C. (*Pickford*, K.C., *E. Sutton*, and *Mellor* with him) for the respondents.—This certificate must be good unless it be the fact that proceedings can never be taken where the analyst cannot define by a percentage or arithmetical statement the parts of the added ingredient. [PHILLIMORE, J.—In my opinion the analyst is not bound to state the exact quantity, but if he says there ought not to be a one-hundredth part of a grain, and there is certainly not less than one-eighth of a grain, that would be enough.] He says something more definite here I submit, and what he states satisfies the condition precedent, and it is evidence. Whether it is enough to justify a conviction is a different matter, but it can be supplemented by other evidence.

LORD ALVERSTONE, C.J.—Perhaps it would be convenient, in the first place, to deal with the points raised in the two last appeals of *Lee v. Bent* and *Barlow v. Noblett*. In the first of these cases the analyst had certified that the sample contained arsenic, and in the second case that it contained a serious quantity of arsenic. Now, we are all of opinion that those two certificates are not sufficient. It is very important that the practice should be uniform, and we do not think it possible, after the series of decisions which have been given, to say that the condition precedent is other than a document which must be issued in proper form before proceedings for a prosecution are instituted, and that that certificate ought to contain in it sufficient materials to enable the magistrates to form a judgment on the face of the certificate that the offence had been committed. Although the judgment is the judgment of the magistrates, yet the certificate should contain sufficient information to enable them to come to a decision. We need not consider whether a certificate would be bad which went further, but we think at least it should contain that. There are many cases in which the only evidence is a certificate. Nothing is said as to what ordinary beer—I will not say absolutely pure beer, but ordinary beer—contains, and nothing is said as to the degree or amount of arsenic. All that is said in one case is that arsenic was there; and, in the other case, that there was a serious quantity. We think, having regard to the necessary protection of the person charged, the certificates ought to contain further particulars to enable the magistrates to have before them the materials on which they can come to a conclusion. I think we could not decide otherwise without overruling several decisions which seem to us to be founded in good sense. We need not consider whether or not in every particular case it is absolutely necessary to say that the certificate must set out all the ingredients contained in the sample, but we think we are justified in saying that these certificates are not sufficient. That disposes of the two cases of *Lee v. Bent* and *Barlow v. Noblett*, in which cases

the convictions must be quashed. I now come to the more important and more difficult point which was raised in *Bent v. Ormerod* and in *Goulder v. Rook*. I am of opinion that the conviction in the latter case should be supported, and that the case of *Bent v. Ormerod*, in which there has been a dismissal, should go back with an expression of our opinion for a conviction. I think a great deal of the difficulty disappears if you look at the language of sect. 6 and consider it by itself for a moment. I quite agree that if you can see clearly that one group of sections seems to deal with one class of offence, and another group of sections to deal with another class of offence, you may get very material assistance by considering the language in the one case and in the other. On the other hand, it has not been disputed by the able counsel who have argued for the brewers in this case that the fact that the sections which create offences overlap does not show that a case is not within one of them. It may very likely be that some facts afford grounds for prosecuting under more than one section. There are numerous instances of that in our criminal statutes. But I think the question of sect. 6 is whether or not a person has sold an article of food or a drug which is not of the nature, substance, and quality of the article demanded by such purchaser. In my opinion sect. 6 starts at the sale, if I may use the expression, and ends at the sale. You have not to consider how that which makes it otherwise than of the nature, substance, and quality demanded has got into it, but whether, in fact, it is there, so that it is different. I think it would be cutting the section down unwisely, and cutting it down without sufficient direction in the statute, if we were to hold that you were to enter into an examination of the stage at which or the precise process by which that which makes it different has found its place in the article which is being sold. Now, applying that test, the magistrates in this case have found as a fact that the beer sold by the appellant was not of the nature, substance, and quality demanded by the purchaser. They have found as a fact, or rather the certificate shows, that arsenious acid, to the extent of not less than one-eighth of a grain per gallon was there, and they find "that arsenic is an ingredient injurious to health, and the quantity of arsenic in the beer was such as to render the same injurious to health and did not form one of the constituents of beer." I read these words as it is agreed by both the learned counsel that they are meant to be read—that arsenic does not form one of the constituent parts of beer in any substantial degree under ordinary circumstances. It is plain that, if I am right in the view I have expressed as to the *primâ facie* meaning of sect. 6, the magistrates have certainly found as a fact that this article was not of the nature, substance, and quality of that demanded by the purchaser; and if there is any evidence that they can come to that conclusion the conviction must stand. I have already indicated that, the magistrates having before them a case in which a dangerous foreign body to the extent of one-eighth of a grain per gallon which is injurious to health is there, it seems to me that if they have drawn the conclusion that the beer sold was not of the nature, substance, and quality demanded, it is not possible for us to say they were wrong. Mr. Moulton has suggested that if what is in the

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article is the result of some ingredient put in in the course of its manufacture, which in fact makes it injurious to health, that it can only be "mixing" under sect. 3, and the offence can only fall within the terms of sect. 3. The penalty is very much more severe under sect. 3, and knowledge is made of the essence of the offence; that is to say, the defendant can show there is no offence if he proves that he did not know and had no means of knowledge. Under sect. 6 the penalty is far less, and it has been expressly decided in two or three cases that the knowledge of the person is immaterial; that is to say, however innocent, however little he may have known, yet he may be convicted under sect. 6. In the second case that was argued before us—that is to say, *Bent v. Ormerod*—the finding was the same, although the summons was dismissed. "We found as a fact that the beer sold by the respondent aforesaid was not of the nature, substance, and quality of the article demanded by the purchaser in that there had been mixed with it under the circumstances mentioned . . . an ingredient prejudicial to the health of the purchaser." Then, if you go back to the analysis, you find that it was proved there was arsenic to the extent of one-ninth of a grain per gallon at least. Then the case continues practically in the same terms as the other case, although it is more clearly stated: "Arsenic does not form one of the constituents of beer, and the quantity of arsenic in the beer was such as to render the same injurious to health." Under these circumstances I come to the conclusion that there was evidence on which the magistrates could find as a fact that there was an article sold different in nature, substance, and quality from that demanded, and that the conviction in the one case ought to stand, and in the other case there ought to be a conviction. I only desire to add that I must not be understood as suggesting that any accidental accumulation of deleterious matter or the accidental presence of deleterious matter in an article sold of necessity makes it different in nature, substance, and quality to the article demanded. It will be for the magistrate in each case, as was decided in the Scotch case—and, I think, rightly decided—as a question of fact to find, as they have here, whether or not the article of food or drug is not of the nature, substance, and quality demanded by the purchaser.

LAWRENCE, J.—I am of the same opinion, and I have nothing to add.

PHILLIMORE, J.—I agree. I will only say I equally lay stress, with my Lord, on the proviso which he has made at the end of his judgment.

Judgment accordingly.

Solicitors: for Goulder, Ormerod, Lee, and Barlow, *Grundy, Kershaw, Samson, and Co.*, for *Grundy, Kershaw, Samson, and Co.*, Manchester; for Rook, *Hudson*, Manchester; for Bent and Noblett, *Snow, Fox, and Higginson*, for *Harcourt E. Clare*, Preston.

April 22 and 23, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

REX v. NORFOLK COUNTY COUNCIL;
Ex parte GREEN. (a)

Local government—Public right of way—Obstruction—Removal by private persons—Action against them—Right of county council to contribute to costs of defence—Local Government Act 1894 (56 & 57 Vict. c. 73), s. 26 (1), (3), (4).

By sect. 26 (1) of the Local Government Act 1894, it is enacted that it shall be the duty of every district council to protect all public rights of way, and to prevent, as far as possible, the stopping or obstruction of any such right of way, where the stoppage or obstruction thereof would, in their opinion, be prejudicial to the interest of the district; by sub-sect. 3 of the same section: "A district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient;" and by sub-sect. 4 the parish council may represent to the district council that a public right of way has been stopped, and if the district council fail to act on such representation may petition the county council, and, if the county council so resolve, the powers and duties of the district council under sect. 26 shall be transferred to the county council.

Held, that sect. 26 (1) imposed a public duty upon the district council to protect public rights of way, where the obstruction would be prejudicial to the district; that sect. 26 (4) transferred this duty under the circumstances therein stated to the county council; and that sect. 26 (3) was wide enough to render it legal on the part of the county council not merely to take and defend proceedings in their own name, but to spend public money in contributing to the cost of the defence of private persons against whom proceedings had been taken for removing an obstruction of what was alleged to be a public right of way within sect. 26 (1).

RULE nisi for a certiorari.

It appeared that a dispute had arisen as to whether or not a public right of way existed over certain land at Snettisham, of which Sir Edward Green was the owner and Mr. Lycett Green the occupier. Two persons called Ellis and French, in order to bring the dispute to an issue, removed an obstruction which these gentlemen had placed across the alleged way, and thereupon the latter commenced an action in the Chancery Division against Ellis and French for (*inter alia*) a declaration that no such right of way existed over the land in question.

After the Chancery action had been commenced, the Rural District Council of Snettisham, on the representation of the parish council interested, passed a resolution to contribute to the costs of Ellis and French in defending the action, and to take such other steps in the matter as seemed expedient. Subsequently the council rescinded this resolution, and thereupon the parish council interested in the matter petitioned the County Council of Norfolk to take up Ellis and French's defence. Thereupon, the county council passed a

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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resolution that the powers and duties of the district council, under sect. 26 of the Local Government Act 1894 in respect of the alleged unlawful obstruction of the path in question, should be transferred to the county council, and that the county council should contribute towards the defendants' costs in the Chancery action, and take any other steps that should seem expedient. It was agreed that for the purpose of testing the point raised in this rule, that this resolution should be regarded as an order for the payment of such costs, so that it could be removed by *certiorari* under sect. 80 of the Local Government Act 1888.

The material part of sect. 26 of the Local Government Act 1894 (56 & 57 Vict. c. 73) is as follows:

Sect. 26.—(1) It shall be the duty of every district council to protect all public rights of way and to prevent as far as possible the stopping or obstruction of any such right of way, whether within their district or in an adjoining district in the county or counties in which the district is situate where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district and to prevent any unlawful encroachment on any roadside waste within their district. (3) A district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings and generally take such steps as they deem expedient. (4) Where a parish council have represented to the district council that any public right of way within the district, or an adjoining district in the county or counties in which the district is situate, has been unlawfully stopped or obstructed . . . it shall be the duty of the district council, unless satisfied that the allegations of such representation are incorrect, to take proper proceedings accordingly; and if the district council refuse or fail to take any proceedings in consequence of such representation, the parish council may petition the county council for the county within which the way . . . is situate, and if the council so resolve, the powers and duties of the district council under this section shall be transferred to the county council.

Russell, K.C. (Fleetwood Pritchard with him) for the county council showed cause.—The question is whether the district council, or, when they have refused to act, the county council, have power under sect. 26 not merely to bring an action themselves to maintain a public right of way, but to undertake to pay the costs of a person who has taken steps to maintain it, and against whom an action has in consequence been brought. I maintain that they have. That section clearly lays a duty upon the district council to protect public rights of way within their district, and when they refuse to carry out that duty then, on the parish council petitioning the county council, the duty is transferred to the county council. And the sole condition precedent to the duty becoming binding in law upon the county council is that they shall not be satisfied that the representations of the parish council are incorrect. Then when the duty does arise, there is no limit set to the mode in which they are to take steps to protect the right of way. Sub-sect. 3 expressly enables them not merely to institute or defend legal proceedings, but also "generally take such steps as they deem expedient." Here the most expedient way of protecting this public right of way was by assisting Ellis and French to defend the Chancery action, which sought a declaration that no such right of way existed.

Bawlinson, K.C. (C. Gordon with him) for Ellis and French.—I associate myself with the argument for the county council. I am prepared to argue that it was the duty of the district council, after the representation from the parish council, to take steps to protect this right of way, and when the district council failed to do so, then, on the petition of the parish council, it became the duty of the county council to do so. And in discharging this duty the county council could take any steps an individual would be justified in taking. An individual might have agreed to pay a share or all of the costs of the defendants in the Chancery action, since, this being a public matter, no question of maintenance arises, and so, I submit, could the county council.

McCall, K.C. and North (Swanson with them).—The real question is, Has the Legislature given the county council power to intervene in an action without becoming a party to it and so making themselves liable in costs if they fail? *Prima facie*, this seems not to be the sort of provision the Legislature would be likely to make—enabling as it does a public authority to use the public money to harrass a private individual from behind the back of someone else; and, before the courts adopt this view of the statute, I submit it should be quite clear that the Legislature intended it to be adopted. The true interpretation of sect. 3 is, I submit, that contained in the memorandum of the Local Government Board, dated Jan. 1895. There it is laid down that where an alleged public right of way is obstructed, the district or county council have three courses open to them: (1) To direct the removal of the obstruction; (2) to indict the person who has caused the obstruction for a misdemeanour; (3) to proceed by way of action in the name of the Attorney-General, for which his fiat must be obtained in the usual way. [Lord ALVERSTONE, C.J.—If the council directed the surveyor to remove the obstruction, and the landowner then brought an action against the surveyor without joining the council, would the county council be justified under sect. 3 in paying the surveyor's costs in the action? Yes; because in that case they are defending their own act. The evil that may arise here could not arise there. By instructing their surveyor to remove the obstruction they made themselves liable for his act, and if the landowner does not choose to sue them, he cannot complain that they are encouraging litigation without incurring liability for its costs. If the construction contended for is adopted, two considerable evils may arise: (1) Men of straw may be put up to fight actions, and when the landowner has succeeded he will find he can recover no costs; (2) public money will be spent in litigation over which the public authority has no control, for of course the private defendant has the conduct of his defence.

Russell, K.C. in reply.

Lord ALVERSTONE, C.J.—This is a point not altogether free from doubt, but, in my opinion, this rule must be discharged. It is important in considering the question before us to note that sect. 26 (1) of the Local Government Act 1894 makes it the duty of every district council to protect all public rights of way, and to prevent, as far as possible, the obstruction of any such right of way. For the purpose of discharging the

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duty thus placed upon them, district councils may, by sub-sect. 3 of the same section, institute or defend any legal proceedings, and generally take such steps as they may deem expedient. I do not say that it would not be possible to construe the words of this sub-section as meaning merely that a district council can take or defend proceedings in their own name; but, at the same time, I am of opinion that this would be too narrow a reading of it. To begin with, there are many proceedings taken in the name of the Attorney-General which in reality are proceedings by and on behalf of local authorities. And again, actions may be brought against the servants of local authorities. During the argument I asked Mr. McCall did he contend that the district council could not, under sect. 26 (3), provide funds for the defence of a servant of theirs who was sued for removing an obstruction from a public way? and he hesitated long before he answered, as he well might. An action could, of course, be brought against the surveyor of the district council for removing such an obstruction by order of the council, and if such an action were brought I cannot but think that the council might, in the discharge of the duty in relation to obstruction of public rights of way which is imposed on them by sect. 26 (1), defray the costs of such an action. But to cover the present case we must go a step further. The obstruction here has been removed by persons who were not servants or officers of the district council. Even under these circumstances I think the council may, under sect. 21 (3), provide funds for defending the action, if they think that such a course is expedient. This being the position of the district council, is that of the county council the same after the district council have declined to take action? That depends on sect. 26 (4). That sub-section is not drafted in language so precise as the earlier sub-sections, but the present case does not appear to me to be one where any conclusion can be based on any difference in the language. I think that, as far as this case is concerned, the county council are in the same position as the district council were before they refused to interfere, and that consequently the county council can lawfully contribute to the costs of the defendants in the action, because, upon the resolution for the transfer of powers from the district to the county council, the latter became entitled to the rights given to the district council by sect. 26 (3). It has been argued that the language of sub-sect. 2 of sect. 26, which relates to the aiding of persons in maintaining rights of common, does not give a county council a general right to commence litigation, but seems to indicate that they may contribute to the costs of persons maintaining rights of common. It is said that the presence of this sub-section shows that it is only with regard to these particular rights that the council are justified in giving such aid. Whether the right as to commons is really so limited I will not decide, but I am satisfied that since, under sub-sects. 1, 3, 4, and 5, a duty is imposed on as well as a power given to the district council and to the county council in their place to defend a right of way and rid it of obstruction, we cannot properly limit that power upon the ground that in the instance of the maintenance of common rights, under sub-sect. 2, the duty to aid other people in the assertion and

defence of their rights may possibly be of a permissive character.

LAWRENCE, J.—I agree. *Rule discharged.*

Solicitors for the county council, *Sharpe, Parker and Co.*, for *C. Foster*, Norwich.

Solicitors for the defendants in Chancery, *Church, Rendell, and Co.*, for *J. A. Parsons*, King's Lynn.

Solicitors for Sir Edward Green, *Burton, Yeates, and Hart*, for *Beloe and Beloe*, King's Lynn.

Tuesday, April 23, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

ROBERTSON v. KING. (a)

Local government—Public health—Dwelling-houses—Unfit for human habitation—Uninhabited—Closing order—Housing of the Working Classes Act 1890 (53 & 54 Vict. c. 70), ss. 29, 32.

By sect. 32 (1) of the Housing of the Working Classes Act 1890, every local authority is put under a duty to ascertain whether any dwelling-house in its district is in a state so dangerous or injurious to health as to be unfit for human habitation, and if on the representation of the medical officer of health any dwelling-house appears to them to be in such a state, to forthwith take proceedings against the owner or occupier for closing the dwelling-house. By sub-sect. 2 of the same section, such proceedings may be taken whether the dwelling-house be occupied or not. By sect. 29, "dwelling-house" in the Act means "any inhabited building."

At the hearing of an application for an order under sect. 32 for closing certain houses, it was proved that the houses in question were in such a state that if they had been inhabited they would have been so dangerous to health as to be unfit for habitation, but that, though built and formerly used as dwelling-houses, they had not in fact been occupied for the past five and a half years, and there was no evidence to show that the owner intended to permit them to be occupied again:

Held, that a closing order should be made, and that non-occupancy did not in itself prevent the application of the powers given by sects. 32 and 33 to what was in the ordinary sense a dwelling-house.

CASE stated by the stipendiary magistrate of Sheffield on appeal from a refusal by the learned magistrate to make a closing order under sect. 32 of the Housing of the Working Classes Act 1890 (53 & 54 Vict. c. 70).

Housing of the Working Classes Act 1890:

Sect. 32 (1) It shall be the duty of every local authority to cause to be made from time to time inspection of their district with a view to ascertaining whether any dwelling-house therein is in a state so dangerous or injurious to health as to be unfit for human habitation, and if on the representation of the medical officer . . . any dwelling-house appears to them to be in such state to forthwith take proceedings against the owner or occupier for closing the same . . . (2) Any such proceedings may be taken for the express purpose of causing the dwelling-house to be closed whether the

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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same be occupied or not, and upon such proceedings the court of summary jurisdiction may . . . make a closing order.

By sect. 29 the expression "dwelling-house" in the second part of the Act (which is the part which contains sect. 32) means, unless the context otherwise requires, "any inhabited building."

The appellant in the case stated was the medical officer of health for the city of Sheffield. He had applied under sect. 32 for a closing order in respect of three dwelling-houses, of which the respondent was owner, on the ground that they were used as dwelling-houses and were in a state so injurious to health as to be unfit for human habitation. A summons being issued, it appeared at the hearing that the premises, which were described in the medical officer's complaint as three dwelling-houses situate in a corner of a court in Sheffield, and as being used as dwelling-houses, were old buildings with their appurtenances, and that for a long time after they were built they had been occupied or inhabited, and had been dwelling-houses within the definition of that expression in sect. 29 of the Act. It was proved and admitted that in their present condition they were unfit for human habitation within the meaning of the Act, inasmuch as they were in a filthy, ruinous, and dilapidated state, and that there were filthy and other accumulations upon them which might probably be a nuisance, as to which proceedings might have been taken by the corporation under sects. 91, 94, and 97 of the Public Health Act 1875.

It appeared, however, that about five and a half years previously the houses had been closed to all purposes of human habitation by the then owner, and had not since then been used or reopened for such purposes.

Evidence was called that during the five and a half years the premises had never been used for purposes of human habitation except possibly by a chance person or vagrant creeping in for a sleep, and even this had never been actually known to happen.

It further appeared that the respondent had no intention of having the premises used for human habitation in their present condition; but it did not appear whether he had formed any intention as to rebuilding or repairing them or turning them to other purposes.

In support of the application for the closing order it was contended that the premises the subject of the complaint were dwelling-houses within the meaning of the Housing of the Working Classes Act 1890, Part 2; that sect. 29, which defines a dwelling-house in that part as "any inhabited building," provides that such definition shall apply "unless the context otherwise provides"; that under sect. 32 (2) the context otherwise requires and provides that the provisions of sect. 32 shall apply whether the premises be occupied or not; that in the present case the buildings had been inhabited dwelling-houses, and that there was no evidence of permanent abandonment of the buildings as dwelling-houses, inasmuch as the evidence showed that they had not been adapted for any other purpose, and might at small cost and in the course of a day or two be made fit for human habitation.

The learned magistrate refused to make a closing order. He was of opinion that as the

premises had been so long closed to human habitation, and placed in a position in which a closing order would place them, whatever nuisance proceedings the respondent might be liable to, there was a want of foundation for a closing order, though he thought that if the owner had caused or allowed them to be reopened for purposes of human habitation a closing order might be made whether they were occupied or not.

The question for the opinion of the court now was whether the learned magistrate was right in refusing the closing order.

Reginald Brown, K.C. for the appellant.—I submit that the contention for the appellant in the court below is unanswerable. It is true sect. 29 defines "dwelling-house" as "any inhabited building," but that definition is made expressly subject to the nature of the context. Here the context is clear. Sect. 32 is to apply to dwelling-houses whether occupied or not. Here we have houses which were built for and used for dwelling-houses, and have never been used for anything else, and there is no evidence the owner has definitely abandoned the intention of ever again using them as dwelling-houses. I submit therefore they are still dwelling-houses though not occupied, and that they come within the precise words of sect. 32 (2). Moreover, the learned magistrate was mistaken in thinking that the mere ceasing to use the houses as human habitations has the same effect as a closing order. By sect. 33 of the Act the corporation may after a closing order direct under certain circumstances the demolition of the houses; and see sched. 4 of the Act as to varying order.

The respondent did not appear.

Lord ALVERSTONE, C.J.—I am of opinion that the learned magistrate ought to have made the closing order which was here applied for. While in no way straining the words of the Act the object of the Act should be carried into effect, and the object of the Act is that if after due notice the owner does not put the houses complained of into a proper state of repair, the powers given by the Act are to be exercised. The view of the learned magistrate seems to have been that because for five and a half years the premises had not in fact been inhabited they were therefore not inhabited buildings within sect. 29 of the Housing of the Working Classes Act 1890. But that definition was never intended to limit the ordinary meaning of the expression "dwelling-house," and sect. 32 expressly includes dwelling-houses which are unoccupied. Here the houses were *prima facie* dwelling-houses, and the fact that they have been for five and a half years uninhabited does not prevent the court from making an order for closing them. It is not necessary to consider what length of non-occupancy would be sufficient to prevent a house being looked upon as a dwelling-house within sects. 32 and 33. Certainly there appears to me to be in this case no objection to the closing order. Practically it amounts to this, that if the owner does not want the houses pulled down he must put them in order. The appeal must be allowed.

LAWRENCE, J.—I agree.

Appeal allowed.

Solicitors for the appellant, *R. F. C. and C. L. Smith*, for *Sayer*, Sheffield.

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STEAD (app.) v. NICHOLAS (resp.).

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Tuesday, April 30, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRANCE, J.)

STEAD (app.) v. NICHOLAS (resp.). (a)

Fishery Acts—Fishery district—Definition of limits of district by Board of Trade certificate—“All waters within the limits of the Act”—Reservoir—Salmon Fishery Act 1865 (28 & 29 Vict. c. 21), s. 35—Freshwater Fisheries Act 1878 (41 & 42 Vict. c. 39), ss. 6, 7.

Sect. 6 of the Freshwater Fisheries Act 1878 extends the provisions of the Salmon Fishery Acts with regard to the formation and alteration of fishery districts and the powers of conservators, to “all waters within the limits of the Act frequented by trout or char,” and sect. 7, read in conjunction with sect. 35 of the Salmon Fishery Act 1865, imposes a penalty upon any person fishing in any fishery district with a rod and line for trout or char without the licence of the conservators:

Held, that an artificial reservoir geographically situated within a fishery district and stocked with trout brought from a distance, but not communicating with a river in the fishery district or any of its tributaries except by a valve, is not a “water within the limits of the Act frequented by trout or char,” and the conservators have no power to require a person fishing for trout therein to obtain a licence from them.

CASE stated by justices of the peace for the West Riding of the County of York.

At a petty sessions held at Rotherham in the West Riding on the 15th Oct. 1900, an information was preferred by Stead (the appellant) who was the chief water bailiff of the Yorkshire Fishery Board, against Nicholas (the respondent), under sect. 35 of the Salmon Fishery Act 1865 (28 & 29 Vict. c. 121), as extended to “trout or char” by sects. 6 and 7 of the Freshwater Fisheries Act 1878 (41 & 42 Vict. c. 39), for that he, the respondent, on the 29th Sept. 1900, at Thrybergh, in the Riding aforesaid, after the time appointed by law in that behalf in the fishery district of Yorkshire, there unlawfully did fish with a rod and line for trout without a proper licence in that behalf.

This information was heard and determined by the justices, who dismissed the same. On the hearing of the information the following facts were admitted or proved:

Thrybergh Reservoir is the property of the Corporation of Doncaster, constructed under the powers conferred by the Doncaster Water Works Act 1873, and is the storage reservoir referred to in sect. 7 of that Act as Storage Reservoir No. 1.

The waters of a small brook, known as Silverwood Brook, are impounded in the reservoir, and conveyed thence by pipes for domestic use in the borough of Doncaster.

Two other subsidiary reservoirs in an adjoining valley supply compensation water for the use and benefit of riparian owners whose water supply was interfered with by the construction of the Thrybergh Reservoir.

In the event of failure to supply compensation water from the subsidiary reservoirs referred to, such water can be, and occasionally is, supplied

from the Thrybergh Reservoir. When such supply is necessary from the Thrybergh Reservoir it is effected by means of a valve. No fish can enter the Thrybergh Reservoir from the old course or channel of the brook below the reservoir, and no water passes from the reservoir into the ancient course or channel of the brook unless allowed to pass through the valve under the circumstances referred to.

The channel or old course of the brook below the reservoir joins the Hooton Brook, which latter flows into the river Don. The river Don flows into the river Ouse.

The Thrybergh Reservoir has been stocked with trout brought from a distance by the corporation of Doncaster. Persons fishing therein must obtain a ticket from the corporation, for which payment is made.

The proceeds arising from the sale of the tickets are devoted to the purchase of trout, which are placed in the reservoir, by which means the stock is maintained.

The limits and bounds of the Yorkshire Fishery District were originally defined and declared by the Home Secretary by certificate, given by virtue of the powers given by the Salmon Fishery Acts 1861 to 1873, and in such certificate were then declared to comprise (*inter alia*) “so much of the rivers Derwent, Wharfe, Nidd, Ure, Swale, Ouse, and Humber, and their tributaries as lies within the county of York,” but the limits of this Yorkshire Fishery District were subsequently, by certificate dated the 21st Jan. 1896 of the Board of Trade acting under the powers conferred by the 3rd section of the Salmon and Freshwater Fisheries Act 1886 (49 & 50 Vict. c. 39), altered, extended, and defined as follows:

The limits of the rivers Derwent, Wharfe, Nidd, Ure, Swale, and Ouse, and of the fishery district of the said rivers, include all such estuaries, rivers, streams, brooks, lakes, ponds, canals, dykes, cuts, drains, channels, water-courses, and waters, and all such portions of the sea and sea coast as lie within the following limits.

Namely, the limits defined by certain lines and boundaries in the above certificate set forth and described.

The Thrybergh Reservoir is situate in that part of the West Riding which is within the limits of the Yorkshire Fishery District as defined by the lines and boundaries in the certificate of the Board of Trade, as above set forth and described.

On the 29th Sept. 1900 the respondent was found fishing for trout in the Thrybergh Reservoir by the appellant, who was the duly appointed water bailiff of the Yorkshire Fishery Board.

The respondent was duly authorised to fish therein by ticket granted by the corporation of Doncaster, but was not in possession and had not obtained any licence authorising him to fish for trout from the Yorkshire Fishery Board within the district under the jurisdiction of that board.

It was submitted by the appellant that such licence was requisite, and that any person fishing for trout in the Thrybergh Reservoir, or in any inclosed waters within the limits of the district of the board, without having previously obtained such licence from the board, was liable to the penalty imposed by the 25th section of the Salmon Fishery Act 1865 (28 & 29 Vict. c. 121).

It was contended on behalf of the respondent that the Yorkshire Fishery Board had no power

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or jurisdiction over the Thrybergh Reservoir; that no licence from the board was required for any person fishing for trout therein; and that even if the certificate of the Board of Trade of the 21st Jan. 1896 did in terms include such reservoir within the Yorkshire Fishery District, which the respondent denied, then such certificate was *ultra vires*, and not authorised by any of the Acts of Parliament under or by virtue of which the certificate was issued and given.

The justices thereupon dismissed the information, and the question of law for the opinion of the court was whether they were right in law in dismissing it.

The Salmon Fishery Act 1865 (28 & 29 Vict. c. 121), provides:

Sect. 35. From and after a time to be appointed as aforesaid in a fishery district, any person fishing in that district with a rod and line for salmon without a proper licence shall be liable to a penalty of not less than double the amount to be paid for the requisite licence, and not exceeding five pounds.

The Freshwater Fisheries Act 1879 (41 & 42 Vict. c. 39), provides:

Sect. 6. The provisions of the Salmon Fishery Acts 1865 and 1873, which relate to the formation, alteration, combination, and dissolution of fishery districts, and to the appointment, qualification, proceedings, and powers of conservators, shall extend and apply to all waters within the limits of this Act frequented by trout or char; and the term "salmon river," in the fourth and nineteenth sections of the Salmon Fishery Act 1865, and in the twenty-sixth section of the Salmon Fishery Act 1873, shall mean any river frequented by salmon, trout or char.

Sect. 7. In any fishery district subject to a board of conservators, the conservators shall have power to issue licences for the day, week, season, or any part thereof, to all persons fishing for trout or char, and in the event of the power being exercised in any fishery district, the provisions of the thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, and thirty-seventh sections of the Salmon Fishery Act 1865, and of the twenty-first, twenty-second, twenty-fourth, and twenty-fifth sections of the Salmon Fishery Act 1873 (relative to licences) shall, with respect to such district, be construed as if the words "trout or char" were inserted throughout after the word "salmon." Provided as follows: (1) A licence to fish for salmon shall have effect as a licence to fish for trout and char; (2) The fee payable for a licence to fish for trout or char exclusively of salmon in any district shall not exceed one-third of the maximum amount chargeable for fishing for salmon under the provisions of the twenty-first section of the Salmon Fishery Act 1873.

Avory, K.C. and H. T. Waddy, for the appellant. —The justices ought to have convicted the respondent. They were influenced in their decision by the case of *George v. Carpenter* (68 L. T. Rep. 714; (1893) 1 Q. B. 505); but that case has really no application here, as the words of the certificate given by the Secretary of State in that case were wholly different from the very wide words used in the certificate in the present case. It is found in the case that this reservoir is at all events situate within the geographical limits or geographical district of the Yorkshire Fishery Board, and the question is whether it is within the fishery district within the meaning of the Acts as defined by the certificate given by the Board of Trade. Our contention is that it comes within the limits as defined by that certificate, and that the certificate is not *ultra vires*. The first of the Salmon Fishery Acts is the Salmon Fishery Act 1861 (24 & 25 Vict. c. 109), which is

limited entirely to salmon, and there is no definition of "river" or of the jurisdiction of the board as to rivers, but there are certain provisions as to taking salmon. Then by the amending Act, the Salmon Fishery Act 1865 (28 & 29 Vict. c. 121), in sect. 3, the word "river" is defined as including "such portion of any stream or lake, with its tributaries, and such portion of any estuary, sea, or sea coast, as may from time to time be declared, in manner hereinafter provided, to belong to such river." Under these words there have been several decisions as to the meaning of "tributaries," and it was in consequence of those decisions that we have the wider view now given to these words. By sect. 5 "the limits of a river" were to be defined by a Secretary of State (now the Board of Trade), and it entitles the secretary to include tributaries. The Salmon Fishery Act 1873 (36 & 37 Vict. c. 71) does not carry this matter any further. Then we come to the Freshwater Fisheries Act 1878 (41 & 42 Vict. c. 39), which (by sect. 3) does not "extend to Scotland or Ireland, nor . . . to the counties of Norfolk and Suffolk and the county of the city of Norwich." Sect. 5 of this Act provides that sects. 8 and 9 of the Act of 1861 and sect. 64 of the Act of 1865 (which provides a close time for trout or char), "shall . . . apply to trout and char in all waters within the limits of this Act"—that is, in England. Sect. 64 of the Act of 1865 had provided for the partial application of the Salmon Acts to trout in salmon rivers. The important section in this case is sect. 6 of the Act of 1878, which enacts that the provisions of the Salmon Fishery Acts which relate to the formation &c., of fishery districts and powers of conservators shall extend and apply to "all waters within the limits of this Act frequented by trout or char," and the term "salmon river" shall mean "any river frequented by salmon, trout, or char." Then sect. 7 gives a board of conservators in a fishery district power to issue licences, and provides that sect. 25 of the Act of 1865, which imposes a penalty upon any person fishing in a fishery district with a rod and line for salmon without a licence, shall be construed to include "trout or char." The result therefore is that any person fishing in a fishery district with rod and line for salmon, trout, or char, without a licence from the board of conservators, is liable to the penalty imposed by sect. 35 of the Act of 1865. There is no definition of the words "all waters within the limits of this Act" other than that contained in sect. 3, that the Act is not to extend to Scotland or Ireland, or to the counties of Norfolk and Suffolk or to Norwich. There are decisions as to the meaning of the word "tributary." In *George v. Carpenter* (*ubi sup.*), the certificate of the Secretary of State defined the fishery district to be a river and "its tributaries," and upon that it was held that reservoir was not a tributary of the river within the meaning of the certificate, and was therefore not within the jurisdiction of the board. In consequence of that decision the certificate of the Board of Trade in this case was given in much wider form, and includes in this fishery district "estuaries, rivers, streams, brooks, lakes, ponds, canals, dykes, cuts, drains, channels, watercourses, and waters"; and these words are wide enough to include this reservoir, although there is no decision either way as to whether a reservoir is a

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"river or waters" within the Act. The respondent therefore ought to have been convicted.

T. Willes Chitty for the respondent. — The justices were clearly right in refusing to convict the respondent. Sect. 6 of the Act of 1878 says that the provisions of the Salmon Fishery Acts in certain respects shall extend and apply to "all waters within the limits of this Act" frequented by trout or char. The case therefore depends on the meaning of the word "waters" in this Act, and to get at this we must look at the meaning in the earlier Acts. Some limit must clearly be put on the phrase "waters," and the meaning as set out in the certificate given by the Board of Trade, is too large; it is outside the Act altogether. This reservoir is not a "water" within the meaning of the certificate at all; and if it does come within the certificate then the certificate is too large and wide, and is *ultra vires*. The words of the Act are simply "waters," and in no section is the word "ponds" mentioned, and there is no provision in the Act which defines "waters." The nearest approach to a definition is in sect. 11 (3), which says that if any person during the close season fishes for any freshwater fish "in any river, lake, tributary, stream, or other water connected or communicating with such rivers," he shall be liable to a fine. That is the only approach to a definition of "waters" given in the Act of 1878, and I rely on that definition. It does not refer to, and does not include "ponds." In sect. 4 of the Act of 1861, we have a definition of "tidal waters" and "inland waters," but not of "waters." The word "waters" clearly would not apply to an artificial lake, and therefore this reservoir is not a "water" within the meaning of the Act at all. The board would therefore have no power to require a person fishing in the reservoir to obtain a licence from them. [He was stopped.]

Avory, K.C. in reply.

Lord ALVERSTONE, C.J. — Speaking for myself, I should have been glad if I could have adopted the view presented to us by counsel for the appellant as to this section. It would be a very good thing if, for the purposes of a fishery district, any water frequented by trout or char came within the provisions of the Act of 1865, as amended by the Act of 1878. It seems to me, however, that the course of the legislation has made that view impossible. There was a well-known code with regard to salmon fishery waters, and trout were protected to a certain extent if they happened to be in a salmon river. The Act of 1878 does not make any fresh enactment in sect. 6, but merely extends the provisions of the Salmon Fishery Acts 1865 and 1873, with regard to the formation and alteration of fishery districts to all waters within the limits of the Act frequented by trout or char. I quite agree that it is possible to construe these words as meaning any waters within England other than Norfolk and Suffolk and the county of the city of Norwich, which are excepted from the operation of the Act of 1878 by sect. 3 of that Act; but I think that would give to the word "limits" a very unusual meaning. I think that the real answer to the argument for the appellant is this: The Acts of 1865 and 1873, which are applied to the Act of 1878 by sect. 6 of the latter Act, contain regulations as to the formation of districts; and I think for the purpose of

this question the previous decisions apply, by which it was held that the waters which may be included in the district of a river must be tributaries of the river or communicate with the river. I further think that the district is not something separate from the river; but that a fishery district under the Act of 1865 is a district which is formed of more than one river. If that is so, the course of legislation was to apply to trout and char rivers—that is, rivers in which there need not be salmon, but in which there are trout or char—all the provisions of the previous Salmon Fishery Acts. It would, in my opinion, be too strong to say that the restrictions on what could be included in a fishery district, were done away with by legislation by incorporation. Therefore, with regret I come to the conclusion that the refusal of the justices to convict was right, and that this reservoir is not, and cannot at present be, included in the words in sect. 6 of the Act of 1878, "all waters within the limits of this Act."

LAWRENCE, J. — I have unwillingly come to the same conclusion. It seems to me that what was intended by the statute of 1878, was to extend to trout and char the same protection that had been extended to salmon by the Salmon Fishery Acts. The intention of the Legislature evidently was to protect rivers frequented by salmon and to prevent them from being interfered with; but the difficulty was considerably extended in the case of trout, and the same difficulty arose as to whether the limit should be extended further than the river or some tributary of the river. The object was to protect trout and any small streams they might go up for the purpose of breeding, and so forth, and it was on that ground that the case of *George v. Carpenter* (*ubi sup.*) was decided. I think the magistrates were right in the view they took.

Appeal dismissed.

Solicitors for the appellant, *Steavenson and Coldwell*, for *J. E. Jones*, York.

Solicitors for the respondent, *Coode, Kingdon, and Cotton*, for Town Clerk, Doncaster.

Thursday, May 2, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

BROADBENT v. SHEPHERD. (a)

Local government — Public health — Nuisance — Abatement — "Owner" — Person who has ceased to be owner before order — Jurisdiction to make order — Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 94, 95, 96, 98, 104.

An order under sect. 94 of the Public Health Act 1875 to abate a nuisance existing on certain premises is not merely a remedy against the person against whom it is made personally, but is also a step in the process which in case the nuisance is not abated, confers the right upon the local authority to enter on the premises and abate the nuisance themselves. Accordingly the fact that the person on whom the notice to abate was served, and against whom the complaint for neglect of such notice was laid, ceases after the complaint comes before the court, but before the order is made, to be owner of the

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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premises within sect. 4 of the Act, does not deprive the court of jurisdiction to make an order to abate against him.

APPEAL by case stated from the decision of the justices of the West Riding of Yorkshire dismissing a complaint laid by the appellant Broadbent on behalf of the Castleford Urban District Council against the respondent as the statutory owner of certain premises in the district, and alleging failure on the part of the respondent to comply with a notice served on him under sect. 94 of the Public Health Act 1875 requiring him to abate certain nuisances on the said premises.

The complaint originally came on for hearing before the justices on the 27th June 1900. It was then proved that the nuisances existed as alleged, but it appeared that the respondent was not the proprietor of the premises in question, but merely the agent and rent collector of the proprietor, a Mr. Donkersley. The justices dismissed the complaint on the ground that the respondent was not the owner of the premises within sect. 94.

On appeal by case stated a divisional court (consisting of Lord Alverstone, C.J. and Kennedy, J.), on the 15th Nov., held, that the respondent as agent was owner of the premises for the purposes of sect. 94 of the Public Health Act, and remitted the case to the justices with an intimation to this effect.

On the 25th Dec. the complaint, having been reinstated in accordance with the decision of the High Court, came on for hearing before the justices. It then appeared that the respondent was no longer agent or rent collector for the premises in question, he having since the previous hearing resigned his agency; and it was admitted that the actual owners of the property had recently been served with notice to abate the nuisance, and that they had actually commenced and carried through part of the work. It was proved, however, that part of the premises was still in a state dangerous to the lives of the tenants, and it was urged on behalf of the appellant that the justices should make an order on the respondent ordering him to abate the nuisance complained of. The justices, however, held that they had no power to make an order on the respondent on the ground that such an order can only be made on a person who is an "owner" of the premises when the order is made.

From this decision the appellant again appealed.

Public Health Act 1875 (38 & 39 Vict. c. 55):

Sect. 4. In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them—that is to say . . . "Owner" means the person for the time being receiving the rackrent of the lands or premises in connection with which the word is used, whether on his own account or as the agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rackrent.

Sect. 94. On the receipt of any information respecting the existence of a nuisance, the local authority shall, if satisfied of the existence of a nuisance, serve a notice . . . on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same.

Sect. 95. If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof . . . the local authority shall cause a complaint relating to such

nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction.

Sect. 96. If the court is satisfied that the alleged nuisance exists . . . the court shall make an order on such person, requiring him to comply with all or any of the requisitions of the notice.

Sect. 98. Any person not obeying an order to comply with the requisition of the local authority or otherwise to abate the nuisance shall, if he fails to satisfy the court that he has used all due diligence to carry out such order, be liable to a penalty . . . ; moreover, the local authority may enter the premises to which any order relates and abate the nuisance and do whatever may be necessary in execution of such order, and recover in summary manner the expenses incurred by them from the person on whom the order is made.

Sect. 104. All reasonable costs and expenses incurred in making a complaint, or giving notice, or in obtaining any order of the court or any justice in relation to a nuisance under this Act, or in carrying the same into effect, shall be deemed to be money paid for the use, and at the request of the person on whom the order is made . . . and in case of nuisances caused by the act or default of the owner of premises, such costs and expenses may be recovered from any person who is for the time being owner of such premises.

Macmorran, K.C. (Scholefield with him) for the appellant.—If the respondent was owner at the time the notice was given and the complaint was laid and came on for hearing, the justices had jurisdiction to make the order. The fact that when the order was made the person was not in a position to carry it out does not take away such jurisdiction:

Parker v. Inge, 55 L. T. Rep. 300; 17 Q. B. Div. 584.

No doubt the cases of *Mayor of Scarborough v. Rural Sanitary Authority of Scarborough* (34 L. T. Rep. 768; 1 Ex. Div. 344) and *Reg. v. Trimble* (36 L. T. Rep. 508) seem to be contrary to the contention, but they must be regarded as overruled by *Parker v. Inge* (*sup.*) where (at p. 302 L. T. Rep.) Cave, J. expresses his inability to understand the former of them and his doubts as to the accuracy of the reports. *Reg. v. Trimble* merely followed *Mayor of Scarborough v. Rural Sanitary Authority of Scarborough* (*sup.*). Moreover, this case is distinguishable from these decisions since the respondent was owner within the Act when the complaint first was heard and when the order should have issued. The real point to be remembered is, that this order is not merely a personal order on the respondent; it is a step necessary to give the local authority the right to enter on the premises under sect. 98 and do the work itself. A penalty is under that section only to be imposed when it is shown that the respondent did not use due diligence to carry out the order, and if he could not legally carry it out of course no penalty could be inflicted. Under sect. 104 the owner for the time being and not the respondent would be liable for the costs of the repairs.

The respondent did not appear.

LORD ALVERSTONE, C.J.—When the case was originally before the court, which consisted of my brother Kennedy and myself, in November last, we held that the justices ought to have made the order because the person against whom it was sought was the "owner" of the premises in question within the definition of that word contained

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in sect. 4 of the Public Health Act 1875. For the purposes of the present case I must assume that the order that the justices would have made would have been an order for the abatement of the nuisance within a certain number of days. What happened is that at some time after the first hearing of the case by the justices the respondent, who was then the agent for the true owner of the property, resigned his agency. If the sole object of the application against him were a personal remedy against the individual either by fine or by the imposition of a personal responsibility, different considerations would arise, and it might be said that the court ought not to make an order which would in effect be futile. However, I do not desire to express any opinion on the point. But when sects. 96, 98, and 104 are considered it appears to be plain that the point of the order is in the right which it gives the local authority to enter the premises, and themselves abate the nuisance if necessary, and recover the expenses from the person who is responsible. The justices had originally jurisdiction to make the order against the respondent as owner within the meaning of sect. 4, and therefore, in my opinion, when the case went back to them from my brother Kennedy and me they ought to have made the order which they would have made in the first instance had they then properly construed the Act—that is to say, an order on the respondent to abate the nuisance. That order being disobeyed, the local authority have power under sect. 98 to enter upon the premises and do whatever may be necessary in execution of the order, and then by sect. 104 there is power given them to recover the costs and expenses from the owner for the time being of the premises. I am for these reasons of opinion that the justices ought to have made this order upon the respondent notwithstanding that he had ceased to be the agent for the property when the case was actually determined. The case must be remitted to the magistrates with this expression of our opinion.

LAWRENCE, J.—I concur.

Case remitted.

Solicitors for the appellant, *G. T. B. S. Thurnell*, for *Claude Kemp*, Castleford.

Wednesday, May 8, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRENCE, J.)

COLLINS (app.) v. HORNSEY URBAN DISTRICT
COUNCIL (resps.). (a)

*Local government—New street—Naming of—
Right of local authority to name—Defacing of
name by owner of street—Offence—Towns Im-
provement Clauses Act 1847 (10 & 11 Vict. c. 34),
s. 64.*

*Sect. 64 of the Towns Improvement Clauses Act
1847 (incorporated with the Public Health Act
1875 by sect. 160 of the latter Act) imposes upon
the local authority the duty of putting up the
name of every street, and imposes a penalty upon
every person who pulls down or defaces the name
so put up.*

(a) Reported by W. W. OAB, Esq., Barrister-at-Law.

*A landowner laid out a new street, and on the
plan submitted to and approved by the local
authority the street was named M.-avenue, and
this name was put up by the owner on a board
fixed to a post in the street.*

*The local authority afterwards determined that the
street should be called C.-avenue, but the owner
objected and said he would remove that name if
put up.*

*The local authority put up the name C.-avenue on
a board affixed to a house belonging to the owner,
and the owner caused the name to be painted out.*

*Held, that, the local authority having put up the
name, the owner, in defacing the name so put up,
had committed an offence under sect. 64, and was
liable to the penalty.*

*Anderson v. Lord Mayor and Corporation of
Dublin (15 L. Rep. Ir. 410) distinguished, upon
the ground that the question there was as to the
changing of the well-known name of an old
street.*

CASE stated by justices of the peace for the county
of Middlesex sitting as a court of summary juris-
diction at Highgate.

An information was preferred on behalf of the
Hornsey Urban District Council (the respondents)
under the Towns Improvement Clauses Act 1847
(10 & 11 Vict. c. 34) against William Collins (the
appellant) for that he (the appellant), on the
27th Nov. 1900, at the parish of Hornsey, did
counsel and procure the defacing of the name of
a certain street—to wit, Collingwood-avenue,
Muswell Hill, within the district of the council—
which had been put up by the council on a con-
spicuous part of a building near the end of such
street, contrary to the provisions of the Towns
Improvement Clauses Act 1847.

This information was heard by the justices on
the 5th Nov. 1900 and the 2nd Jan. 1901, when the
justices convicted the appellant and ordered him
to pay a fine of 1s. and costs.

Upon the hearing of the information the follow-
ing facts were proved:—

The appellant in the year 1899 was the owner
of the Fortismere building estate at Fortis Green,
in the Hornsey urban district, and was still the
owner of a large portion of it.

Early in 1899 he submitted to the respondents
plans showing the positions and names of certain
proposed new streets on this building estate,
together with notice of his intention to lay out
and construct the same.

One of the proposed new streets shown on these
plans was named "Midhurst-avenue" thereon;
and the appellant received from the respondents
a notice of approval thereof dated the 19th July
1899.

The appellant in Aug. 1899 submitted to the
respondents plans and descriptions of sixty-two
dwelling-houses to be erected in this street, which
was named "Midhurst-avenue" on the plans also,
and he received from the respondents notice of
approval thereof dated the 14th Aug. 1899, and in
this notice of approval they state that they
"approve of certain intended works which you
propose to execute at Muswell Hill—namely,
building sixty-two dwelling-houses in Midhurst-
avenue—of which a notice, plan, and description
were deposited by you at the above offices, and
have this day been laid before us. This approval
is subject in all things to the several con-

ditions of the bye-laws and regulations of the council," &c.

The appellant in Sept. 1899 commenced to erect dwelling-houses in the street, which had not then been formed, but was only marked out with stakes. The street was subsequently formed.

At the date of the information ten of the houses had been completed, and twenty-six were in course of erection.

In an agreement entered into in July 1899 by the appellant and the respondents as to sewerage and other works on the building estate, the proposed new streets were referred to as "the intended new roads shown on the said plan," but in one clause "Midhurst-avenue," was mentioned, and in a number of written communications addressed to the appellant by the respondents subsequently to the 13th Sept. 1900, the street was referred to as "Midhurst-avenue," and, referring to this street, the following passages "alter the existing name," "the question of the renaming," and "the proposed new name" occurred therein.

The name "Midhurst-avenue" was put up by the appellant in the street at or near one end of it by means of a notice board affixed to a post. The street had not been known by any other name than that of "Midhurst-avenue" when the respondents proposed to name it "Collingwood-avenue," but it had been referred to as "Midhurst-avenue" in leases and agreements of tenancy relating to houses therein.

Adjoining this building estate was a large house known for many years as "Midhurst," and on the 13th Sept. 1900 the owner of this house objected to the street in question being called "Midhurst-avenue."

There is no street in the district called "Midhurst" other than this street called "Midhurst-avenue"; and no confusion or inconvenience arose from the street being so named.

The respondents on the 24th Sept. 1900 wrote to the appellant in reference to Midhurst-avenue, and, after adverting to an interview in the matter, desired to have at the earliest date the name that the appellant would desire to substitute for "Midhurst-avenue" in the event of their committee deciding to alter the existing name; and the respondents subsequently suggested that the street should be called "Collingwood-avenue." The appellant objected to it being called "Collingwood-avenue," and gave notice in writing of his objection to the respondents.

After failing to agree with the appellant as to the name of the street, the respondents on the 5th Nov. 1900 resolved that it should be called "Collingwood-avenue," and informed the appellant of their intention to put up that name in the street.

The appellant disputed the right of the respondents so to do, and repeated his objection to the intended alteration, and informed the respondents that he would at once remove the name of "Collingwood-avenue" if affixed to his property in the street.

The respondents on the 27th Nov. 1900 affixed a board, with the name of "Collingwood-avenue" thereon, to a house at the end of the street of which the appellant was the owner.

The appellant on the same day caused the board bearing the name of "Collingwood-avenue," which had been attached to his building by the

respondents, to be painted over and the name obliterated.

A petition signed by all the owners of property in the street was presented to the respondents after the information was preferred, objecting to the street being called "Collingwood-avenue" instead of "Midhurst-avenue."

The respondents contended: (1) That they were entitled to determine the name by which a new street in their district was to be known; (2) that they determined that the street was to be known by the name of "Collingwood-avenue," and were entitled accordingly to cause such name to be put up on the appellant's house; (3) that they never determined that the street was to be known by the name of "Midhurst-avenue"; (4) that if they had determined that the street was to be known by the name of "Midhurst-avenue" (which they did not admit), they were entitled to alter such name if they thought proper, and to cause another name to be put up; (5) that the appellant was not entitled to pull down or deface the name put up by the respondents.

The appellant contended: (1) That the name of the street was "Midhurst-avenue," and not "Collingwood-avenue"; (2) that the respondents assented to and acquiesced in the name of "Midhurst-avenue," approved plans and descriptions of the proposed street and houses bearing that name, and determined, so far as any determination was necessary, that the name of the street should be "Midhurst-avenue"; (3) that the respondents had no power to alter the name of the street from "Midhurst-avenue" to "Collingwood-avenue," either contrary to the wishes of the owners of property in the street or at all; (4) that the action of the respondents in putting up the name of "Collingwood-avenue" in the street as the name by which it should be known, and for that purpose affixing a board bearing that name to the property of the appellant, was *ultra vires* of the respondents and an illegal act on their part; (5) that the appellant was therefore not guilty of any offence under the Towns Improvement Clauses Act 1847, or at all, in causing the board bearing the name "Collingwood-avenue" to be removed from his house.

The justices were of opinion that the respondents had power under sect. 64 of the Towns Improvement Clauses Act 1847 to determine that the street should be known by the name of "Collingwood-avenue," and for that purpose to put up a board bearing that name upon the appellant's house notwithstanding the objections of the appellant thereto, and notwithstanding their previous approval of the plans and description and the other facts herein mentioned, and, further, that, notwithstanding the fact that the street had been named "Midhurst-avenue" by the appellant, the respondents had power to alter that name, and that the appellant was guilty of an offence under the Act in causing the name to be defaced.

The question for the opinion of the court was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law. If the court should answer the question in the affirmative, then the conviction was to stand; if in the negative, the conviction was to be quashed or the case remitted to the justices with the opinion of the court thereon.

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The Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34) provides, with respect to naming the streets and numbering the houses :

Sect. 64. The commissioners shall from time to time cause the houses and buildings in all or any of the streets to be marked with numbers as they think fit, and shall cause to be put up or painted on a conspicuous part of some house, building, or place at or near each end, corner, or entrance of every such street the name by which such street is to be known; and every person who destroys, pulls down, or defaces any such number or name, or puts up any number or name different from the number or name put up by the commissioners, shall be liable to a penalty not exceeding forty shillings for every such offence.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides :

Sect. 160. The provisions of the Towns Improvement Clauses Act 1847, with respect to the following matters; that is to say (1) with respect to naming the streets and numbering the houses . . . shall, for the purpose of regulating such matters in urban districts, be incorporated with this Act.

Sect. 316. All penalties incurred under the provisions of any Act incorporated with this Act shall be recovered and applied in the same way as penalties incurred under this Act.

Naldrett for the appellant.—Sect. 160 of the Public Health Act 1875 incorporates the provisions of sects. 64 and 65 of the Towns Improvement Clauses Act 1847, with respect to the naming of streets, and sect. 316 of the Act of 1875 provides as to the recovery of penalties, and sect. 157 gives the urban authority power to make by-laws as to the giving of notices and the submitting of plans by persons laying out new streets. Sect. 87 of the Metropolis Management Act 1862 contains—with respect to the metropolis—provisions as to the naming of streets by vestries and district boards, and it is observable that there is given in the section an express power to alter the name of a street to any other name. There is no such express power to alter the name of a street given in sect. 64 of the Act of 1847. The facts stated in the case show that the appellant had put up the name "Midhurst-avenue" as the name of the street; that it had been so described in the plans and in communications with the respondents, and in leases relating to houses therein, and that the respondents had acquiesced in that name; that it had been known by that name, and had never been known by any other name. That being the name of the street, the respondents had no power to alter it. The power of the urban district council to determine the name must depend upon statute; and in sect. 64 the council have power merely to put up the name, but they have no power to alter the name when once put up. The principles applicable in such a case are clearly laid down by Chatterton, V.C. in the Irish case of *Anderson v. Lord Mayor and Corporation of Dublin* (15 L. Rep. Ir. 410, at p. 419). In that case the householders in a certain street in Dublin brought an action for an injunction to restrain the corporation of Dublin from carrying into effect a resolution passed by them to change the name of the street, and in this action it was held by the Vice-Chancellor that the corporation had no power, either by statute or at common law, to change the name of the street, and that, even if they possessed such power, the court had jurisdiction to restrain them from so doing if

satisfied that the change would be injurious to the owners or occupiers of houses in the street. As pointed out by the Vice-Chancellor, the question must depend altogether on statute, and every owner of property has a common law right to call his property by any name he pleases, and the local authority have no power to change it unless such power is given in express terms by statute, which is not so in this case. The acts of the council were in the nature of a trespass to the appellant's property, and, according to the judgment of Chatterton, V.C., the appellant was justified in doing what he did.

Alexander Glen for the respondents.—The conviction by the justices was right. The question is whether when the local authority put up this name, the appellant had a right to pull it down. Under the latter part of sect. 64, the appellant clearly committed an offence in pulling down and defacing the name. The respondents' contention is, first, that the local authority is the proper authority to determine the name of a new street; secondly, this local authority did not accept the name given to the street by the owner; and, thirdly, even if on the facts they may be taken to have accepted the name given by the appellant, they have a right to change it. The local authority did nothing to concur in the name of the street being called "Midhurst-avenue" before they put up their own name. A person has no legal right to the exclusive use of any name he chooses to affix to his property, whether consisting of a house or land; and such a right is not known to the law: (per Jessel, M.B. in *Day v. Brownrigg*, 39 L. T. Rep. 553; 10 Ch. Div. 294). Therefore the appellant had no such common law right as is contended for to the exclusive use of the name. Sect. 64 itself says that the commissioners shall cause to be put up in each street the name by which the street is to be known, and in this case the respondents merely carried out this provision, a provision which is followed in other Acts dealing with the same subject, as in sect. 145 of the City of London Sewers Act 1848 (11 & 12 Vict. c. cxliii.) and in sects. 33 & 34 of the London Building Act 1894 (57 & 58 Vict. c. cccxiii.). Sect. 64 deals with the numbering of the houses as well as the naming of the streets, and provides that such numbering is to be done "from time to time"; and the reason for this is obvious from sect. 65. The Irish case of *Anderson v. Lord Mayor and Corporation of Dublin* (*ubi sup.*) is not in point. This was a new street, and the naming of it was the naming of a new street, whereas in that case there was no question as to the naming of a new street, but the question was as to the change of an old name. Chatterton, V.C. there says (15 L. Rep. Ir., at p. 422): "I express no opinion as to the naming of new streets, which plainly involves a different consideration." The appellant had no right to take the law into his own hands and pull down the name after the local authority had put it up. He cannot pull down or deface the name, and by so doing he committed an offence under the latter part of sect. 64. If he objects to the name, he must take the proper proceedings to enforce his objection. The real question is the right to name the street in the first instance. The section gives the local authority that right, and therefore what they did in putting up the name was not a trespass. The case is quite dis-

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tinguishable from the Irish case, as here there is no question of the change of name as there was in that case. Both on the wording of the statute and on grounds of convenience the local authority were right.

Naldrett in reply.

LORD ALVERSTONE, C.J.—In my opinion the Irish case of *Anderson v. Lord Mayor and Corporation of Dublin* (*ubi sup.*) is in no way an authority upon the point that is now before us. As has been pointed out by counsel for the respondents, the Vice-Chancellor there expressly said that he was not dealing with the case of new streets, as to which very different considerations might apply. When you are dealing with the case of altering the name of an old street, one can see at once that very great inconvenience and difficulty may arise if an alteration in the name is forced upon persons when they do not want it. Therefore, if this case had rested on a right claimed by the local authority to change the well-known name of an existing street, speaking for myself, I do not think they have the right to do so, although I do not suppose it is absolutely necessary to decide that point. The language in sect. 64, with which we are now dealing, is very different from the language used in other sections of other Acts, such as sects. 33 and 34 of the London Building Act 1894, to which our attention has been called. In those sections there is a power given to the local authority to alter the name; but I do not see under sect. 64 of this Act of 1847 any right to change the name of an existing street. The facts of this case, however, are very different, but I do not think, as I have said, that if the local authority were claiming to alter an existing name, the section gives them the right to do so. In this case, in the year 1899 the owner, the present appellant, was intending to lay out his estate for building purposes, and on his plans he called the street in question "Midhurst-avenue." That was brought to the knowledge of the local authority, but they exercised no judgment upon the matter as to that name. Some questions have been raised as to objection having been taken by some person, but we must take it that the local authority determined, and that they *bona fide* determined, that the street ought to be called "Collingwood-avenue." Having come to that determination, they then put up the board with the name of "Collingwood-avenue" thereon. Now, having regard to the duty put upon the commissioners by sect. 64, of putting up the name of the street, and having regard to the words in the latter part of the section that every person who pulls down or defaces the name so put up shall be liable to a penalty, I think it was not open to the appellant to do what he has done in this case—namely, deface the name of the street, and then say that he wished another name given to the street. I think, if he had a right as owner or proprietor to call this street "Midhurst-avenue," that he should have enforced his right by taking proper proceedings to restrain the local authority from putting up the board. I think that the statute does put upon the local authority in the first instance the duty to put up the name, and it imposes a penalty upon persons who pull down or deface that name. I do not think that the question whether the name was a rightful name, or was a wrongful name, should be decided

in proceedings like the present for defacing the name put up, *prima facie* lawfully, by the local authority. This was really a new street, and one can well imagine cases where, if there were several owners or occupiers of land or houses in a street, serious difficulty might arise as to what would be the proper name of the street. Although I think it would be better if the matter were made clear with regard to this particular class of district, by words which would be analogous to those used in the later Acts, such as the Metropolis Management Act 1862 or the London Building Act 1894, yet I do not think we can say, as matter of law, that the local authority were wrong in putting up the name, and that the appellant was justified in painting it out when they had put it up. I think, therefore, that the justices were right, and that this appeal must be dismissed.

LAWRANCE, J.—I agree.

Appeal dismissed.

Solicitor for the appellant, *Alan M. M. Forbes*.
Solicitors for the respondents, *Tatham and Hardy*.

Monday, May 13, 1901.

(Before Lord ALVERSTONE, C.J., LAWRENCE and PHILLIMORE, JJ.)

WEATHERITT (app.) v. CANTLAY (resp.). (a)
Metropolis—House let in lodgings or occupied by members of more than one family—Bye-laws—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 94.

A block of artisans' dwellings was divided into double and single roomed tenements, each of which were occupied by one family. A w.c., sink, water, and dust shoot were furnished on each floor for the use in common of three or four tenements. The landlord did not live on the premises, but there was a caretaker who (inter alia) cleaned the common passages, staircases, and w.c.'s.

Held, that the block was not a house let in lodgings or occupied by members of more than one family within sect. 94 of the Public Health (London) Act 1891.

CASE stated on a summons on a complaint preferred by the appellant under bye-laws made by the vestry with respect to houses let in lodgings or occupied by members of more than one family, pursuant to sect. 94 of the Public Health (London) Act 1891, charging the respondent that he, being the landlord of the lodging-house, Artisans' Dwellings, Gun-street, failed to furnish the sanitary authority after notice with particulars with respect to such house, contrary to the bye-laws.

Upon the hearing of the complaint the following facts were proved:—

Artisans' Dwellings, Gun-street, consist of two blocks of buildings, the fronts of which abut on Gun-street and the backs on another street. No. 2 block, the subject of the summons and complaint, is entered directly from Gun-street by a single entrance. There is a front door to the entrance, but no means of fastening the same beyond a Norfolk latch. The figure 2 is affixed to the transom of the door frame. The entrance passage branches into two passages about the centre of the building, and there are two double-

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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duty thus placed upon them, district councils may, by sub-sect. 3 of the same section, institute or defend any legal proceedings, and generally take such steps as they may deem expedient. I do not say that it would not be possible to construe the words of this sub-section as meaning merely that a district council can take or defend proceedings in their own name; but, at the same time, I am of opinion that this would be too narrow a reading of it. To begin with, there are many proceedings taken in the name of the Attorney-General which in reality are proceedings by and on behalf of local authorities. And again, actions may be brought against the servants of local authorities. During the argument I asked Mr. McCall did he contend that the district council could not, under sect. 26 (3), provide funds for the defence of a servant of theirs who was sued for removing an obstruction from a public way? and he hesitated long before he answered, as he well might. An action could, of course, be brought against the surveyor of the district council for removing such an obstruction by order of the council, and if such an action were brought I cannot but think that the council might, in the discharge of the duty in relation to obstruction of public rights of way which is imposed on them by sect. 26 (1), defray the costs of such an action. But to cover the present case we must go a step further. The obstruction here has been removed by persons who were not servants or officers of the district council. Even under these circumstances I think the council may, under sect. 21 (3), provide funds for defending the action, if they think that such a course is expedient. This being the position of the district council, is that of the county council the same after the district council have declined to take action? That depends on sect. 26 (4). That sub-section is not drafted in language so precise as the earlier sub-sections, but the present case does not appear to me to be one where any conclusion can be based on any difference in the language. I think that, as far as this case is concerned, the county council are in the same position as the district council were before they refused to interfere, and that consequently the county council can lawfully contribute to the costs of the defendants in the action, because, upon the resolution for the transfer of powers from the district to the county council, the latter became entitled to the rights given to the district council by sect. 26 (3). It has been argued that the language of sub-sect. 2 of sect. 26, which relates to the aiding of persons in maintaining rights of common, does not give a county council a general right to commence litigation, but seems to indicate that they may contribute to the costs of persons maintaining rights of common. It is said that the presence of this sub-section shows that it is only with regard to these particular rights that the council are justified in giving such aid. Whether the right as to commons is really so limited I will not decide, but I am satisfied that since, under sub-sects. 1, 3, 4, and 5, a duty is imposed on as well as a power given to the district council and to the county council in their place to defend a right of way and rid it of obstruction, we cannot properly limit that power upon the ground that in the instance of the maintenance of common rights, under sub-sect. 2, the duty to aid other people in the assertion and

defence of their rights may possibly be of a permissive character.

LAWRANCE, J.—I agree.

Rule discharged.

Solicitors for the county council, *Sharpe, Parker and Co.*, for *C. Foster*, Norwich.

Solicitors for the defendants in Chancery, *Church, Rendell, and Co.*, for *J. A. Parsons*, King's Lynn.

Solicitors for Sir Edward Green, *Burton, Yeates, and Hart*, for *Beloe and Beloe*, King's Lynn.

Tuesday, April 23, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRANCE, J.)

ROBERTSON v. KING. (a)

Local government—Public health—Dwelling-houses—Unfit for human habitation—Uninhabited—Closing order—Housing of the Working Classes Act 1890 (53 & 54 Vict. c. 70), ss. 29, 32.

By sect. 32 (1) of the Housing of the Working Classes Act 1890, every local authority is put under a duty to ascertain whether any dwelling-house in its district is in a state so dangerous or injurious to health as to be unfit for human habitation, and if on the representation of the medical officer of health any dwelling-house appears to them to be in such a state, to forthwith take proceedings against the owner or occupier for closing the dwelling-house. By sub-sect. 2 of the same section, such proceedings may be taken whether the dwelling-house be occupied or not. By sect. 29, "dwelling-house" in the Act means "any inhabited building."

At the hearing of an application for an order under sect. 32 for closing certain houses, it was proved that the houses in question were in such a state that if they had been inhabited they would have been so dangerous to health as to be unfit for habitation, but that, though built and formerly used as dwelling-houses, they had not in fact been occupied for the past five and a half years, and there was no evidence to show that the owner intended to permit them to be occupied again:

Held, that a closing order should be made, and that non-occupancy did not in itself prevent the application of the powers given by sects. 32 and 33 to what was in the ordinary sense a dwelling-house.

CASE stated by the stipendiary magistrate of Sheffield on appeal from a refusal by the learned magistrate to make a closing order under sect. 32 of the Housing of the Working Classes Act 1890 (53 & 54 Vict. c. 70).

Housing of the Working Classes Act 1890:

Sect. 32 (1) It shall be the duty of every local authority to cause to be made from time to time inspection of their district with a view to ascertaining whether any dwelling-house therein is in a state so dangerous or injurious to health as to be unfit for human habitation, and if on the representation of the medical officer . . . any dwelling-house appears to them to be in such state to forthwith take proceedings against the owner or occupier for closing the same . . . (2) Any such proceedings may be taken for the express purpose of causing the dwelling-house to be closed whether the

(a) Reported by J. ANDREW NTRAHAN, Esq., Barrister-at Law.

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same be occupied or not, and upon such proceedings the court of summary jurisdiction may . . . make a closing order.

By sect. 29 the expression "dwelling-house" in the second part of the Act (which is the part which contains sect. 32) means, unless the context otherwise requires, "any inhabited building."

The appellant in the case stated was the medical officer of health for the city of Sheffield. He had applied under sect. 32 for a closing order in respect of three dwelling-houses, of which the respondent was owner, on the ground that they were used as dwelling-houses and were in a state so injurious to health as to be unfit for human habitation. A summons being issued, it appeared at the hearing that the premises, which were described in the medical officer's complaint as three dwelling-houses situate in a corner of a court in Sheffield, and as being used as dwelling-houses, were old buildings with their appurtenances, and that for a long time after they were built they had been occupied or inhabited, and had been dwelling-houses within the definition of that expression in sect. 29 of the Act. It was proved and admitted that in their present condition they were unfit for human habitation within the meaning of the Act, inasmuch as they were in a filthy, ruinous, and dilapidated state, and that there were filthy and other accumulations upon them which might probably be a nuisance, as to which proceedings might have been taken by the corporation under sects. 91, 94, and 97 of the Public Health Act 1875.

It appeared, however, that about five and a half years previously the houses had been closed to all purposes of human habitation by the then owner, and had not since then been used or reopened for such purposes.

Evidence was called that during the five and a half years the premises had never been used for purposes of human habitation except possibly by a chance person or vagrant creeping in for a sleep, and even this had never been actually known to happen.

It further appeared that the respondent had no intention of having the premises used for human habitation in their present condition; but it did not appear whether he had formed any intention as to rebuilding or repairing them or turning them to other purposes.

In support of the application for the closing order it was contended that the premises the subject of the complaint were dwelling-houses within the meaning of the Housing of the Working Classes Act 1890, Part 2; that sect. 29, which defines a dwelling-house in that part as "any inhabited building," provides that such definition shall apply "unless the context otherwise provides"; that under sect. 32 (2) the context otherwise requires and provides that the provisions of sect. 32 shall apply whether the premises be occupied or not; that in the present case the buildings had been inhabited dwelling-houses, and that there was no evidence of permanent abandonment of the buildings as dwelling-houses, inasmuch as the evidence showed that they had not been adapted for any other purpose, and might at small cost and in the course of a day or two be made fit for human habitation.

The learned magistrate refused to make a closing order. He was of opinion that as the

premises had been so long closed to human habitation, and placed in a position in which a closing order would place them, whatever nuisance proceedings the respondent might be liable to, there was a want of foundation for a closing order, though he thought that if the owner had caused or allowed them to be reopened for purposes of human habitation a closing order might be made whether they were occupied or not.

The question for the opinion of the court now was whether the learned magistrate was right in refusing the closing order.

Reginald Brown, K.C. for the appellant.—I submit that the contention for the appellant in the court below is unanswerable. It is true sect. 29 defines "dwelling-house" as "any inhabited building," but that definition is made expressly subject to the nature of the context. Here the context is clear. Sect. 32 is to apply to dwelling-houses whether occupied or not. Here we have houses which were built for and used for dwelling-houses, and have never been used for anything else, and there is no evidence the owner has definitely abandoned the intention of ever again using them as dwelling-houses. I submit therefore they are still dwelling-houses though not occupied, and that they come within the precise words of sect. 32 (2). Moreover, the learned magistrate was mistaken in thinking that the mere ceasing to use the houses as human habitations has the same effect as a closing order. By sect. 33 of the Act the corporation may after a closing order direct under certain circumstances the demolition of the houses; and see sched. 4 of the Act as to varying order.

The respondent did not appear.

Lord ALVERSTONE, O.J.—I am of opinion that the learned magistrate ought to have made the closing order which was here applied for. While in no way straining the words of the Act the object of the Act should be carried into effect, and the object of the Act is that if after due notice the owner does not put the houses complained of into a proper state of repair, the powers given by the Act are to be exercised. The view of the learned magistrate seems to have been that because for five and a half years the premises had not in fact been inhabited they were therefore not inhabited buildings within sect. 29 of the Housing of the Working Classes Act 1890. But that definition was never intended to limit the ordinary meaning of the expression "dwelling-house," and sect. 32 expressly includes dwelling-houses which are unoccupied. Here the houses were *prima facie* dwelling-houses, and the fact that they have been for five and a half years uninhabited does not prevent the court from making an order for closing them. It is not necessary to consider what length of non-occupancy would be sufficient to prevent a house being looked upon as a dwelling-house within sects. 32 and 33. Certainly there appears to me to be in this case no objection to the closing order. Practically it amounts to this, that if the owner does not want the houses pulled down he must put them in order. The appeal must be allowed.

LAWRENCE, J.—I agree.

Appeal allowed.

Solicitors for the appellant, *R. F. C. and C. L. Smith*, for *Sayer*, Sheffield.

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POLL v. DAME.

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May 14 and June 13, 1901.

(Before Lord ALVERSTONE, C.J., LAWRENCE
and PHILLIMORE, JJ.)

POLL v. DAME. (a)

Merchant shipping—Foreign ship in British port—Desertion of foreign seaman—Inducing such desertion—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 236 (1).

Sect. 236 (1), which makes it an offence to persuade or attempt to persuade "a seaman or apprentice to . . . desert from his ship," does not apply to the persuading or attempting to persuade a foreign seaman to desert a foreign ship lying in a British port.

P. was a foreign sailor serving on board a Russian ship. While the Russian ship was lying in a British port, A. persuaded him to desert. A. was afterwards prosecuted for an offence under sect. 236 (1) and convicted.

Held, that the conviction was wrong.

CASE stated by the stipendiary magistrate for the county borough of Cardiff.

The respondent was the master of the Russian ship *Lennox*, which at the time of the alleged offence was lying at the West Dock at Cardiff. The *Lennox* was not registered or owned in the United Kingdom, and was not a British ship but a foreign ship.

On the 25th Dec. 1900, one Johannes Pilder, who was then a foreign seaman lawfully engaged on the *Lennox*, met the appellant Poll, a boarding master living at Cardiff. At this interview the appellant persuaded Pilder to desert from the *Lennox* and to join another ship where he would receive better wages. Pilder did then desert from the *Lennox*, and on the following day was taken to the railway station at Cardiff by the appellant, who, after providing him with a ticket, saw him leave the station in a train for Bristol in the company of five other sailors and an agent of the appellant. Pilder was subsequently arrested, on a warrant, as a deserter from the *Lennox*.

Upon the hearing of the information, charging the appellant, under sect. 236 of the Merchant Shipping Act 1894, with having unlawfully persuaded Pilder to desert from his ship, it was contended on behalf of the appellant that the magistrate had no jurisdiction to hear and determine the case, the offence being charged in respect of a foreign seaman engaged on a foreign ship, and that by sects. 260 and 261 of the Merchant Shipping Act 1894, Part 2 of the Act (under which head the section creating the offence is classified), was restricted in its application to those ships mentioned in those sections—viz., sea-going ships registered in the United Kingdom and sea-going British ships registered out of the United Kingdom.

The magistrate was of opinion that sect. 236 was applicable to foreign ships, that the words "his ship" in that section were as general as the words "any ship in the United Kingdom" in sect. 111, and that, as both sections are classified under Part 2 of the Act, the present case was governed by *Reg. v. Stewart* (80 L. T. Rep. 660). He therefore convicted the appellant, and fined him 5*l.* and costs, but

stated this case for the opinion of the High Court.

Bailhache for the appellant.

H. Sutton for the respondent.

The arguments of counsel appear sufficiently for the judgment.

Besides the authorities therein mentioned, counsel cited

Thomson v. Hart, 18 So. Sess. Cas. 4th ser., Just. 3;
Bank of England v. Vagliano, 64 L. T. Rep. 353;
(1891) A. C. 353;

The Fulham, 81 L. T. Rep. 19; (1899) P. 251, at p. 259.

June 13.—PHILLIMORE, J. read the following judgment of the court.—This is a case stated by the stipendiary magistrate for Cardiff, and upon it we have to determine whether it is an offence under the Merchant Shipping Act of 1894 to persuade in England a foreign seaman to desert from a foreign ship when such ship is lying in an English port. The language of sect. 236, subsect. 1, is as follows: "If a person by any means whatever persuades or attempts to persuade a seaman or apprentice to neglect or refuse to join or proceed to sea in or to desert from his ship, or otherwise to absent himself from his duty, he shall for each offence in respect of each seaman or apprentice be liable to a fine not exceeding 10*l.*" By sect. 742 "seaman" includes every person (except masters, pilots, and apprentices, duly indentured and registered) employed or engaged in any capacity on board any ship. The language of the Act is thus wide enough to cover this case; but it is contended on behalf of the appellant that Part 2 of the Merchant Shipping Act, in which this section is found, applies only (except in certain specified places) to British ships, and the word "ship" in sect. 236 must be read as meaning British ship. Sect. 236, making it criminal to persuade desertion, may be looked upon as supplementary to the earlier sections, which made desertion itself punishable. They are sects. 221 to 224, both inclusive, and sect. 238. Sects. 221 to 224 are in equally general terms, and they follow upon sect. 220, which contains express words limiting its own application to the crews of British ships; there is, therefore, some ground for supposing that sects. 221 to 224 were not intended to be so limited. The sections as to the application of Part 2 are sects. 260 to 266, both inclusive. By sect. 260 this part "shall, unless the context or subject-matter requires a different application, apply to all sea-going ships registered in the United Kingdom, and to the owners, masters, and crews of such ships," with certain qualifications as to lighthouses, vessels, yachts, and fishing-boats, which are dealt with in sects. 262 and 263. By sect. 261 this part shall, unless as aforesaid, apply to all sea-going British ships registered out of the United Kingdom, and their owners, masters, and crews in respect of certain specified matters, one of which is discipline. It will be important to note that this specification of details occurs only in the section which deals with British ships registered out of the United Kingdom, and that there is the same arrangement in sect. 109 of the Act of 1854, which in substance corresponds with the two sects. 260 and 261 of the Act of 1894. This is not unimportant in view of some observations of Blackburn, J. in the case of *Leary v.*

Lloyd (3 E. & E. 178). Sect. 264 enables colonial Legislatures to adopt any provisions of this part which do not otherwise apply, and sect. 265 provides for the case of an apparent conflict of laws "in any matter relating to a ship or to a person belonging to a ship." This section would meet the case of a conflict between the laws of different parts of His Majesty's dominions; but it might have a wider application in the case of any sections of Part 2 of the Act which apply to foreign ships. Sect. 266 is not material to this case. It is clear, therefore, that as a general rule this part of the Act is not to apply to foreign ships—that is to say, it is not to be enforced against foreign ships or owners of foreign ships, or persons on board foreign ships, or as to matters done or to be done on foreign ships. But it does not, therefore, necessarily follow that it does not apply to persons who have deserted from foreign ships or to English subjects who in England have abetted such desertion. A formidable argument, however, against the application of the section as to desertion from foreign ships is derived from sect. 238. By this section, where it appears to the Crown "that due facilities are or will be given by the Government of any foreign country for recovering and apprehending seamen who desert from British merchant ships in that country," the Crown may by Order in Council direct that this section shall apply, and where it applies and a seaman deserts when within any of the king's dominions from a merchant ship belonging to a subject of that country, "any court, justice, or officer that would have had cognisance of the matter if the seaman had deserted from a British ship shall, on application of a consular officer of a foreign country, aid in apprehending the deserter," and may "order him to be conveyed on board his ship or delivered to the master . . ." It is said that it is only under this section that desertions from foreign ships can be dealt with by an English court, and also that this section would be unnecessary if the general provisions of sects. 221 to 224 applied to foreign as well as British ships. The third sub-section of sect. 238 inflicts a penalty not exceeding 10*l.* for harbouring or secreting a deserter who is liable to be apprehended under this section. This is said to overlap the second sub-section of sect. 236. There is no sub-section in sect. 238 corresponding with sub-sect. 1 of sect. 236, under which the information in the present case is laid. The weight of this argument is to a certain extent lessened by the consideration that the Act of 1894 is a consolidating Act, and includes not only the Act of 1854, but several other Acts. Sect. 238 is a re-enactment of the Foreign Deserters Act 1852 (15 & 16 Vict. c. 26), an earlier Act than the Act of 1854. It may well be that the Act of 1854 did make that of general application which had only limited application by the Act of 1852; and in some respects the special provisions of the Act of 1852, as reproduced in sect. 238, are different from the general provisions in the Act of 1894. Still, in our opinion, having regard to the terms of sect. 221, the general sections as to deserters, 221 to 224, do not apply to cases which come, or may come by the operation of an Order in Council, under sect. 238. The procedure is different; the seaman to whom sect. 222 applies is to be conveyed on board his ship, not by warrant of the court, but by the master or certain other

persons, with or without the assistance of a police constable, and may require to be taken before a court to be dealt with according to law. More complicated provisions are applied to cases under sect. 223. But under sect. 238 there is to be a warrant under which the man is to be conveyed on board his ship, and when the warrant has been issued the seaman apparently has no direct right to have recourse to the court which issued it. The penalty for harbouring is different, and in sect. 238 there is a significant proviso to which we have not yet referred excepting the case of a seaman who is a slave. There is no such proviso in sects. 221 to 224. We therefore come to the conclusion that sects. 221 to 224 apply only to British ships, and that the offence of desertion from a foreign ship is punishable only under sect. 238, and where that section has been applied by Order in Council. Similarly, we must hold that the offence of harbouring a deserter from a foreign ship comes, if at all, under sub-sect. 2 of sect. 238, and does not come under sub-sect. 2 of sect. 236. Holding this, can we hold that sub-sect. 1 of 236 applies in respect of foreign ships? We think it is impossible so to hold. The words "seaman" and "ship" in sub-sect. 1 must have the same limited meaning as the same words in sub-sect. 2. This view is in accordance with the decision of the Court of Queen's Bench in the year 1860 in the case of *Leary v. Lloyd* (*sup.*) upon the parallel section (257) of the Act of 1854. We have, however, not held ourselves concluded by that decision, but have reconsidered the matter upon the following grounds: First, the case was only argued on one side; secondly, Blackburn, J. who delivered the judgment of the court, seems to have thought that there was something special in the sections about discipline limiting their application, though possibly not the application of the other section in the other part of that Act, to British ships, and we think this is not so. Thirdly, we think the case of *The Milford* (Swabey, p. 362) was not brought to the notice of the court. Now, the case of *The Milford* is certainly an authority for not restricting Part 3 of the Merchant Shipping Act 1854 to British ships. Dr. Lushington, in dealing with the argument that the 109th section of the Act of 1854 restrained the application of sect. 191, says, "The language there used, however, is affirmative, stating the cases to which the third part of the Act shall extend; there are no negative words which extend to show that the court should not apply sect. 191 to foreign masters and seamen." This observation is perfectly general, and the authority of Dr. Lushington on shipping matters and on the construction of Acts was so high that it is unfortunate that *The Milford* case was not brought before the Court of Queen's Bench before it decided *Leary v. Lloyd* (*sup.*). It should be added that the law as decided in *The Milford* case has been accepted ever since, and that the remedies given by sect. 191 were, and those of the corresponding section (sect. 167 (1) of the Act of 1894 are, always afforded in proper cases to masters of foreign ships. On the other hand, it may be said Dr. Lushington's judgment may well be supported on other grounds as well, and that he relied on other grounds as well. The decision may rest upon the ordinary rule as to the application of the *lex fori*. Again, the effect of sect. 191 was to enable the master to sue in the Admiralty Court

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and thereby to obtain process *in rem* against the ship. By the ordinary maritime law as administered in the other countries he had this right always, just as a seaman had. The English law had been exceptional in denying him this remedy, and in denying it to him because of a point of internal jurisdiction. When sect. 191 brought the maritime law of this country into line with that of other countries it would have been absurd that the anomaly thus removed from municipal cases should have been left for foreign ones. These considerations certainly affect the weight of *The Milford* case as an authority in the present case. On the other hand, the case of *Cope v. Doherty* (2 De G. & J. 614) and the class of cases represented by *The Zollverein* (Swabey, 96) show that there were other parts of the Merchant Shipping Act 1854 which our courts have declined to hold to be applicable to foreign ships. We do not, however, decide this case upon the ground that no sections in Part 2 of the Act of 1894 apply to foreign ships. We agree with our brethren Darling and Channell in the case of *Reg. v. Stewart* (80 L. T. Rep. 660; (1899) 1 Q. B. 964) that there may be acts done in relation to foreign ships which when done by English subjects in England come as much under the present provisions of the Merchant Shipping Act 1894 as if they were done in relation to English ships. We think that the case they had to deal with was one of such cases. We ground our decision upon the fact that this part of the Act (Part 2) contains a special provision for the case of desertion from foreign ships, and has thus shown that its general provisions are limited to desertion from British ships. We hold, therefore, the appellant was not liable to conviction under sect. 236 of the Merchant Shipping Act 1894, and that the appeal must be allowed with costs.

Conviction quashed.

Solicitor for the appellant, *Hier Jacob*, for *Morgan Rees*, Cardiff.

Solicitor for the respondent, *Solicitor of the Board of Trade*.

Thursday, May 2, 1901.

(Before Lord ALVERSTONE, C.J. and
LAWRENCE, J.)

BARNETT v. POPLAR BOROUGH. (a)

Tramway—Highway—Obligation to repair—Contract with road authority—Transfer of obligation—Tramways Act 1870 (33 & 34 Vict. c. 78), ss. 28, 29, 55.

By sect. 28 of the Tramways Act 1870 the promoters of a tramway are placed under statutory liability to keep in repair in such manner as the road authority shall direct so much of the road as lies between the rails of the tramway, and for 18in. beyond the rails on each side of the tramway.

By sect. 29 they may enter into agreements with the road authority with respect to the paving and keeping in repair of the whole or any portion of the roadway of any road on which they lay any tramways.

By sect. 55 they and their lessees are liable in damages for any accidents happening in consequence of any of their works.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

Held, that when a tramway company enters into an agreement with the road authority by which the latter undertakes to keep in repair the roadway of the roads on which the tramway lies, the liability of the company for accidents arising through such roadway not being kept in repair is thereby transferred to the road authority along with the liability of the company to keep such roads in repair.

Dictum of Lord Coleridge, C.J. in Howitt v. Nottingham Tramways Company (50 L. T. Rep. 99; 12 Q. B. Div. 16) approved and applied.

APPEAL from a decision of the judge of Bow County Court.

On the 6th Sept. 1900 the plaintiff's van while proceeding along the Bow-road struck against the rail of the tramway belonging to the North Metropolitan Tramways Company, and sustained injury. It was alleged that the rail projected an inch and a half above the level of the street owing to failure on the part of the defendants to keep the street in proper repair.

By sect. 28 of the Tramways Act 1870 (33 & 34 Vict. c. 78), the promoters of tramway companies are put under a liability to maintain and keep in good condition and repair in such manner as the road authority shall direct so much of the road as lies between the rails of the tramway and for 18in. beyond the rails on each side of the tramway.

By sect. 29 the road authority on the one hand and the promoters on the other hand may from time to time enter into and carry into effect "contracts, agreements, or arrangements, with respect to the paving and keeping in repair of the whole or any portion of the roadway of any road on which the promoters shall lay any tramway. . . ."

By sect. 55:

The promoters or lessees . . . shall be answerable for all accidents, damages, and injuries happening through their act or default, or through the act or default of any person in their employment, by reason or in consequence of any of their works or carriages, and shall save harmless all road and other authorities, companies, or bodies collectively and individually . . . from all damages and costs in respect of such accidents, damages, and injuries.

In pursuance of sect. 29 of the above Act, the North Metropolitan Tramways Company had contracted with the defendants (the corporation of Poplar Borough), as the road authority of the district, that the latter should keep in proper repair that part of the road which the company were liable to repair under sect. 28.

The plaintiff brought this action in the County Court for damages for the injury to his van, and put in the contract between the tramway company and the defendants, but the judge nonsuited the plaintiff.

The plaintiff appealed.

Abinger for the plaintiff.—When the road authority took over under the contract the obligation of the company to repair the road, it also took over the liability of the company to compensate persons injured through neglect to repair. An agreement under sect. 29 frees the tramway company from liability for non-repair. That was decided in *Howitt v. Nottingham Tramways Company* (50 L. T. Rep. 99; 12 Q. B. Div. 16). In delivering judgment in that case Lord Coleridge,

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C.J. expressed a strong opinion that the road authority took over the liability of which the company had become freed. This case has since been followed by the Court of Appeal in *Aldred v. West Metropolitan Tramways Company* (65 L. T. Rep. 138; (1891) 2 Q. B. 398), when Lord Coleridge's decision was approved without any limitation or qualification as to this dictum.

Chester Jones for the defendants.—As public authorities the defendants were not liable at common law for non-repair:

Cowley v. Newmarket Local Board, 67 L. T. Rep. 486; (1892) A. C. 345.

Nothing but express statutory enactment could alter their position in this respect:

Municipality of Pictou v. Geldert, 69 L. T. Rep. 510; (1893) A. C. 524.

There was no express provision in the Tramways Act 1870 making a road authority who took over the repair of the road under sect. 29 liable for non-repair, and Lord Coleridge's opinion, to the effect that the liability of the tramway company went over under a contract within that section, was merely *obiter dictum*. Though the decision in *Howitt v. Nottingham Tramways Company* (*sup.*) was approved by the Court of Appeal in *Aldred v. West Metropolitan Tramways Company* (*sup.*), nothing was there said as to Lord Coleridge's dictum.

Lord ALVERSTONE, C.J.—I think that the County Court judge was premature in nonsuiting the plaintiff. But for the decisions in *Howitt v. Nottingham Tramways Company* (*sup.*) and in *Aldred v. West Metropolitan Tramways Company* (*sup.*), there would be much that could be said in favour of the view that the action could be brought against the tramway company, for the liability imposed upon the tramway company is a statutory liability, and it might, I think, be reasonably contended that, being statutory, it was a liability it could not rid itself of. But in *Howitt v. Nottingham Tramways Company* (*sup.*) it was expressly laid down that where, as here, the tramway company enter into a contract with the road authority under sect. 29 of the Tramways Act 1870, and the road authority undertake the repair of the road on which the tramway is laid, the tramway company are exonerated from liability under the Act. The judgment of Lord Coleridge goes further, and declares that the liability is transferred to the road authority by the contract under sect. 29. It is said that this opinion was not necessary to the decision. Nevertheless, it seems to me more than a mere dictum; it is very material to the decision, since it would be a very strong thing to say that this liability being imposed by Parliament the tramway company can get rid of by an agreement which does not impose it on any other body. That would be the result if the tramway company could divest themselves of liability without the road authority becoming liable instead. When *Howitt v. Nottingham Tramways Company* (*sup.*) came before the Court of Appeal in *Aldred v. West Metropolitan Tramways Company* with the express object of having that decision reviewed, it was affirmed. If the Court of Appeal differed from the dictum of Lord Coleridge it certainly seems surprising under the circumstances that it did not say so.

I think, therefore, that the County Court judge stopped the case too soon, and that the nonsuit is wrong. The case must, therefore, go back for a new trial.

LAWRENCE, J.—I agree.

Appeal allowed.

Solicitor for the appellant, F. George.

Solicitor for the respondents, C. G. Bradshaw.

Saturday, May 18, 1901.

(Before KENNEDY and PHILLIMORE, JJ.)

MAYOR, &C., OF THE BOROUGH OF HUNTINGDON AND OTHERS v. HUNTINGDON COUNTY COUNCIL. (a)

Local government—Borough without separate commission of the peace—Justices' clerk—Proper authority to appoint—Payment of clerk's salary—Unappropriated fines and fees in borough—County Council entitled to receive—Justices' Clerks Act 1877 (40 & 41 Vict. c. 43), s. 5—Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 154, 159.

Sect. 159 of the Municipal Corporations Act 1882, which imposes upon the justices of a borough the duty of appointing their clerk, applies only to boroughs which have a separate commission of the peace, and therefore the mayor and ex-mayor of boroughs which have no separate commission of the peace are not entitled under that section to appoint a justices' clerk.

In the case of boroughs having no separate commission of the peace, a justices' clerk cannot be appointed either by the mayor and ex-mayor, acting in conjunction with the county justices, usually acting for the petty sessional division in which the borough is situated, or by such county justices themselves, to perform solely the duties of clerk in matters arising within the borough; and if a petty sessions court be held in the borough, it must be held for the petty sessional division.

The county justices of the petty sessional division in which such a borough is situated (including the mayor as a county justice under sect. 22 of the Local Government Act 1888) are the proper persons to appoint a clerk for that division; and, if they bring themselves within the provisions of sect. 5 of the Justices' Clerks Act 1877, by appointing more than one place for holding petty sessions in the petty sessional division, they may appoint a second clerk for that division; but the clerk or clerks so appointed are clerks for the petty sessional division and not for the borough; and the salaries of such clerks are payable by the county council, who are entitled to receive the unappropriated fines and fees imposed in petty sessions held within such borough.

SPECIAL CASE stated by consent in an action pursuant to Order XXXIV., r. 1.

The plaintiffs were the Mayor, Aldermen, and Burgesses of the Boroughs of Huntingdon, Godmanchester, and St. Ives respectively, and the defendants were the County Council of Huntingdonshire.

The following statement of facts and questions to be submitted to the court were agreed upon by

(a) Reported by W. W. ORR, Esq., Barrister-at-Law

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the above-named borough councils and county council:

The boroughs of Huntingdon, Godmanchester, and St. Ives are all situate in the county of Huntingdon, and each of them has a population of less than 10,000. The several parishes in and forming part of the boroughs are assessed to the county rate levied for the county in like manner as other parishes within the county.

The two first-named boroughs are very ancient boroughs. The borough of St. Ives was incorporated in the year 1874. All three boroughs are governed by the provisions of the Municipal Corporations Act 1882, and are policed by the county force.

None of these boroughs has a separate commission of the peace, and the jurisdiction of the Quarter Sessions of the county extends to all three.

The county of Huntingdon is divided into four petty sessional divisions. The boroughs of Huntingdon and Godmanchester are situate within the Leightonstone petty sessional division, and the borough of St. Ives is situate within the Hurstingstone petty sessional division. There is one salaried clerk to the justices for each of the Leightonstone and the Hurstingstone petty sessional divisions. Each of such clerks is appointed by the justices acting in and for the petty sessional division in which he is clerk, and his salary is paid by the Huntingdonshire County Council.

The justices acting in and for the Leightonstone petty sessional division hold the special and petty sessions for the division in the petty sessional court house, in the county hall, within the borough of Huntingdon. At such sessions the justices deal with all matters cognisable by a court of special or petty sessions arising within the petty sessional division other than those arising within the boroughs of Huntingdon and Godmanchester.

The justices acting in and for the Hurstingstone petty sessional division hold the special and petty sessions for the division in the petty sessional court house within the borough of St. Ives. At such sessions the justices deal with all matters cognisable by a court of special or petty sessions arising within the petty sessional division other than those arising within the borough of St. Ives.

From the passing of the Municipal Corporations Act 1835 up to the present time petty sessional courts have been regularly held in the boroughs of Huntingdon (in the town hall) and Godmanchester, and in the borough of St. Ives from the time of its incorporation, but on days different from those on which the special or petty sessions for the Leightonstone and Hurstingstone petty sessional divisions are held.

The mayor and ex-mayor of each borough as justices for such boroughs by virtue of the provisions of sect. 155 of the Municipal Corporations Act 1882, and any county justices who choose to attend form the petty sessional court for each borough respectively, and deal with all matters cognisable by a court of special or petty sessions arising within each borough respectively, except in licensing matters, in which the mayors and ex-mayors, unless themselves county justices, do not act.

Salaried clerks to perform the duties of clerk of special sessions, petty sessions, and of the justices,

acting in and for the respective boroughs, have been appointed as to Huntingdon and Godmanchester since 1835 by the mayor and ex-mayor of such boroughs respectively, as justices for such boroughs and the county justices usually acting in each of such boroughs, and as to St. Ives in the case of the present clerk and his predecessor by the county justices for the Hurstingstone petty sessional division, but the appointment of the present clerk was, immediately after his appointment by county justices, confirmed by the mayor and ex-mayor at the borough petty sessions. For the borough of Huntingdon the clerk is not, but for the borough of Godmanchester he is, the same person as the clerk for the Leightonstone division, and for the borough of St. Ives the clerk is the same person as the clerk of the Hurstingstone division, separate salaries being paid in each case.

Up to the passing of the Local Government Act 1888 the salaries of the clerks referred to in the last preceding paragraph so appointed as aforesaid, were paid out of the borough fund of the respective boroughs and the fines and fees imposed and taken at the special and petty sessions holden in and for the boroughs respectively, which were not by the statutes imposing and authorising the same specially directed to be paid to any other person (in this case referred to as the "unappropriated fines and fees") were paid to the treasurers of the respective boroughs and credited by them to the borough fund of their respective boroughs.

None of the boroughs had any scale of fees peculiar to its own borough, but the county scale was and is treated as applicable and acted upon in each borough court and all fines imposed at such borough petty sessions were imposed in respect of offences against the general law and not under local statutes.

After the passing of The Local Government Act 1888 until May 1899 the county council paid the salaries of the clerks so appointed for the boroughs and a return was made by the clerks of all unappropriated fines and fees, and the amounts thereof were paid over to the treasurer of the county.

After May 1899, in consequence of the decision of the Court of Appeal in the case of *Theftford Corporation v. Norfolk County Council* (79 L. T. Rep. 315; (1898) 2 Q. B. 468), the auditor objected to such salaries being paid by the county council and threatened to surcharge the same if continued, and the county council have from that date declined to make any further payments in respect of such salaries, and such salaries have since been paid out of the respective borough funds of the boroughs, and the unappropriated fines and fees have in the cases of the boroughs of Godmanchester and St. Ives been paid into the borough funds of these respective boroughs, while in the case of the borough of Huntingdon the unappropriated fines imposed by the court of that borough, and the fees payable in respect of proceedings in such court, have continued to be paid to the county treasurer.

In June 1900 the clerk of the county council applied for a return of the unappropriated fines and fees imposed and taken in the borough courts, and for payment thereof to the county treasurer on the ground that the same were payable to the treasurer of the county, notwith-

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standing that the salaries of the justices' clerks acting in and for the boroughs and other expenses connected with the holding of the petty sessions in the respective boroughs had been since May 1899 paid out of the borough funds and not by the county, but payment thereof has not been made to the treasurer of the county by the boroughs of Godmanchester and St. Ives.

The plaintiffs contended that: (1) The mayor and immediate ex-mayor of the respective boroughs of Huntingdon, Godmanchester, and St. Ives are entitled to appoint a clerk for the borough for which they are justices respectively pursuant to sects. 155 and 159 of the Municipal Corporations Act 1882. (2) All unappropriated fines or penalties and fees imposed and received in the courts held in the boroughs are payable to the treasurer of such boroughs respectively, and the town council of such boroughs are liable to pay the salary of the justices' clerk acting in and for each of such boroughs and the expenses of and incidental to holding special sessions and petty sessions of the peace in and for each of such boroughs.

Alternatively: (1) The mayor and immediate ex-mayor of each of the boroughs are entitled, in conjunction with the justices usually acting for the petty sessional division in which such boroughs are respectively situated, to appoint a salaried clerk to perform the duties of clerk of petty sessions, special sessions, and of the justices acting in and for such borough or place pursuant to sect. 155 of the Municipal Corporations Act 1882 and sect. 5 of the Justices' Clerks Act 1877. (2) If the unappropriated fines or penalties and fees imposed and received in the courts held in the boroughs are payable to the county council, the county council are liable to pay the salaries of the several justices' clerks and the expenses of and incidental to holding special sessions and petty sessions of the peace in and for each of the boroughs.

The defendants contended that: (1) The mayor and immediate ex-mayor of the respective boroughs of Huntingdon, Godmanchester, and St. Ives, are not entitled to appoint a justices' clerk. (2) If they are entitled to appoint such clerk, all unappropriated fines or penalties and fees imposed and received by and in the special and petty sessional courts held in and for each of the boroughs are nevertheless payable to the county treasurer, and the county council is under no liability to pay the salary of such clerk, or the expenses of or incidental to the holding of special and petty sessions in and for any of the boroughs. (3) The mayor and immediate ex-mayor of each of the boroughs, in conjunction with the justices of the county usually acting for the division in which such borough is situate, are not entitled to appoint a salaried clerk to perform only the duties of clerk of the special and petty sessions held in and for such borough and of clerk of the justices acting in and for such borough. (4) If they are entitled to appoint such salaried clerk, all unappropriated fines or penalties and fees imposed and received by and in the special and petty sessional courts held in and for each of the boroughs are nevertheless payable to the county treasurer, and the county council is under no liability to pay the salary of such clerk or the expenses of or incidental to the holding of

special and petty sessions in and for any of the boroughs.

The questions for the opinion of the court were: (1) Are the mayor and immediate ex-mayor of the respective boroughs of Huntingdon, Godmanchester, and St. Ives entitled to appoint a justices' clerk? (2) If they are entitled to appoint such clerk, to whom should be paid all unappropriated fines or penalties and fees imposed and received by and in the special and petty sessional courts held in and for such boroughs, and who is liable to pay the salary of such clerk and the expenses of and incidental to the holding of special and petty sessions in and for the boroughs? (3) Are the mayor and immediate ex-mayor of each of the boroughs, in conjunction with the justices of the county usually acting for the division in which such borough is situated, or are the justices of the county usually acting for the division in which such borough is situated, by themselves entitled, if it seem fit, to appoint a salaried clerk to perform solely the duties of special and petty sessions held in and for such borough and of the justices acting in and for such borough? (4) If such mayor and immediate ex-mayor, in conjunction with such county justices, or if such county justices by themselves are entitled to appoint such salaried clerk, to whom should be paid all unappropriated fines or penalties and fees imposed and received by and in the special and petty sessional courts held in and for each of the boroughs, who is liable to pay the salary of such clerk and the expenses of and incidental to the holding of special and petty sessions in and for each of the boroughs?

The Municipal Corporations Act 1882 (45 & 46 Vict. c. 50) provides, under the heading "County Justices":

Sect. 154. (1) Where a borough has not a separate court of quarter sessions, the justices of the county in which the borough is situate shall exercise the jurisdiction of justices in and for the borough as fully as they can or ought in and for the county.

Borough Justices.

Sect. 155. (1) The mayor shall, by virtue of his office, be a justice for the borough, and shall, unless disqualified to be mayor, continue to be such justice during the year next after he ceases to be mayor.

Sect. 156. It shall be lawful for the Queen, on the petition of the council of a borough, to grant to the borough a separate commission of the peace.

Sect. 157. (1) It shall be lawful for the Queen, from time to time, to assign to any persons Her Majesty's Commission to act as justice in and for each borough having a separate commission of the peace.

Sect. 158. (1) A justice for a borough shall, with respect to offences committed and matters arising within the borough, have the same jurisdiction and authority as a justice for a county has under any local or general Act with respect to offences committed and matters arising within the county; except that he shall not, by virtue of his being a justice for the borough, act as a justice at any court of gaol delivery or quarter sessions, or in making or levying any county or borough rate.

Sect. 159. (1) The justices for a borough shall, from time to time, appoint a fit person to be their clerk, to be removable at their pleasure.

Sect. 160. (1) The council of a borough having a separate commission of the peace shall provide and furnish a suitable justices' room, with offices, for the business of the borough justices.

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The Local Government Act 1888 (51 & 52 Vict. c. 41) provides:

Sect. 84. (1) The salaried clerk of every petty sessional division shall be from time to time appointed, and removed, as heretofore. (2) The county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks, and all fees and costs payable to such clerks which are not excluded in the fixing of their salaries shall be paid into the county fund, and in the enactments relating to such salaries and fees the standing joint committee shall be substituted for the quarter sessions justices and the local authority respectively.

The Justices' Clerks Act 1877 (40 & 41 Vict. c. 43) provides:

Sect. 5. In each petty sessional division there shall, after the first day of February one thousand eight hundred and seventy-eight, or any later date at which an order for the payment of a clerk by salary in lieu of fees comes into operation in the division, be only one salaried clerk in the division to perform the duties of clerk of petty sessions, clerk of special sessions, or clerk of any justice or justices of the peace: Provided that: (1) Where special or petty sessions are usually held at more than one place appointed for the purpose in a petty sessional division, there may, if it seem fit, be a separate salaried clerk appointed in respect of each such place . . . and (4) A Secretary of State, on the application of the local authority, may, if he thinks fit, authorise in any case the appointment of more than one salaried clerk. The salaried clerk (in this Act referred to as a clerk of a petty sessional division) shall be appointed from time to time by the justices acting in and for the petty sessional division in which he is clerk assembled in special sessions, and shall hold his office during the pleasure of those justices.

Asquith, K.C. (W. W. Mackenzie with him) for the plaintiffs.—Two questions arise, first, by whom, in case of certain boroughs, the salaried clerk to the justices in petty sessions ought to be appointed; and, secondly, by whom the salary of the clerk should be paid. These questions depend on certain sections of the Municipal Corporations Act 1882, the Local Government Act 1888, and the Justices' Clerks Act 1877, and particularly on the series of sections of the Municipal Corporations Act 1882, ss. 155 to 159. The point is whether sects. 158 and 159 of the latter Act apply to boroughs which have no separate commission of the peace. If they do so apply, then the power of the justices to appoint a clerk is clear. Sect. 154 deals with the jurisdiction of county justices in a borough which has no separate court of quarter sessions, and gives such justices jurisdiction to act in the borough as in the county. Then we have a series of sections, by the first of which (sect. 155) the mayor and ex-mayor of every borough are, by virtue of their office, justices. Then the next two sections—sects. 156 and 157—deal with boroughs having a separate commission of the peace and are interpolated sections. Then sects. 158 and 159 must be read as applying to boroughs not having a separate commission of the peace, and sect. 159 says that the justices of a borough—that is, if this be the correct reading, of a borough not having a separate commission of the peace—shall have power to appoint their clerk, and by the 5th schedule amongst the payments out of the borough fund, which may be made without order, is the remuneration of the clerk to the justices. The statutory authority for appointing a clerk to justices outside boroughs is contained in sect. 5 of the Justices' Clerks Act

1877, by which the salaried clerk of a petty sessional division is to be appointed by the justices acting for that division. We have, therefore, two sets of salaried clerks, those for the county and those for the borough. Sect. 158 must apply to the mayor and ex-mayor as justices for the borough, as well when there is no separate commission of the peace as where there is a separate commission. It is perfectly general and there is nothing in it to limit it to boroughs having a separate commission. The natural interpretation, therefore, of sect. 158 is that it applies to boroughs generally, and it cannot be argued that sect. 159 is necessarily dealing with boroughs with a separate commission because there is an interposed section (sect. 158) which deals with boroughs generally. Then the crux of the whole question is whether sect. 159 applies only to boroughs having a separate commission of the peace. It is necessary to bear in mind that this is a consolidating Act, and that the corresponding section in the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), s. 102, provided that justices of every borough to which a separate commission of the peace had been granted should appoint the clerk. The power to appoint the clerk was thus expressly granted to boroughs "to which a separate commission of the peace shall be granted." In sect. 159 of the Act of 1882, these words are omitted, thus showing that the section is general, and is not limited to boroughs having a separate commission. Whoever appoints the clerk ought to pay him, and whoever pays him ought to receive the fees. That is a logical position and a common-sense view, and it was the position adopted till the payment was disallowed by the auditor. Under sect. 5 of the Justices' Clerks Act 1877 the county justices have power, where the sessions are held at more than one place, to appoint a clerk for each place. Therefore, if the appointment rests with them, as regards two of the places (Huntingdon and Godmanchester), there would be power to have two clerks, because the sessions are held at two places; and as regards St. Ives there might also be the same power under sub-sect. 4 if the Secretary of State consented. By sect. 84 (1) of the Local Government Act 1888, the salaried clerk of every petty sessional division is to be appointed as heretofore; so that that Act makes no change in the appointment of clerks. The case on which the auditor objected to the salaries being paid by the county council—namely, *Thetford Corporation v. Norfolk County Council* (79 L. T. Rep. 315; (1898) 2 Q. B. 468)—has very little bearing on the case, as the borough in that case had a separate commission of the peace, and the decision throws no light on this case.

C. A. Russell, K.C. (Brooke Little with him), for the defendants.—The clerks for these boroughs ought not to exist at all. In the case of the petty sessional divisions of the county of Huntingdon no occasion exists for exercising the power given by sect. 5 of the Justices' Clerks Act 1877, and there is therefore no justification for imposing on the county the burden of paying two salaries for duties which can properly be performed by one person. The clerks for these boroughs are not clerks for the petty sessional divisions, nor were they appointed as clerks under sect. 5, sub-sect. 1, of the Justices' Clerks Act 1877. The clerks for these boroughs could not

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have been lawfully appointed under sect. 159 of the Municipal Corporations Act 1882, unless that section applies to boroughs which have no separate commission of the peace; and they could not have been appointed under sect. 5, sub-sect. 1, of the Justices' Clerks Act 1877 except by county justices at special sessions, if petty sessions were held at more than one place. These clerks were not appointed in that way under the Act of 1877, and in the case of *St. Ives* the second clerk could not be appointed there, as the petty sessions are not held for that division in more than one place. The question is, could they have been appointed under sect. 159 of the Act of 1882, and the answer to that depends on whether all the sections from sect. 156 to sect. 159 are governed by the consideration of the borough being a borough having a separate commission of the peace. The borough which is spoken of in sect. 159 is a borough which is not part of the county and which has a separate commission of the peace. The two preceding sections deal in terms with boroughs which have a separate commission of the peace, and sect. 159 forms one of the same group of sections and is governed by the same consideration. The position of the mayor and ex-mayor of a borough which has no separate commission of the peace was considered in the case of *Mayor of Reigate v. Hart* (18 L. T. Rep. 237; L. Rep. 3 Q. B. 244), and it was there held that where the borough has no separate commission of the peace, the mayor and ex-mayor act as county justices. That decision was under sect. 57 of the Municipal Corporations Act 1835, which is about identical with sect. 155 of the present Act of 1882. So sect. 160 in terms applies to a borough having a separate commission of the peace. Therefore with regard to sect. 159—coming as it does in a series of sections referring to boroughs with a separate commission of the peace—it would be extraordinary if that section were held to apply to boroughs other than those having a separate commission. Sect. 159 applies only to boroughs having a separate commission of the peace. These clerks for the boroughs, therefore, had no legal existence at all; the mayor and ex-mayor were not entitled to appoint them. The case of *Mayor of Reigate v. Hart* (*ubi sup.*) also shows that the fines ought to be paid to the county treasurer, and not to the borough treasurer.

Asquith, K.C. in reply.—I do not now contend that sect. 159 applies to this case; on the contrary, I think that that section was intended to apply to boroughs having a separate commission of the peace. By sect. 22 of the Local Government Act 1894, the mayor, but not the ex-mayor, is a justice of the peace for the county. If a second clerk has to be appointed, the mayor (as being a justice for the county) and the county justices are the appointing body, and in that view we have to consider sect. 5 (1) of the Justices' Clerks Act 1877. The question is one, not of jurisdiction, but of the convenient administration of justice; and the justices could say with regard to offences arising in district A. that they should be tried in that district, and those arising in district B. should be tried in that district. They could thus have two places and two clerks.

KENNEDY, J.—The questions submitted to us in this case are four in number. The first question is, Are the mayor and immediate ex-mayor

of these three boroughs entitled to appoint a justices' clerk. My answer to that question is that the mayor and ex-mayor are not entitled to appoint a justices' clerk, because, in my opinion, sect. 159 of the Municipal Corporations Act 1882 has no application except to the case of a borough with a separate commission of the peace. Then with regard to the second question, it does not arise after the answer given to the first question. Then the third question is, Are the mayor and ex-mayor of the boroughs, in conjunction with the justices of the county usually acting for the division in which the borough is situated, or are the justices of the county usually acting for the division in which such borough is situated, by themselves entitled to appoint a salaried clerk to perform solely the duties of special and petty sessions held in and for such borough? In my opinion, the power to appoint a salaried clerk rests with the justices of the petty sessional division. Then I answer that question in this way. Those justices, who are justices for the petty sessional division, may appoint a salaried clerk for the division, and they may also appoint a second clerk for the division, provided they can bring themselves within the power given by sect. 5, sub-sect. 1, of the Justices' Clerks Act 1877, but not otherwise. My answer, therefore, to the third question is that clearly they could not so appoint a clerk. The justices could not themselves appoint a clerk to perform duties solely as to matters arising within the borough. What they can do is this: If the case comes within sect. 5, sub-sect. 1, of the Justices' Clerks Act 1877, then they can appoint, under and as prescribed by that sub-section, a second clerk for the whole of the petty sessional division, if special or petty sessions are usually held at more than one place in that petty sessional division; and further, with regard to the "places" at which petty sessions are held, the two places may be places both within the borough, and not necessarily one within and one without the borough. That will be for the determination of the justices of the particular petty sessional division. Then with regard to the fourth question that does not arise after the answers we have given to the other questions. What, however, we can say, in answer to that question, is, that the moneys referred to in that question should be paid—as the county justices are alone entitled to appoint the clerk—to the county treasurer; and with regard to the payment of the salary of the clerk, that question is determined by sub-sect. 2 of sect. 84 of the Local Government Act 1888, which provides that: "The county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks." That provision will apply whether there is one clerk only appointed, or whether a second clerk is appointed under the power given by sect. 5 of the Justices' Clerks Act 1877.

PHILLIMORE, J.—I agree, and I will only add this: When we say that the mayor has no power to appoint, we mean that he has no power as mayor to appoint; but the mayor is, under and by virtue of sect. 22 of the Local Government Act 1894, a county justice, and he does not lose his privilege as a county justice because he is mayor.

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KENNEDY, J.—I entirely agree as to this latter observation.

Judgment accordingly.

Solicitors for the plaintiffs, *Grubbe and Troughton*, for *Hunnybun and Sons*, Huntingdon, and for *G. Dennis Day*, St. Ives.

Solicitors for the defendants, *Peacock and Goddard*, for *J. P. Maule*, Huntingdon.

Tuesday, June 4, 1901.

(Before RIDLEY and BIGHAM, JJ.)

OVERSEERS OF BOOTLE (apps.) v. LIVERPOOL WAREHOUSING COMPANY (resps.); SAME (apps.) v. J. AND T. WEBSTER (resps.). (a)

Rating—Empty warehouse—Occupation—Intention—Liability to rates.

From a date prior to the making of certain rates the respondents gave notice to the appellants that they intended to keep certain warehouses unoccupied during the current overseers' year, and to claim exemption from the rates in respect thereof.

All goods had been removed before the making of the rate, and the warehouses had not been used since that date, though they were advertised in the list of warehouses to let belonging to the respondents. Each warehouse was one of a block, through which continuous shafting passed, and at the end of the block was a notice: "For storage, apply to the L. W. Company."

A warehouse in respect of which notice had been given to the appellants was still advertised on the cards issued by the respondents, and they had tried to let it by notice affixed on the warehouse.

Held, that the justices were justified in coming to the conclusion that there was no occupation of these warehouses so as to render the respondents liable to be rated in respect thereof.

Mayor of Southend-on-Sea v. White (ante, p. 18; 83 L. T. Rep. 408) considered.

OVERSEERS OF BOOTLE v. LIVERPOOL WAREHOUSING COMPANY.

CASE stated upon a complaint preferred on behalf of the appellants against the respondents for that they, being duly rated and assessed to the relief of the poor of the borough of Bootle and to the maintenance of the police in that borough by certain rates made the 26th March 1900, had not paid the same, but had neglected or refused to do so.

Upon the hearing of the complaint it was admitted that the respondents carried on the business of warehouse owners and warehouse keepers at (among other places) five warehouses in Bedford-place, fourteen warehouses in Effingham-street, four warehouses in Princes-street, and six warehouses in Globe-road, all in the borough.

The rate-book showing the rating of the respondents in respect of all the premises and the allowance by the justices was duly produced, and the allowance and the due publication of the rate and the demand for and nonpayment of the rates were duly proved. Each warehouse was separately assessed.

It was admitted that on the 26th March 1900, when the rate was made, the respondents were in occupation of all the warehouses with the exception of the three which were described as follows: Warehouse "L," in Globe-road; warehouse "E," in Bedford-place; and warehouse "D," in Bedford-place, in the borough.

In June 1900 the respondents gave notice by two letters to the appellants that it was the intention of the respondents to keep the three warehouses above referred to unoccupied during the whole of the current overseers' year, and to claim exemption from all rates in respect thereof.

The following are copies of the letters:

The Liverpool Warehousing Company Limited, 19, Brunswick-street, Liverpool, June 15, 1900.—The Collector, Poor Rate Office, Bootle.—Dear Sir,—On behalf of the Liverpool Warehousing Company Limited I beg to give you notice that the warehouses as enumerated below have not been occupied from the end of March last, and, owing to the present state of the warehousing business, it is our intention to keep these warehouses out of occupation for the whole of the current year, and to claim exemption from all rates and taxes.—"J, K, and L," three warehouses, Globe-road; "R, S, T, and U," four warehouses, Effingham-street; "C and D," two warehouses, Princes-street.—Yours faithfully, A. SLER.

The Liverpool Warehousing Company Limited, 19, Brunswick-street, Liverpool, 19th June 1900.—The Collector Poor Rates, Bootle.—Dear Sir,—Referring to my letter of the 15th June, I find that "C" warehouse, Princes-street, was put on the list in error, and would be obliged if you would kindly correct my list as follows: "D," one warehouse, Princes-street; "D and E," two warehouses, Bedford-place; these having been empty from the beginning of April.—Yours truly, A. SLER.

It was proved to the satisfaction of the justices that warehouse "L" had been empty since the 14th March 1900, that warehouse "D" had been empty since Oct. 1899, and warehouse "E" since the 20th March 1900, and it was also proved that all goods of every description had been removed therefrom at the dates respectively, and that from the dates respectively the three warehouses had been looked up and had not been used by the respondents for the purposes of their business. It was also proved that each of the warehouses was one of a block of warehouses belonging to the respondents in which they carried on their business as aforesaid, and at the end of each block there was a notice to this effect: "For storage, apply to the Liverpool Warehousing Company"; that in their business the respondents issued lists of their warehouses, that the lists included the three warehouses "L," "D," and "E," and that no alteration was made in the lists at or since the time when the warehouses became empty as aforesaid. It was also proved that the warehouses contained shafting and hoists for use in the warehousing business, the shafting being continuous throughout each block of warehouses. That there was nothing to prevent goods being moved from one warehouse to another, but that there was no internal connection between the warehouses in each block. That the warehouse "L," in Globe-road, is insured, and that since it became empty it had been inspected by the insurance company's agent who was accompanied by a man in the employ of the respondents.

It was contended on behalf of the appellants that the proved and admitted facts showed that the respondents were liable to be rated as occupiers

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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of each of the three warehouses on the 26th March 1900.

On behalf of the respondents it was contended that the facts did not show any occupation of the three warehouses, or any of them, by the respondents on the date such as would make them liable for the rates.

The justices were of opinion that no occupation of the warehouses "L," "E," and "D" by the respondents had been proved, and that the respondents were not liable to be rated therefor, and, in so far as the complaint applied thereto, they dismissed the same.

The question for the court to decide was whether, under the circumstances, there was such occupation of the warehouses "L," "E," and "D" by the respondents proved as to make them properly rateable to the relief of the poor and for the maintenance of the borough police in respect thereof.

Pickford, K.C. (Greer with him) for the appellants.—The justices here have missed the point of the case, for they have considered the question of profit from the premises. In *Mayor of Southend-on-Sea v. White* (ante, p. 18; 83 L. T. Rep. 408) the respondent held certain premises on a lease or licence for years, and entered into possession and used the premises as a shop. At the end of the summer, as the business then ceased to be remunerative, he locked up the shop and left it, with the intention of not reopening the same for business until the beginning of the following summer. During this interval he did not return to the premises, and no one lived there. All the stock was removed, but fixtures and some other articles were left there. A general district rate was made for the half year, during the whole of which the shop was closed, and it was held that the respondent was in occupation of the premises during the time they were so closed, and was liable therefore to pay this half year's rate. That case is an authority here. [RIDLEY, J. referred to *Tyne Coal Company v. Wallsend Overseers*, 35 L. T. Rep. 854.] The only thing that prevented these warehouses being used was that there was no trade or custom to use them. It is just the same as if no customers came into a shop. They are ready to be used at any moment. [BIGHAM, J.—But is not that the same with an empty house?] Yes. But occupation is a question of fact, and taking away all the furniture would show that there was no occupation, but these warehouses are naturally kept empty. Of course I agree that unless there is an occupation, a rate cannot be made. The facts that the boards were not taken down or the circular altered are important as showing intention. [BIGHAM, J.—But do the facts show an intention to use the premises?] I submit, yes. This is the case of a place that must be kept empty. The fact that there are no chattels here is no element in this case. [BIGHAM, J.—The question seems to be whether the mere expression of intention not to use is sufficient.] I submit that is so, and the intention expressed here is not any more than that in *Mayor of Southend-on-Sea v. White* (sup.), which was to go away and not occupy for six months.

Danckwerts, K.C. (Tobin with him) for the respondents.—The point to be decided here is whether the magistrates were justified in finding as

they did. In *Holywell Union v. Halkyn Drainage Company* (71 L. T. Rep. 818; (1895) A. C. 117), Lord Herschell says, at p. 125: "The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title. The person legally possessed may not occupy. On the other hand, a person may be occupier either with or without the consent of the owner." [RIDLEY, J.—But that does not show that there can be no question of law upon a question of occupation.] The point here is as to the state of affairs on the 26th March, and whether the facts were such as to justify the justices in coming to the conclusion that they did. I say that there was evidence to justify this conclusion, as all the goods were cleared out, and the premises were locked up. In the case of *Mayor of Southend-upon-Sea v. White* (sup.), the justices, having found certain facts, held that in law the respondent was not in occupation of the premises during the period in question. In that case everything was left in the shop in the way of fixtures. Lush, J. in *Willing v. St. Pancras Assessment Committee* (37 L. T. Rep. 126; 2 Q. B. Div. 581) says: "It is not easy to give an accurate and exhaustive definition of the word 'occupier.' Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession, and may maintain trespass against anyone who invades it, but as long as he leave it vacant he is not rateable for it as an occupier."

Greer in reply.

RIDLEY, J.—In this case we come to the conclusion that the decision of the magistrates was the correct one. The question seems to shape itself in the following way: Certain facts are set out in the case, from which facts, which are not in dispute, the magistrates came to the conclusion that there was not any occupation of these three warehouses. Then they ask us to decide whether under the circumstances there was such an occupation of the warehouses as to make the respondents properly rateable to the relief of the poor. Now, I think that means, "Is there a principle of law according to which we were compelled to find in the opposite way from what we do find and what we did find? That is to say, upon these facts we came to the conclusion that there was not an occupation; but if the law says that upon these facts legally and as a matter of law there was, why then the decision must be reversed." So far as it is a finding of fact, it is not for us to interfere with them. If there be a principle of law which says that upon such facts as the present the warehouses were still in occupation for the purpose of the poor rate, we should reverse their decision, but not otherwise. Now, it lies on the appellants to make out that there was this principle of law, and also it lies upon them to show that there was occupation. Upon both the grounds it lies upon Mr. Pickford to make out this matter. I do not think he has succeeded in doing so. Perhaps it is unnecessary for me to run through the facts which are stated in this case, but shortly stated it comes to this, that three of the warehouses had been empty for a considerable period, one from the 14th March 1900, the other from Oct. 1899, and the third from

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the 20th March 1900. In June 1900 a notice was given that there was no intention of using these three warehouses for the full year to elapse from the end of March 1900. It seems that upon the days in question which I have now mentioned, all the goods of every description had been removed from the warehouses, and that from those dates they had been locked up and not used. It is true that there had been a notice which had been there before, which had been left at the end of each block of warehouses, which was this: "For storage, apply to the Liverpool Warehousing Company"; that there was but one pile of buildings, of which these three warehouses were portions; and upon that fact reliance is placed by the appellants in seeking to make out that there was an occupation; but I think, as a matter of fact, the proper inference from these facts is that from the date at which the goods had been removed there was a *bona fide* intention by the warehousing company not to use these three particular warehouses during the year. A difficulty may arise upon that part of the case in this way, that I think we ought to infer that, if the trade had required it, they would have resumed the occupation and use of these warehouses. But that is an indefinite date. What we have to see is what the state of things was at that time, and I think the proper inference is that then and at that time there was an intention to abandon and not to use these three warehouses for that particular time. A distinction may be drawn, perhaps, in that respect between this case and the one of *Mayor of Southend-on-Sea v. White* (ante, p. 18; 83 L. T. Rep. 408), but that case is distinguishable also upon another ground, not only that at the return of the season it was certain that the shopkeeper would return, but also that he had left in that shop sundry articles which were necessary for the purpose of carrying on his trade and which were not fixtures. I cannot help thinking, on looking at that decision, there may have been good reason for supposing that, if nothing had been left in the shop except the bare fixtures, there might, although I do not say there would, have been a decision the other way. Upon these facts there is any principle of law which makes it necessary for us to say that a warehouse so left intentionally empty and unused is in occupation for the purpose of the poor rate? I do not think that there is. No case exactly in point has been quoted, the nearest being that of *Mayor of Southend v. White* (sup.), but the principle has been quoted from a judgment of Lush, J. in *Willing v. St. Pancras Assessment Committee* (37 L. T. Rep. 126; 2 Q. B. Div. 581), from which it would appear, so far as I can apply that case to the present case, that that principle would not apply, and that this may be treated as vacant premises in the same way as a house which contains nothing in the way of furniture may be treated as a vacant house although there is a present intention to let it, and although there be a notice upon the door that it would be let, if persons applied to take it. In that case there would be a use and occupation if it was let to anybody. So in this case, if the intention to leave the warehouses unused were to cease upon the occasion arising, there would then and there be an occupation. That is apparently a similar condition of things to that which would arise if the vacant house was let. Under the circumstances I do not see why

we should not apply it here as far as we can, and, judging from the facts found in this case, I think we ought to say there is no principle of law which on such a state of facts compels us to say the warehouses were in occupation. For these reasons I think the justices were right in finding that there was none, and that there is no occasion to send the case back.

BIGHAM, J.—I agree. The question is whether upon the 26th March these warehouses were occupied so as to make them rateable—that is to say, were they occupied by the respondents for the purpose of their business? That is, in my opinion, a question of intention—of course a *bona fide* intention—to be answered with reference to the circumstances of the case; in other words, it is a question of fact. Now, what are the facts here? The facts here are found in the case. I need not read them. There are facts which point to an intention not to occupy, not to carry on the business of the respondents in those particular premises. It is said that there are some facts which point the other way—namely, that a board which probably had been in existence for a very long time upon the block of the warehouses of which these particular warehouses formed part, stating that application might be made to the respondents for warehouse room, was still up. Another fact is that these particular warehouses were still left in the list on the circular issued by the respondents; and another fact is that apparently there was some shafting running through these warehouses, connected with other warehouses which were in use, used for the purpose of the hoisting gear in the warehouses, and that this shafting revolved in the unused warehouses when the shafting was being used for the purpose of the warehouses where the work was going on. But all that amounts merely to this, that there were facts on the one hand and facts on the other hand. It was for the magistrates to say what conclusion of fact they drew from all these particular circumstances. They came to the conclusion that the facts did not justify them in finding that there was any occupation of these warehouses on the 26th March. For my own part, although it is not necessary that I should say anything about it, I agree with them. I think there was no occupation in point of fact upon the 26th March, and that therefore the respondents were entitled as a matter of fact to succeed before the magistrates. But, as I say, I do not think that is a matter for us to decide. The question we have to decide is whether there were facts before the magistrates which could justify them in coming to the conclusion to which they did. In my opinion there were. There was ample evidence in the facts to show that there was in fact no occupation of these premises upon the 26th March by the respondents for the purpose of their business, and therefore I agree with my brother that this appeal must be dismissed.

OVERSEERS OF BOOTLE v. J. AND T. WEBSTER.

Case stated by justices upon a complaint claiming poor and police rates.

The respondents were the lessees of six warehouses in Bootle, the lease of which expired at the end of the year 1900, and the respondents did not at the time of the rate intend to apply for a renewal.

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They were rated and assessed separately in respect of each of the warehouses.

The rate was made on the 26th March 1900. On the 5th Jan. 1900 the respondents gave notice to the appellants that one of the warehouses was empty and untenanted, and that they claimed to be exempt from rates in respect thereof.

In the course of the respondents' business the warehouses in question were let sometimes by space and sometimes by single tenancies for separate warehouses, and the amount of space vacant varied with the amount of storage.

The respondents carried on their usual business in the other five warehouses.

They issued cards in connection with their business, and the empty warehouse was advertised on such cards.

The warehouse had been empty since the 5th Jan. 1900, on which day the last of the goods stored therein had been removed in the ordinary course of business, and no goods had been stored therein since, but the respondents had tried to let it by notice on the warehouse, but owing, however, to the state of trade they had not succeeded in doing so.

It was contended by the appellants that by reason of the above facts, which were proved and admitted, the respondents were in occupation of the warehouse, and were properly rated in respect thereof, as well as the remaining five warehouses.

On behalf of the respondents it was contended that, inasmuch as they had closed the warehouse and had given notice to the appellants thereof before the 26th March 1900 when the rate was made, and as the warehouse remained closed and untenanted, they were not liable to be rated in respect thereof.

The justices were of opinion that these facts did not afford evidence of such occupation as would make the respondents liable in respect of this warehouse, and they dismissed the complaint so far as it referred to the same.

Pickford, K.C. and Greer for the appellants. Danckwerts, K.C. and Tobin for the respondents.

RIDLEY, J.—I think this case is the same as the other. I do not find anything to distinguish it from the former decision. Therefore the judgment must be to the same effect.

BIGHAM, J.—Perhaps it is not so strong as the other one, but the same reasoning applies.

Appeals dismissed.

Solicitors: for the overseers, Sharpe, Parker, and Co., for Cleaver, Holden, and Co., Liverpool; for the Warehousing Company, Hill, Dickinson, and Co., Liverpool; for J. and T. Webster, Layton, Melly, and Layton, Liverpool.

Thursday, June 6, 1901.

(Before RIDLEY and BIGHAM, JJ.)

PYM (app.) v. WILSHER (resp.). (a)

Vaccination—Child born before the 1st Jan. 1899

—Application of statute—Condition precedent—

Vaccination Act 1867 (30 & 31 Vict. c. 84), s. 31

—Vaccination Act 1898 (61 & 62 Vict. c. 49), ss. 1 (3), 2.

Where proceedings are taken under sect. 31 of the

Vaccination Act 1867 in respect of a child born before the coming into operation of the Vaccination Act 1898, compliance with the provisions in sect. 1, sub-sect. 3, of the Act of 1898 is not a condition precedent.

The provisions of sect. 2 of the Vaccination Act 1898 apply to the case of children born before the coming into operation of that Act.

CASE stated upon an information laid by the appellant against the respondent under sect. 31 of 30 & 31 Vict. c. 84.

Upon the hearing of the information the following facts were proved or admitted:—

The respondent was the father of the child, which was born on the 18th Aug. 1897, and he had received on the 23rd Oct. 1900 a copy of the notice requiring him to have the child vaccinated within fourteen days, and also a prior notice to the same effect, and the child had not been vaccinated. It was also admitted that these notices were the only ones that had been given, and the notice of the public vaccinator of the district to the parent of the child to visit the home of the child as prescribed by sect. 1 (3) of the Vaccination Act 1898 had not been given, and also that the public vaccinator had not visited the home of the child and offered to vaccinate the child with glycerinated calf lymph or otherwise as required by that section.

It was contended on behalf of the appellant that the child having been born before the coming into operation of the Vaccination Act 1898—i.e., the 1st Jan. 1899—the respondent did not come within sect. 1 (3) of that Act in respect of the child.

It was also contended on behalf of the appellant that under sect. 31 of 30 & 31 Vict. c. 84, unless the respondent proved some reasonable excuse to have his child vaccinated, an order to vaccinate must be made.

For the respondent it was contended that the Vaccination Acts 1867 to 1898 must be read together as one Act, and that sect. 1 (3) of the Act of 1898 applied to all children, whether born before or after the coming into operation of that Act, in all cases where the proceedings are taken alleging default to have arisen after the 1st Jan. 1899.

The justices were of opinion that the Vaccination Acts 1867 to 1898 are to be read as one Act so far as the provisions thereof are not expressly repealed, and also that the notice of the vaccination officer, dated the 23rd Oct. 1900, before mentioned, was expressed to be given under the Acts 1867 to 1898, and that in the Vaccination Act 1898 are no words which can be construed as not applying to children born before the passing of that Act except in sect. 2 (2), which contains special provisions as to children born before the passing of the Act. They were also of opinion that the provisions of sect. 1 (3) of the Act of 1898 were imperative and not optional, and were therefore a condition precedent to an application for an order under sect. 31 of the Vaccination Act 1867, and upon the facts before them they did not see fit to make an order.

They therefore dismissed the summons.

Etherington Smith for the appellant.—There is nothing in the Vaccination Act 1898 to show that the visit of the public vaccinator under sect. 1 (3) of that statute is a condition precedent

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ELLIOTT (app.) v. PILCHER (resp.).

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to proceedings under sect. 31 of the Vaccination Act 1867. The respondent was in default on the 1st Jan. 1899, at which date the Vaccination Act 1898 came into operation. A notice having been served under the Act of 1867, it was not necessary to serve another, or to visit the home of the child under sect. 1 (3) of the Act of 1898. The provisions of the later statute do not apply to children born before the coming into operation of that Act.

The respondent did not appear.

RIDLEY, J.—As the case stands, although I should like to have heard an argument on behalf of the respondent, I have come to the conclusion that the justices were wrong and they might have made the order asked for by the appellant. Sect. 1 (3) of the Vaccination Act 1898 is part of the general provisions of the Act. I think that that sub-section would probably apply in the case of a child born before the passing of the Act. This seems to be likely, because sect. 2 (2) says that in the application of that section—viz., sect. 2—to a child born before the passing of the Act there shall be substituted for the period of four months from the birth of the child, the period of four months from the passing of the Act. It assumes that that section, which is the section which exempts from penalties any persons who satisfy the justices that they conscientiously believe that vaccination would be prejudicial to the health of the child, would apply in the case of a child born before the passing of the Act. It seems probable that the same would be the case as regards sect. 1. But I find a difficulty in saying that the provision of sub-sect. 3 requiring the public vaccinator to visit the home of the child is a condition precedent to proceedings taken under sect. 31 of the Vaccination Act 1867. The Act of 1898 is no doubt a statute meant to be beneficial to parents, but it does not say that before proceedings are taken under sect. 31 it must be shown that the public vaccinator has visited the home of the child. The justices seem to have thought that such a visit was a condition precedent, and in so holding I think they were wrong.

BIGHAM, J. concurred.

Appeal allowed.

Solicitors: Gibson, Weldon, and Bilborough, for George Pym, Belper.

June 6 and 12, 1901.

(Before RIDLEY and BIGHAM, JJ.)

ELLIOTT (app.) v. PILCHER (resp.). (a)

Adulteration—Milk—Warranty—Contract for future deliveries—Application of warranty to particular deliveries—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 9, 25.

Sect. 25 of the Sale of Food and Drugs Act 1875 cannot apply to the offence of abstracting from an article of food, with the intent that the same may be sold in its altered state without notice, any part of it so as to affect injuriously its quality, substance, or nature, created by sect. 9 of that Act. It applies to the other offence created by that section—namely, of selling the article so altered without making disclosure of the alteration.

A general warranty in writing contained in a con-

tract for future deliveries of milk is sufficient to satisfy sect. 25 of the Sale of Food and Drugs Act 1875. It is not necessary to show on the face of the warranty that it applies to the particular sale of milk, as it is sufficient to show the connection by evidence. The section does not require a specific warranty with each particular sale of milk.

Laidlaw v. Wilson (1894) 1 Q. B. 74) followed.

Robertson v. Harris (82 L. T. Rep. 536) not followed.

Harris v. May (12 Q. B. Div.) dissented from.

CASE stated upon an information preferred by the appellant against the respondent, under sect. 9 of the Sale of Food and Drugs Act 1875, charging him that he, having in his possession a certain article of food called milk, unlawfully and with intent that the same should be sold in its altered state without notice, abstracted from such article of food a part of it, so as to affect injuriously its quality.

At the hearing it was proved on behalf of the appellant that on the 20th July 1900 he purchased a pint of milk from the manager of the respondent in the prescribed manner, and submitted a third part to the public analyst, who duly gave his certificate of the analysis, which he proved.

The respondent wrote to the appellant, inclosing a copy of the warranty he had received from the persons from whom he had bought the milk, which was as follows:

To Mr. A. B. Pilcher, trading as the King-street Dairy Company, Margate.—We hereby warrant that each and every supply of milk sent by us shall be new milk unadulterated and with all its cream.—July 29, 1899.

He also sent notice of his intention to rely upon such warranty within the time prescribed by sect. 20 of the Sale of Food and Drugs Act 1875.

The vendor of the milk deposed to having made a verbal contract with the respondent in Jan. 1897 to supply him with milk for the King-street Dairy, and said that the contract had continued up to the present time without suspension, and that he had continuously supplied the dairy with daily quantities; that he had given the written warranty in July 1899 at the respondent's request; and that the warranty was still in force and applied to the milk supplied to the respondent on the 20th July.

The justices found as facts that the milk sold to the appellant on the 20th July was the milk supplied to the respondent under the contract and warranty, and, considering that the respondent had proved to their satisfaction the matters mentioned in sect. 25 of the Sale of Food and Drugs Act 1875, they discharged him from the prosecution.

A case was applied for by the appellant upon the following points of law: (1) That the warranty formed no part of the contract; (2) that there was nothing to show on the face of it that the warranty applied to the particular sale of milk on the 20th July; and (3) that there must be a specific warranty with each sale of milk.

The justices, after hearing the evidence on oath in proof of such warranty being then in force and on the admission on oath of liability thereunder being given by the wholesale dealer, came to the conclusion that the validity of such warranty was a question of fact only and that no question of

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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law arose thereon, and that in these circumstances the wholesale dealer was liable under his warranty, and they dismissed the information on these grounds.

The question arising upon the above statement is whether the warranty was a good defence to the information.

Stuart Sankey for the appellant.

The respondent did not appear.

June 12.—BIGHAM, J.—In this case an information was laid by the appellant against the respondent under sect. 9 of the Sale of Food and Drugs Act 1875. Now, that section provides that no person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty in each case not exceeding 20l. It is with the first offence created by the section that the respondent is charged. The information is "that on the 20th July 1900, at the parish of St. John the Baptist, and in the said borough, having in his possession a certain article of food called milk," the respondent "unlawfully did, with intent that the same should be sold in its altered state without notice, abstract from such article of food a part of it so as to affect injuriously its quality." The section, it is to be observed, in addition to the words which are followed in the information, says that no person shall sell the article so altered without making a disclosure of the alteration. That is another offence, and with which the respondent is not charged. He is only charged under the first part of the section. The question we are here asked to decide is whether, under the circumstances set out in the case, the respondent has brought himself within the protection provided by sect. 25 of the Sale of Food and Drugs Act 1875. By that section, if the defendant in any prosecution under that Act proves to the satisfaction of the justices that he has purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect; that he had no reason to believe at the time when he sold it that the article was otherwise; and that he sold it in the same state as when he purchased it, then he is to be discharged from the prosecution. The only point we have to consider is whether one part of the section has been complied with—that is, that relating to the written warranty. We are to assume that the other parts of the section have been complied with. For myself I do not believe that sect. 25 has anything to do with the offence with which the respondent is charged. That section only applies to a sale, and in my opinion does not relate to the offence with which the respondent is charged here at all. The Act creates several offences. Sects. 3 and 4 prohibit the mixing, &c., of any food or drug with injurious ingredients, and the selling the same. It is to be noticed that those sections also create the offence of selling the article when mixed, and by sect. 5 it is provided that no one shall be convicted under those sections in respect of the sale of any article of food or any drug if he shows absence of knowledge, and that he could not with reasonable

diligence have obtained that knowledge. In my opinion sect. 25 does not apply to offences under those sections. Sect. 6 makes it an offence to sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality of that demanded by the purchaser. Sect. 25 does apply to that section, and also to sect. 7, which forbids the sale of any compound article of food or compounded drug which is not composed of ingredients in accordance with the demand of the purchaser. But the offences under sect. 9 are different, and here the offence charged is not selling, but abstracting from the article of food a part of it so as to injuriously affect its quality with the intent that it should be sold in its altered state. In the case stated there is nothing to show that the man did anything of the kind. Although I am of opinion that sect. 25 does not apply, I propose to deal with the case as if it did. The points raised by the appellant are: (1) That the warranty formed no part of the contract; (2) that there was nothing to show on the face of it that the warranty applied to the particular sale of milk on the 20th July; (3) that there must be a specific warranty with each delivery of milk. The facts are set out in the case. It appears that the respondent began purchasing milk from the original vendor in 1897, having milk delivered day by day probably in such circumstances that a promise to pay arose each time the milk was received. Then in July 1899 he obtained from his vendor a warranty in these terms: "We hereby warrant that each and every supply of milk sent by us to you shall be new milk unadulterated and with all its cream." It was found, as a fact, and no doubt on sufficient evidence, that the milk sold by the respondent to the appellant was milk delivered by the original vendor under the contract to which this warranty applied. The original vendor himself appears to have been called and to have stated that the milk in question was milk he intended to deliver under the contract. I agree that it is not sufficient for the vendor to come forward and say it was intended to deliver the milk under the contract containing the warranty. It must appear that the delivery was in fact under the warranty. But here that fact is found. Sect. 25 requires that the accused should prove to the satisfaction of the justices that he purchased the article as the same in nature, substance, and quality as that demanded by the prosecutor, and with a written warranty to that effect. That the respondent has proved, for he proved that he bought under a warranty applying to the particular milk in question. No one can doubt that if the respondent had brought an action against his vendor for a breach of the warranty he would have succeeded. It is said that this is not sufficient, and certain authorities are relied on. The first one is a case of *Harris v. May* (12 Q. B. Div. 97), where the information was laid under sect. 6 of the Sale of Food and Drugs Act 1875, a section to which sect. 25 applies. It was there proved that the milk had been supplied to the appellant under a written contract dated the 24th March 1883, and made between the vendor of the one part and the appellant of the other part, whereby the vendor agreed to sell to the appellant "eighty-six imperial gallons of new and pure milk each and every day for six months commencing the 25th March." The sale in respect of which the infor-

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mation was laid was on the 12th April. It is suggested there that goods to be delivered in the future are not within a former written warranty at all. There the contract and the warranty were made many days before the actual sale which was the subject of the prosecution. Lord Coleridge, C.J. in his judgment says: "I entertain no doubt on this matter. I am of opinion that the contract relied on by the appellant is not a written warranty within the meaning of the Act. . . . It seems clear that the Legislature meant that a person seeking to protect himself against the penalty, and wishing to make himself perfectly safe in respect of the sale of a specific article, must show that he had a proper specific warranty in writing in respect of that article from his vendor. The appellant here has not shown that. It is possible that he may have had a parol statement amounting to a warranty from his vendor each morning that the milk was supplied, but that would not be sufficient to comply with the requirements of the Act." The Chief Justice at the beginning of his judgment says that an action for breach of warranty could be brought on the contract, and, that being so, he must have considered it a proper warranty. It was there specific and in writing. It is suggested that the warranty should be affixed to the article or package, or at any rate must specifically refer to each article; but I ask, Where in the statute does it appear that such a cumbersome procedure is required? Who is to do it? When or how is it to be done? Is the vendor or the purchaser to affix it? I see nothing in the Act that requires anything of the sort. The Act requires that the purchaser should have bought the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor and with a written warranty to that effect, and that he had no reason to believe at the time when he sold the article that it was otherwise, and that he sold it in the same state as he purchased it. Those are all the requisites of the statute, and, those having been fulfilled, I am at a loss to understand why that case was so decided. The next case is that of *Farmers and Cleveland Dairy Company v. Stevenson* (63 L. T. Rep. 776), where the appellants were convicted of having sold milk not of the nature, substance, and quality demanded. They proved that they had bought the milk under a written contract with the vendor by which they were to have a daily supply for six months. By the contract the vendor warranted each and every supply of milk delivered under the contract to be pure, genuine, and new milk unadulterated and with all its cream on. The milk was delivered in London in cans, to each of which a label was attached stating the quantity in each can of "warranted genuine new milk with all its cream on." In my opinion that last fact does not make the least difference. Stephen, J. says at p. 72: "I agree that in the case before us there is such a warranty by the producer as to protect the purchaser. In the agreement there was a written warranty that the milk to be delivered was to be pure, genuine, and new milk unadulterated and with all its cream on, and the fact that the milk was not to be delivered all at one time does not, to my mind, make any difference." Stephen, J. states there what I believe the law to be. In *Laidlaw v. Wilson* (1894) 1 Q. B. 74) the respondent entered into a contract

with the manufacturers on the 17th Dec. 1892 as follows: "We have this day sold to you three tons Kilvert's pure lard for delivery to end of Jan. 1893." A parcel of the lard was delivered on the 23rd Dec. which turned out to be adulterated. On a prosecution under sect. 6 it was held that the contract of the 17th Dec. contained a sufficient warranty of purity in respect of the specific parcel of the 23rd Dec. to satisfy sect. 25, and so the respondent was entitled to be discharged from the prosecution. It became necessary to distinguish *Harris v. May* (*sup.*), and Charles, J. attempted to do it. In my opinion they cannot be distinguished one from another because they are in direct conflict, but Charles, J. did attempt to draw a distinction. He says with reference to the invoice: "I decide the present case upon the construction which is to be put, not upon the invoice of the 23rd Dec., but upon the contract of the 17th Dec." Then he goes on to deal with *Harris v. May*, and says: "There, no doubt, Lord Coleridge, C.J., at the commencement of his judgment, said that, in his opinion, the contract relied on by the defendant was not a written warranty within the meaning of the Act. But on looking at his judgment as a whole, I think that what he really meant was that it was not such a warranty as would cover the specific delivery of milk on the 12th April, in the absence of some written evidence that that specific delivery was made under the contract." But what he says there is clearly not what Lord Coleridge meant. The two cases cannot be distinguished. As I have said, they are in direct conflict. Charles, J. then goes on: "In the present case there is evidence that the particular parcel of lard was delivered under the contract, the delivery having been accompanied by an invoice which describes the lard in the same terms as those contained in the contract. The invoice, however, is material, not as itself containing a warranty of purity, but as earmarking the particular parcel as having been delivered under a contract in which a written warranty of purity was contained." If by that Charles, J. meant to say that there must be something in writing to earmark the particular article, I dissent from that proposition. Wright, J. in *Laidlaw v. Wilson* says: "The word 'pure' in the contract of the 17th Dec. amounts to an agreement as an essential part of the contract that the lard supplied should be pure, and that is, in my opinion, a sufficient warranty of its purity within the meaning of the section." The only other case is that of *Robertson v. Harris* (82 L. T. Rep. 536; (1900) 2 Q. B. 117), and it was there held that, even if the written agreement amounted to a warranty within the meaning of sect. 25, there must be some evidence in writing to show that the particular milk sold to the appellant was purchased with that warranty, and that in the absence of that evidence the agreement afforded no defence, following the suggestion of Charles, J. in *Laidlaw v. Wilson* (*sup.*) as to what Lord Coleridge, C.J. meant in *Harris v. May* (*sup.*), that there must be something to identify the article with the warranty. I find nothing in the statute to justify placing such an onerous condition on either the vendor or the purchaser. The view that I take is that *Laidlaw v. Wilson* (*sup.*) is right, and that it is in direct conflict with *Harris v. May*, and that it is the authority that we ought

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to follow in the present case. Assuming sect. 25 applies to this case, I think that the respondent has brought himself within its protection. As to the specific questions we have to answer, I think that the warranty did form part of the contract; that it is not necessary to show on the face of the warranty that it applied to the particular sale of milk, as it is sufficient to show the connection by evidence; and that the statute does not require that there must be a specific warranty with each sale of milk. It requires nothing of the kind. It merely requires that the article should be sold with a warranty. I think the appeal must be dismissed.

RIDLEY, J.—I agree with my brother Bigham. It is necessary for me just to add a few words as I was a party to the decision in *Robertson v. Harris* (*ubi sup.*). In *Laidlaw v. Wilson* there was an invoice, and Charles, J. in dealing with it said that it could be treated as written evidence connecting the warranty found in the contract with the sale of that particular consignment. His words were: "In the present case there is evidence that the particular parcel of lard was delivered under the contract, the delivery having been accompanied by an invoice which describes the lard in the same terms as those contained in the contract. The invoice, however, is material, not as itself containing the warranty of purity, but as earmarking the particular parcel as having been delivered under a contract in which a written warranty of purity was contained." He interpreted the judgment of Lord Coleridge in *Harris v. May* as proceeding upon this—that there must, in order to satisfy this section of the statute, be "some written evidence that the specific delivery was made under the contract." I adopted what he said. At the present moment I think *Laidlaw v. Wilson* was rightly decided, and that *Robertson v. Harris* was not necessarily wrong. The headnote in the *Law Journal* report is correct in law, though possibly not so accurate a summary of the decision as the headnote in the *Law Reports*, which, on the other hand, in my opinion, is wrong in law, for it states as the reason of that decision the principle with which I do not agree—namely, that in order to satisfy the statute there must be some written invoice to connect the warranty contained in the contract with the particular consignment.

Appeal dismissed.

Solicitors: Warren, Murton, and Miller.

Thursday, June 20, 1901.

(Before RIDLEY and BIGHAM, JJ.)

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Public Health — Drain — Effectual drainage of house — Requirements for drainage scheme — Public Health Act 1875 (38 & 39 Vict. c. 54), s. 25.

All that the local authority are entitled to consider under sect. 25 of the Public Health Act 1875, is whether the drain is constructed of such size and materials, and at such level and with such fall as is necessary for the effectual drainage of the house.

Therefore, where two drains were required, con-

nected with the two sewers of the authority, in order to facilitate the ultimate disposal of the sewage by the council, this was held to be beyond the powers conferred on the authority by the section.

CASE stated on an information laid by the respondent against the appellant, charging him for that within the six months then last past he had newly erected a house in Lyon-road in the urban district of Harrow-on-the-Hill without constructing such covered drains thereto as on the report of the surveyor to the urban district council of the district appeared to the council necessary for effectual drainage of such house contrary to sect. 25 of the Public Health Act 1875.

The information was laid by the respondent as clerk for and on behalf of the above-mentioned urban district council of Harrow, hereinafter called the council.

The appellant erected the house referred to in the information between Aug. and Sept. 1900. The house is within the council's district, and abuts upon a street in the district called Lyon-road.

Two sewers have been laid by the council in Lyon-road, both within 100ft. of the site of the house. One of these sewers (hereinafter called the surface-water sewer") the council desire and intend to be used for the reception and conveyance of surface water only. The other of these sewers (hereinafter called "the sewage sewer") the council desire and intend to be used for the reception and conveyance of sewage only.

Bye-laws in relation (*inter alia*) to the drainage of buildings made under sect. 157 of the Public Health Act 1875 are in force in the council's district. These bye-laws do not require that separate drains for surface water and sewage respectively should be laid for any building.

On the 22nd Jan. 1900 certain regulations were issued by the council. These regulations purport to be made under sect. 21 of the Public Health Act 1875 with reference to the mode in which the communications between drains and sewers are made. One of these regulations purports to prohibit surface water from being permitted to enter the council's sewers without the special sanction of the council.

Before erecting the house the appellant deposited plans of the same in accordance with the requirements of the bye-laws above mentioned, showing, *inter alia*, the method proposed to be adopted, and afterwards in fact adopted, by him for the drainage of the house—namely, by means of a single drain, which the appellant proposed to connect with the sewage sewer intended for the discharge both of the surface water and of the sewage. These plans were at first disapproved by the council on the ground that they were not in compliance with the regulations above referred to, but were subsequently conditionally approved as hereinafter appears.

On the 21st Nov. 1900, the council's surveyor made to the council the following report with reference to the house:

Gentlemen, — Drainage of new house, Lyon-road, for Mr. H. R. Matthews. — As instructed I beg to present my report on the above. The requirements for the effectual drainage of this house are as follows: (a) One main drain of not less than 4in. internal diameter for conveying sewage only to be constructed of good

(c) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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sound stoneware pipes or other equally suitable material, and connected to the council sewage sewer, in Lyon-road. The pipes to be laid on a bed of good concrete at a gradient of not less than 1ft. in 60ft., and with water-tight joints (where drain passes under building, the same to be of iron with lead joints, or of stoneware completely surrounded with 6in. of good and solid concrete). Manholes to be built at every change of direction and gradient in drain; also a manhole where soil pipe is connected to drain, and a disconnecting chamber with proper disconnecting trap to be built as far distant as practicable from the building. To this main drain must be connected with suitable 4in. pipes the soil pipe taking the water-closet on the first floor. Also the drains taking the water-closet on the ground floor, the lavatories, bath and scullery waste pipes must discharge in the open air over trapped gully gratings, which gullies must be connected to this main sewage drain. The drain to be ventilated by means of a fresh air inlet pipe of 4in. diameter, connected to the disconnecting chamber on the house side of the disconnecting trap; and an outlet shaft, also of 4in. diameter, connected to the head of the drain and carried up above the roof. (b) One main drain of not less than 4in. internal diameter for conveying surface water only, to be constructed of good sound stoneware pipes or other equally good material, with water-tight joints, and laid at a not less gradient than 1ft. in 60ft., which drain is to be connected to the council's surface water sewer in Lyon-road. To this drain must be connected the whole of the rainwater pipes or gullies which carry the surface water from the roof or roofs. The whole to be tested by and laid to the satisfaction of the surveyor to the council.—I am, gentlemen, your obedient servant, (Signed) J. PERCY BENNETTS, Engineer and Surveyor.

On the 26th Nov. 1900 the council took the report into consideration and, after considerable discussion, passed the following resolution:

That the council approve the plans submitted by Mr. H. E. Matthews subject to the requirements contained in the above report as to the drainage of the house being carried out. Mr. Marchant, Mr. Hankins. Carried; Messrs. Batchelor, Charles, and Young not voting.

On the 27th Nov. 1900 the respondent, by direction of the council, forwarded to the appellant a copy of the report of the surveyor and wrote him therewith a letter, of which the following is a copy:

Dear Sir,—New House, Lyon-road.—I am now directed by my council to inform you that they received a report from their surveyor, a copy of which is inclosed herewith, specifying what drains are necessary for the effective drainage of the house now in course of erection by you in Lyon-road, and the council call upon you to lay the drains in accordance with that report. I am also directed to state that the council have taken counsel's opinion upon the matter and are advised that they have power, under section 25 of the Public Health Act 1875, to prescribe what drains are necessary for the effectual drainage of your house and to what sewers the drains shall be connected. The council approve the plans deposited by you subject to the requirements contained in such report as to the drainage of the house being carried out.—Yours faithfully, JOHN STRACHAN, Clerk.

The appellants did not lay two drains for the drainage of the house as required by the notice and report, but laid one drain only for the drainage thereof in the manner shown in the plans deposited by him as hereinbefore stated. The drain so laid by the appellant was in all respects in accordance with the requirements of the report, and notice as regards the conveyance of surface water as required by the report and notice, such

surface water being conveyed to the soil drain in direct contravention of the council's requirements.

The council's surveyor was called as a witness before the justices. He admitted that the drain laid by the appellant would have been perfectly effectual if there had been only one sewer in Lyon-road, and that his reason for reporting that separate drains ought to be laid—one for sewage only, and one for surface water—was that it was desirable with a view of facilitating the ultimate disposal of sewage by the council that sewage only should be discharged into the sewage sewer, and surface water only into the surface water sewer, and that there were separate sewers for sewage and for surface water in Lyon-road aforesaid.

It was contended for the appellant that the powers of the council under sect. 25 of the Public Health Act 1875 did not extend to requiring separate drains for surface water and sewage respectively to be laid for a house; that in exercising their powers under that section an urban authority must confine themselves to a consideration of what is necessary for the effectual drainage of the house, and cannot require the laying of drains not necessary for that purpose but required or desirable for facilitating the ultimate disposal of sewage by the urban authority; that the requirements of an urban authority under that section must be confined to the size, level, materials, and fall of the drain or drains to be constructed, and cannot extend to other matters connected with the drainage of the house; that the report of the council's surveyor was not such a report as the council could act upon under the section, inasmuch as in the first place the report was not an expression of the opinion of the council's surveyor as to what was necessary for the effectual drainage of the house, but as to what was necessary or desirable for the purpose of facilitating the ultimate disposal of the sewage, and, in the second place, the report was not confined to the size, level, materials, and fall of the drain or drains to be constructed, but extended to other matters.

It was contended for the respondent that the surveyor having made the report above set out to the council, and the council having in fact taken that report into consideration, and passed a resolution that the drains specified in the report appeared to the council to be necessary for the effectual drainage of the house; and having given notice of that resolution to the appellant, the justices were bound, in the absence of any evidence that the council had not fairly considered the facts of the particular case, to convict upon its being found that the appellant had not complied with such notice.

The justices held as a point of law that under these circumstances they had no power to question the reasonableness of the requirements for the effectual drainage of the house either as regards the house itself only or in connection with the general system of drainage in the district, and they convicted the appellant accordingly.

A. F. Jenkin (McCall, K.C. with him) for the appellant.—The question here is whether the local authority under sect. 25 of the Public Health Act 1875 can require a new house to be drained by two drains, one for sewage and one for surface water, or whether the proper method of proceed-

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ing is by making bye-laws. Under sect. 25 the local authority has absolute powers, and there is no appeal from their decision, but if bye-laws are made, they have to be approved by the Local Government Board under sect. 184, and objections can be heard against them. They have to be reasonable, and their reasonableness may be tested in a court of law. In this section, however, the words are "drain or drains be constructed . . . as on the report of the surveyor may appear to the urban authority necessary for the effectual drainage of such house." Where such words are used, the local authority are absolute. But all the local authority have to consider is what is necessary for the effectual drainage of the house if they wish to go under this section. If they wish to take into consideration what is desirable or necessary for the district at large, they must not go under the section, but must make bye-laws, which they have power to make under sect. 157 (4). As a matter of fact they have made bye-laws, but they do not deal with the question of two drains to each new house. The powers conferred by sect. 25 do not extend to requiring two drains for different purposes. The local authority here have not considered what is necessary for the effectual drainage of the house, but have taken into consideration other matters. The drains must be made of such size, materials, at such level, and with such fall, as is necessary, and those are the only four matters that are to be considered by the local authority when seeing whether the drain or drains are necessary for the effectual drainage of the house.

S. G. Lushington (Macmorran, K.C. with him) for the respondents.—It is clear that the local authority has two sorts of powers—namely, those under sect. 25 and those under sect. 157. These are co-existent. But here they are acting under sect. 25 alone. That section says that drains are to be constructed as on the report of the surveyor may appear to the authority necessary for the effectual drainage of the house. What is necessary is within the discretion of the local authority, and all that has to be decided here is whether that discretion has been properly exercised. The report of the surveyor was before the local authority, and after discussion they came to the conclusion that what was reported was in fact necessary. The principle to be acted upon in cases like this is laid down in *Smith v. Chorley District Council* (76 L. T. Rep. 637; (1897) 1 Q. B. 678). [BIGHAM, J.—The section says that the drain or drains shall empty into a sewer, not sewers.] The report is in the words of the section, and that is sufficient. The discretion here was properly exercised, and the court should not interfere with the decision of the local authority which has been upheld by the justices.

RIDLEY, J.—We think that the magistrates were wrong in this case. The point arises upon sect. 25 of the Public Health Act 1875, as the appellant was convicted of newly erecting a house without constructing such covered drains thereto as on the report of the surveyor to the urban district council appeared to the council necessary for the effectual drainage of such house contrary to sect. 25. The surveyor had made a report to the council that did state on its face that the requirements for the effectual drainage of the house were as therein contained. No evi-

dence was called before the council at the time when they considered this report, and they acted upon the report alone. When the case came before the justices the surveyor was called as a witness, and he admitted that the drain laid by the appellant would have been perfectly effectual if there had been only one sewer, and that his reason for reporting that separate drains ought to be laid was that it was desirable, with a view of facilitating the ultimate disposal of sewage by the council, that sewage should be discharged into one sewer and surface water into another. We must take that as constituting the facts in this case. It may be that the attention of the council was not called to the circumstances which caused the surveyor to make the report, but the report was founded on a misconception, and the surveyor acted on powers which were not given him by sect. 25. That section refers only to the effectual drainage of such house. If you go beyond the section, you are asking the owners to assist the council in the disposal of sewage. When the surveyor admits that the drain would have been perfectly effectual as laid by the appellant if it had not been that there were two sewers which were desirable with a view of facilitating the ultimate disposal of sewage by the council, that shows he acted upon a misconception, as the section merely contemplates the effectual drainage of the house, and not the scheme of the council for the disposal of their sewage. No doubt the council are masters of the situation so far as the powers given them by the section are concerned, but if they go beyond the limits of the discretion given them by that section it is for us to say so. Now, sect. 25 of the Public Health Act 1875 is as follows: "It shall not be lawful in any urban district newly to erect any house or to rebuild any house which has been pulled down to or below the ground floor or to occupy any house so newly erected or rebuilt unless and until a covered drain or drains be constructed of such size and materials and at such level and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house; and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use and which is within 100ft. of some part of the site of the house to be built or rebuilt; but if no such means of drainage are within that distance then shall empty into such covered cesspool or other place, not being under any house, as the urban authority direct." It appears to me that the words are carefully selected to show what has to be considered for what is necessary for the effectual drainage of the house. It is possible that for the effectual drainage of a house it might be necessary to have more than one drain, and, further, if it were necessary for the requirements of the house that the drains should go into more than one sewer, that might have to be done. If these matters were for the effectual drainage of the house, it would not be beyond the power of the local authority to order them; but if the authority considers what is beneficial for the inhabitants in general—such as the disposal of sewage—that does not come within the powers given them by this section. There is no liability upon the owner of a house as to that matter except as a ratepayer in common with other ratepayers.

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BIGHAM, J.—I am of the same opinion. Sect. 25 empowers the authority to take into consideration certain matters only when considering whether the drain is effectual for the drainage of the house. Those matters are mentioned in the section, and they are whether the drain is constructed of such size and materials and at such level and with such fall as is necessary for the effectual drainage of the house. Those are the only matters which they are entitled to take into consideration. If they are of opinion that those matters are not as they should be, the new house cannot be proceeded with. In this case the council have considered other matters. I come to this conclusion, not only from the evidence of the surveyor given before the justices, but by reading the report upon which the council acted. It is said that they took no other matters into consideration but what were necessary for the effectual drainage of the house. The report shows, however, that both the surveyor and the council took matters into consideration which they should not have done. In the report we find that one drain for conveying sewage only was to be of pipes connected to the council's sewage sewer, and that another drain was to be of pipes connected to the council's surface-water sewer. It is clear that both council and surveyor had nothing to do with these matters, but only with the powers given them by the section. When one considers all the facts, one can see the reason why all these matters were considered. There was a drainage scheme in the district by which sewage and surface water were separated. No doubt it is good and desirable that this should be carried out effectively, but the scheme must be carried out at the expense of the ratepayers, and not at the expense of the individual householder. This is an attempt to throw the expense of the system on one particular person. The council in exercising their discretion have travelled outside what the section allows. As to the words in the section "and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use," I see nothing in those words to allow the council to direct which sewer the drain is to empty into. The local authority are not to consider or to direct which sewer the drains are to empty into. It is only necessary that the drain should empty into a sewer within 100ft. of some part of the site of the house to be built or rebuilt, and those words do not enlarge the power of the council. Here they have taken into consideration matters they should not have taken into consideration, and the appeal must be allowed.

Judgment accordingly.

Solicitors: Burgess and Taylor; Fishers.

Thursday, May 9, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

SQUIRE (app.) v. BAYER AND Co. (resps.) (a)
Employer and workman—Factory—Fines under contract—Good order and decorum while in factory—Specification of acts and omissions—Acts causing or likely to cause damage to employer—Truck Act 1896 (59 & 60 Vict. c. 44), s. 1 (1) (b) (c). By the terms of the contract between employers and

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

their workmen the latter were to be liable to a fine of 6d. or less if they failed to observe "good order and decorum" while in the factory.

By the consent of the employers the workmen were permitted to have their dinner in a workroom in the factory in which there were machinery and materials. During the dinner hour B., a workman within the meaning of the Truck Act 1896, was discovered in such playing a small harp to the music of which the other workmen were dancing. It was found as a fact that such conduct was disorderly, and that the dancing, by raising dust, caused or was likely to cause damage to the machinery and materials in the room. B. was fined by the employers.

Held, on these facts, that under the circumstances the rule prescribing fines for breaches of "good order and decorum" while in the factory was a sufficient specification of the acts or omissions for which fines might be inflicted to satisfy sect. 1 (1) of the Truck Act 1896, and that there was sufficient evidence to support the finding that B.'s conduct was a breach of such rule.

CASE stated by the justices of the city and county of Bristol.

An information and complaint was laid against the respondents, Bayer and Co., by the appellant, Rose Elizabeth Squire, one of H.M. inspectors of factories and workshops, that the respondents, being employers within the Truck Act 1896, did unlawfully make a contract with a workman—to wit, Helen Louisa Robbins—for a deduction for or in respect of a fine—to wit, of 6d. or less—from the sum contracted to be paid by the employers to the workman, contrary to sect. 1, sub-sect. 1. of the Truck Act 1896 in that the said contract did not specify the acts or omissions in respect of which the fine might be imposed; and the fine was imposed not in respect of some act or omission which caused or was likely to cause damage or loss to the employers or interruption or hindrance to their business, whereby the respondents were liable to a penalty of 10l.

Truck Act 1896 (59 & 60 Vict. c. 44):

Sect. 1 (1) An employer shall not make any contract with any workman for any deduction from the sum contracted to be paid by the employer to the workman or for any payment to the employer by the workman for or in respect of any fine unless . . . (b) the contract specifies the acts or omissions in respect of which the fine may be imposed, and the amount of the fine, or the particulars from which that amount may be ascertained; and (c) the fine imposed under the contract is in respect of some act or omission which causes or is likely to cause damage or loss to the employer or interruption or hindrance to his business.

It was proved or admitted at the hearing before the justices that the respondents were corset manufacturers, and that their works at Bristol were a factory within the meaning of the Factory and Workshop Acts 1878 and 1895. Among the rules produced by the respondents as containing the terms of the contract between them and their employees was the following:

All workers shall observe good order and decorum while in the factory, and shall not do anything which may interfere with the proper and orderly conduct of the business thereof or of any department thereof; and shall in all respects obey the lawful commands of the general manager, forewoman, or superintendent of their respective departments. A fine of 6d. (or less at the

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discretion of the manager) shall be paid by each worker who shall be guilty of any infringement of this rule.

The before-mentioned Helen Robbins was employed by the respondents under a contract upon the terms contained in these rules.

The respondents granted to their employees the privilege of having their dinners in the workroom of the factory between 1 and 2 p.m.; but the employees were not obliged to have their dinners there, but might dine elsewhere if they wished. The rules of the factory were in force during the dinner hour as well as at other times, and this was known to the employees. One day in November during the dinner hour Miss Knight, who was then in charge of the factory, and whose room was immediately beneath that in which the employees were having dinner, heard a considerable noise and commotion going on in that room, and on going there discovered Robbins playing a small harp, to the music of which several girls were dancing, singing, and clapping their hands. Miss Knight, in the course of her duty, reported the disorder, and Robbins and some others were fined 2d. each. Robbins stated before the justices that she had not been told that it was wrong to dance and sing during the dinner hour, and that she was not aware that there was any harm in it; but it was proved that a copy of the rules was posted in that workroom and other copies at other places in the factory, and Robbins admitted that she and the other girls would not have done what they did if Miss Knight had been present.

It was proved before the justices that the disorder and dancing caused considerable dust, and that dust would cause injury to the machines at which the employees worked as well as to the material served out to them to work upon. It was further proved that no fines were deducted from the wages of the employees, but a fine-book was kept, and once a week the employees were asked to pay such fines after they had received their wages in full, and a receipt was given for the fine, the one given to Robbins being as follows:

The sum of 2d. has this day been received from Robbins in respect of a fine for making a noise during dinner hour.

The appellant contended (a) that the rule did not specify the acts or omissions in respect of which a fine might be imposed; and (b) that the fine imposed under the rule was not in respect of some act or omission within the meaning of sub-sect. 1 (c) of sect. 1 of the Truck Act 1896.

The respondents contended that the words of the rule sufficiently specified the acts and omissions in respect of which a fine might be imposed, and that the fine in fact inflicted was in respect of an act which caused or was likely to cause damage or loss to the respondents or interruption or hindrance to their business.

The justices found as a fact upon the evidence that good order and decorum were not observed, and that dancing and disorder were likely to cause damage or loss to the respondents and injury to the discipline necessary to be enforced in a factory of that description. They also found as a fact that the rule (which was the only one in dispute before them) constituted a reasonable contract between the respondents and their employees for securing good order and decorum in the factory and complied with sect. 1 (1) (b)

and (c) of the Act, and they accordingly dismissed the summons.

The question for the opinion of the court was whether on the facts stated the justices had come to a right conclusion.

The *Attorney-General* (Sir Robert R. Finlay, K.C.) (*H. Sutton* with him) for the appellant.—The whole object of sect. 1 of the Truck Act 1896 is to secure that the workman shall have specific notice of the acts for doing which he will be fined. Here there is no specific notice. There is a general and vague rule that the workmen are to maintain good order. This general rule is applicable not merely during working hours, but during the dinner hour. Surely it is impossible to say that the workmen have received specific notice of the acts they may not do while eating their dinners except at the risk of a fine. We submit the rule, then, is too general and vague to be in compliance with the requirements of sect. 1. Moreover, there is no evidence that any breach of it was committed. All that Robbins did was to play a small harp. This in itself could not in any way be a breach of order and decorum during dinner, though it might during working hours, when it would naturally interrupt the work. Neither could it by itself raise dust or in any other way injure the employers.

Foots, K.C. (*Douglas Metcalfe* with him).—If there is to be any rule at all as to the observance of order and decorum in the factory it must be in the general form which characterises this rule. It is impossible to prescribe the different acts which may constitute breaches of order and decorum either during working hours or the dinner hour. Here the workpeople were allowed the privilege of taking dinner in the factory, and it was perfectly proper that the employers should take measures to secure order while they were at dinner there. The only way in which this could be secured was by a general provision that disorder would be punished by fines. As to the point whether what was done by Robbins amounts to a breach tending to injure the employers, the finding of the justices is one of fact on the evidence and it cannot now be reviewed.

The *Attorney-General* in reply.

Lord ALVERSTONE, O.J.—This case is not free from difficulty, but I cannot see my way to hold that the justices have come to a wrong decision. The two questions which we are asked to consider are—first, whether the rule is valid; and, secondly, whether there has been such a breach of it as would justify the infliction of a fine, having regard to the statute. In the view I take, I do not dissent materially from anything the *Attorney-General* has said as to the conditions which must be present in order to justify the infliction of a fine. By sect. 1, sub-sect. 1, of the Truck Act 1896 there must be a contract which shall specify the acts and omissions in respect of which the fine shall be imposed, and the amount of the fine in money imposed under the contract must be in respect of some act or omission which causes or is likely to cause damage or loss to the employer; and under sub-sect. 2 the deductions must be made in pursuance of such a contract, and particulars in writing showing the acts or omissions in respect of which the fine is imposed are to be supplied to the workman. In the present case the justices have found that there was during the

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dinner hour dancing and disorder in this particular room in the factory—disorder is the word to which I call attention; that to the knowledge of the employees the rules were in force in the factory during the dinner hour, and that the disorder was discovered and reported by the clerk who was then in charge in pursuance of her duty. It has been pressed upon us that a rule which provides that "all workers shall observe good order and decorum while in the factory" is not a sufficient specification of the "acts or omissions in respect of which the fine may be imposed." Now, as there are so many different factories and so many kinds of businesses, and as good order and decorum must, in my view, be something with reference to the particular character of the business carried on and to the particular privileges given by the factory owners to the work-people, I think it would be going too far to say that the language prescribing a fine for breach of good order and decorum is necessarily too general. In a sense, of course, it does not specify the particular acts and omissions which will lead to the infliction of fines; but, in my opinion, "good order and decorum" must be construed with reference to the circumstances under which the business is carried on. Speaking for myself, I think it is a sufficient compliance with the Act for the employers to say that a fine may be inflicted if the employee does not observe good order and decorum while in the factory. The second point taken by the Attorney-General is that there was no evidence of anything done by the girl Robbins which could fairly be called a non-observance of the rule. As to that, I think that the facts found by the justices prevent the point being raised. They have clearly found that there was dancing by the girls to the music she was playing on the harp, and that such conduct was not an observance of good order and decorum, and that it was likely to cause injury, by reason of the dust raised, to the machinery and materials. I think on the face of these findings we cannot take the isolated act of the girl who provided the music, however innocent it may have been, and say that that particular act was not part of the disorder. The matter must be looked at as a whole, and, if the rule is in accordance with the requirements of the statute, we cannot say that there was no evidence of a breach of good order and decorum, having regard to the privileges which were allowed to these girls and the position they occupied in the factory. For I do not think we ought entirely to shut out of consideration the circumstance of the girls being allowed to have their meals in the workroom, where there were much valuable machinery and materials; and it is with reference to that that we must consider whether there has been a breach of the rule, having regard to the place in which the act was done which the justices have found to be disorderly. For these reasons the decision of the justices upon their findings must be affirmed.

LAWRENCE, J.—I am of the same opinion.

Appeal dismissed.

Solicitors: for the appellant, *Solicitor to the Treasury*; for the respondents, *George Reader and Co.*

Tuesday, May 14, 1901.

(Before Lord ALVERSTONE, C.J. and LAWRENCE, J.)

FULLERS LIMITED (apps.) v. SQUIRE (resp.). (a)

Factory—Workshop—Shop—Packing goods for sale after shop hours—"Adapting for sale"—Factory and Workshop Act (41 Vict. c. 16), s. 93.

The packing in a shop of goods for sale to customers may, if it takes place after the ordinary shop hours, amount to "adapting" them for sale within sect. 93 of the Factory and Workshop Act, and make the shop a workshop within the meaning of the Factory and Workshop Acts 1878 to 1895.

CASE stated by a metropolitan magistrate.

A complaint and information was preferred by the respondent, Rose Elizabeth Squire, an inspector of factories and workshops, against the appellants, Fullers Limited, under sects. 13 and 83 of the Factory and Workshop Act 1878 (41 Vict. c. 16), for that they on the 19th Dec. 1900, being then the occupiers of certain premises, the same being a workshop within the meaning of the Factory and Workshop Acts 1878 to 1895, at 206, Regent-street, within the metropolitan police district, did there and then unlawfully employ a certain woman—to wit, one Ada Simmonds—after the legal period of employment, contrary to the said statute.

By sect. 93 of the Factory and Workshop Act 1878 the expression "workshop" means (*inter alia*)

Any premises, room, or place not being a factory within the meaning of this Act in which premises, room, or place, or within the close or curtilage or precincts of which premises, any manual labour is exercised by way of trade or for the purposes of gain in or incidental to the following purposes or any of them; that is to say (a) in or incidental to the making of any article or of part of any article, or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (c) in or incidental to the adapting for sale of any article, and to which or over which premises, room, or place the employer of the persons working therein has the right of access or control.

The appellants were a firm of wholesale and retail manufacturers of bonbons, sweetmeats, and confectionery, carrying on a wholesale business at a factory at Hammersmith, and had amongst other retail places of business a retail shop at 206, Regent-street.

At 206, Regent-street the appellants carried on their business on the ground, first, and top floors.

On the top floor artificial flowers were sewn on to the wicker hampers hereinafter mentioned. This floor was separate and distinct from the ground and first floors, and was separately managed and regulated by the appellants according to the provisions of the Factory and Workshop Acts 1878 to 1895. The ground and first floors were used for the sale of bonbons, sweetmeats, wicker hampers packed and decorated as hereinafter set out, cardboard boxes, and confectionery, and also as tea rooms and in the manner hereinafter described.

Ada Simmonds was on the 19th and 20th Dec. 1900 in the employment of the appellants, and was employed by them at their premises at Hammersmith from 8 a.m. till noon on the 19th

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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Dec., and afterwards on the ground and first floors at 206, Regent-street (with certain intervals) from 1 p.m. on the 19th Dec. to 3 a.m. on the 20th Dec.

For the purposes of such last-mentioned employment Simmonds was furnished by the appellants with an assortment of bonbons and sweetmeats of various shapes, sizes, and colours, also with cardboard boxes, ornamented wicker hampers, ribbons of a variety of sizes and colours, and fancy lace-paper necessary for her work as hereinafter described.

From 1 p.m. on the 19th Dec. until 3 a.m. on the 20th Dec. Simmonds was chiefly engaged in packing and arranging in layers in the cardboard boxes and ornamented hampers an assortment of bonbons and sweetmeats of different colours, shapes, and sizes in fancy patterns; placing sheets of the lace-paper between each layer of sweetmeats or bonbons, tying up the boxes and hampers when so filled with the fancy ribbons, and in arranging the same with bows on the outside of such boxes and hampers with a view to rendering the same more attractive to purchasers than they would be if not so tastefully sorted, arranged, packed, and bound up; and the magistrate found as a fact that the same were so rendered more attractive by the work so expended upon them, and that such work required the exercise of skill and taste upon the part of Ada Simmonds.

The hampers when so filled, arranged, and dealt with were intended to be and were sold to customers as a whole, and at a certain fixed price for the whole, but such price was the same as that charged to customers for such ornamental hampers when empty, plus the price of the sweets, no special or separate charge being added in respect of the packing.

At the hearing before the magistrate it was contended on behalf of the appellants that the employment of Simmonds by the appellants was not manual labour exercised by way of trade or for purposes of gain in or incidental to any of the purposes set out in sect. 93 of the Factory and Workshop Act 1878.

The magistrate held that that portion of the premises at 206, Regent-street in which Simmonds was so engaged was a workshop within the meaning of sect. 93 of the Factory and Workshop Act 1878, and that she was employed contrary to the provisions of the Factory and Workshop Acts, and convicted the appellants.

The question for the opinion of the court was whether the magistrate was right in convicting the appellants of the offence charged in the information.

Joseph Walton, K.C. (Given with him) for the appellants.—All that was done here was to parcel the goods out for sale; it was, in fact, part of the process of sale. If this makes the shop where it takes place a workshop within the Factory and Workshop Acts, then every druggist's or, for that matter, grocer's is a workshop. What sect. 93 (2) of the Factory and Workshop Act 1878 refers to is not the process of sale, but the process of manufacture. All that was done here is what is done in every shop—get the goods ready for delivery to the customers.

H. Sutton, for the respondent, was not called upon.

Lord ALVERSTONE, C.J.—This case is very near the line. The magistrate thought that the operations carried on came within sect. 93 of the Act of 1878. The facts appear to be that the place at which this work of packing sweetmeats was being carried on was, at any rate for a great part of the day, an ordinary shop—that is to say, sweetmeats were sold on the ground floor and tea was sold on the first floor—but up to a very late hour of the night the premises were being used for the carrying on of this particular operation. It must have been continued for several hours after the ordinary shop had closed. I do not wish to express any opinion upon the point raised upon behalf of the appellants—namely, that if in an ordinary shop during shop hours packing takes place the matter will of necessity come within sect. 93 of the Act of 1878. All we have to consider here is whether there was evidence on which the magistrate could come to the conclusion that he did. I have no doubt that there was. There were boxes of sweetmeats, and they were adapted for sale by the operation that was carried on—namely, that of placing them in layers, laying lace-paper in between the layers, and afterwards ornamenting the boxes. If this operation had taken place in a room in a separate building in which sweets were bought wholesale, I should have entertained no doubt upon the point. I was pressed, however, at first by the ingenious argument on behalf of the appellants, but I think the magistrate was entitled to hold on the evidence before him that, having regard to the fact that the operation was carried on for several hours after shop hours, it was not incidental to the shop business, but nothing more than carrying on the work which was to adapt the articles for sale. It is impossible to say there was no evidence upon which the magistrate could come to the conclusion he has arrived at. The appeal must be dismissed.

LAWRENCE, J.—I agree. *Appeal dismissed.*

Solicitors for the appellants, *Beaumont and Son.*

Solicitor for the respondent, *Solicitor to the Treasury.*

Tuesday, June 4, 1901.

(Before *BRUCE and PHILLIMORE, JJ.*)

STODDART v. ARGUS PRINTING COMPANY LIMITED. (a)

Gaming—Office used for betting—House opened abroad for receiving money in respect of bets—Advertisement of such house—Legality of advertisement—Betting Act 1853 (16 & 17 Vict. c. 119), ss. 1, 7—Betting Act 1874 (37 & 38 Vict. c. 15), s. 3.

Sec. 7 of the Betting Act 1853, which forbids the publication of any advertisement showing that any house is kept or used for the purpose of making bets or wagers, applies only to the first of the two illegal purposes specified in sect. 1 of the Act—namely, to houses opened, kept, or used, for the purpose of betting with persons resorting, that is, physically resorting thereto, and sect. 3 of the Betting Act 1874 also applies only to the same class of betting houses; and, therefore,

(a) Reported by *W. W. OBE, Esq., Barrister-at-Law.*

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the advertisement of a house kept or used for the purpose of money being there received as or for the consideration of an undertaking to pay thereafter money on events or contingencies relating to horse races, is not made illegal by either of these sections :

Consequently, an advertisement in a newspaper containing a "coupon competition," that is, a promise to pay a specified sum of money to such persons as should correctly guess the result of certain horse races shortly about to be run, and should write their guesses upon forms issued by the newspaper, and return the coupons so filled up, together with one penny for each guess, to a house or office abroad, kept and used for that purpose, is not made illegal by either of the above sections, as there is no physical resorting to such house for the purpose of betting.

ARGUMENT of a question of law raised on the pleadings.

The plaintiff, Joseph Stoddart, in his statement of claim alleged that :

1. The plaintiff is and has since the beginning of the year 1890 been carrying on business as the proprietor of a newspaper called *Sporting Luck*.

2. By an agreement, dated the 20th March 1890, the defendants agreed with the plaintiff to print and publish *Sporting Luck* on his behalf every week on terms and conditions in the said agreement more particularly specified.

3. The defendants have recently, while the said agreement was still in force, without any justification and in violation of their said agreement, refused to print and publish *Sporting Luck* for the plaintiff, whereby the plaintiff has suffered considerable damage.

The plaintiff claimed 1000*l.* damages.

By their amended defence the defendants alleged that :

1. The defendants always have been and still are ready and willing to fulfil their said contract so far as they legally may and to print the said newspaper. It was a condition of the said agreement that the defendants were only to be called upon to fulfil it if the said newspaper contained matter which was neither libellous nor illegal.

2. The defendants only refused to print the said newspaper because the plaintiff called upon them, under the contract which is above referred to, to print and publish for circulation in England with the said newspaper, and as a part of it, an advertisement, headed "International Supplement," relating to a horse racing competition, the publication of which, according to the defendants' contention, constitutes an offence against the Betting Acts of 1853 (16 & 17 Vict. c. 119, s. 7) and 1874 (37 & 38 Vict. c. 15, s. 3).

PARTICULARS.

1. On the 30th October 1900 one Ada Jane Stoddart was tried and convicted at the Central Criminal Court for that she, being the occupier of an office at 10, Red Lion-court, in the city of London, had unlawfully opened, kept, or used that office for the purpose of money being there received by her as the consideration of undertaking to pay thereafter money on events relating to horse racing, in contravention of sect. 1 of the Betting Act of 1853.

2. The learned judge, at the trial of the said Ada Jane Stoddart, reserved the point and stated a case for the consideration of the Court of Crown Cases Reserved as to whether the then defendant had in law been guilty of any offence against the said section of the said Act, and on the 17th November 1900 the conviction of the said Ada Jane Stoddart was unanimously affirmed by the Court for the consideration of Crown Cases

Reserved: (see *Reg. v. Stoddart*, 83 L. T. Rep. 538; (1901) 1 Q. B. 177.)

The facts that were proved against the said Ada Jane Stoddart and upon which her conviction was founded were that she was the occupier of an office at 10, Red Lion-court, in the City of London, and the registered proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a "coupon competition," that is to say, of a promise by the then defendant to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse race then shortly about to be run, and should write their guesses upon certain forms called "coupons," which were issued with each number of the newspaper, and should return the coupons so filled up to the then defendant's office, together with the sum of one penny in respect of each guess made. A large number of persons every week sent in to the said office coupons filled up as aforesaid, accompanied by remittances of money.

3. As between the date of the said decision of the Court of Crown Cases Reserved affirming the said conviction and the date of the issue of the writ in this action, the plaintiff instructed the defendants under the agreement referred to in par. 1 in this defence to publish the advertisement called "An International Supplement," containing a number of coupons as part of the newspaper called *Sporting Luck*, in which was advertised to the English public a system of competition identical in all respects with that in regard to which the said Ada Jane Stoddart had been convicted, except that the competitors were no longer to send their moneys or deposits to No. 10, Red Lion-court, in the city of London or to any place of receipt or deposit within the jurisdiction of the English courts, but were to send all moneys to, and it was expressly announced that in the future all moneys would only be received at, an office which had been opened by the plaintiff for the purpose of receiving them at Middleburg, in the kingdom of Holland.

4. The defendants refused to print the said advertisement, contending that as the said office in Middleburg in Holland had been opened by the plaintiff for a purpose which would infringe sect. 1 of the Betting Act of 1853 and sect. 3 of the Betting Act 1874, if it had been so opened in this country the publication of an advertisement in relation to such an office was illegal under the specified sections of the two several Acts of Parliament which are above set forth, which refusal constitutes the breach alleged in the statement of claim and sued upon in this action.

The question raised on the pleadings and now argued was whether the advertisement of the "International Supplement" was or was not an infringement of sect. 7 of the Betting Act 1853 and sect. 3 of the Betting Act 1874.

The Betting Act 1853 (16 & 17 Vict. c. 119), provides :

Sect. 1. No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or

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valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

Sect. 7. Any person exhibiting or publishing or causing to be exhibited or published any placard, handbill, card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers, in manner aforesaid, or for the purpose of exhibiting lists for betting, or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers, in manner aforesaid, or any person who, on behalf of the owner or occupier of any such house, office, room, or place, or person using the same, shall invite other persons to resort thereto for the purpose of making bets or wagers, in manner aforesaid, shall, upon summary conviction thereof before two justices of the peace, forfeit and pay a sum not exceeding thirty pounds, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance if to such justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding two calendar months.

The Betting Act 1874 (37 & 38 Vict. c. 15)—which by sect. 1 is to be construed as one with the Betting Act 1853, called the principal Act—provides:

Sect. 3. Where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published—(1) Whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager, or any such event or contingency as is mentioned in the principal Act, or will make on behalf of any other person any such bet or wager as is mentioned in the principal Act; or (2) with intent to induce any person to apply to any house office, room, or place, or to any person, with the view, of obtaining information or advice for the purpose of any such bet or wager or with respect to any such event or contingency as is mentioned in the principal Act; or (3) inviting any person to make or take any share in or in connection with any such bet or wager; every person sending, exhibiting, or publishing, or causing the same to be sent, exhibited, or published, shall be subject to the penalties provided in the seventh section of the principal Act with respect to offences under that section.

Lord Coleridge, K.O. and Stutfield (*Bovill Smith* with them) for the plaintiff.—The only advertisement which is illegal under these Acts is an advertisement of a betting-house, which comes within sect. 1. The preamble of the Act of 1853 is important as showing the scope of the Act; then sect. 1 deals with two distinct offences or illegal purposes: first, the offence of opening, keeping, or using a house for the purpose of betting with persons resorting thereto; and, secondly, the keeping such a house for the purpose of any money or valuable thing being received there for those purposes. Then sect. 7, which is the section dealing with this matter, refers in fact to sect. 1, and prohibits the exhibiting or publishing, as described in that section, of any advertisement of a house as described in sect. 1. It does not prohibit the advertising of anything which does not come within sect. 1; and sect. 3 of the Act of 1874 does not go beyond the scope of sect. 1 of

the Act of 1853, but merely refers us back again to sect. 1. Therefore these sections—sect. 7 of the Act of 1853 and sect. 3 of the Act of 1874—merely prohibit certain acts done in connection with the “house or office” which is defined in sect. 1, and do not enlarge the scope of that section. It becomes important, therefore, to see what is a “house, office, room, or place,” within sect. 1 of the Act of 1853, which is the governing section of the Act. That question was very fully discussed by the Court of Appeal and House of Lords in *Powell v. Kempton Park Racecourse Company* (77 L. T. Rep. 2; (1897) 2 Q. B. 242; 80 L. T. Rep. 538; (1899) A. C. 143). That case shows that what is forbidden in the first part of sect. 1 is the user of a prohibited place for the purpose of making bets with persons resorting to it—that is to say, an ordinary betting-house. The object of the Act was to suppress betting-houses, and the locality or place was the object of the suppression, and that locality must be within the jurisdiction of the court. The “bets” and the “resorting” referred to in sect. 7 must be bets made in, and a resorting to, a betting-house such as is aimed at in the Act, and the “house” in that section means and can only mean a betting-house in this country. Sect. 7, therefore, with regard to advertising, must relate to a place within the jurisdiction which comes within sect. 1, and sect. 3 of the Act of 1874 must also relate back to the Act of 1853 and to a house or betting-house in this country:

Coe v. Andrews, 12 Q. B. Div. 126.

Publishing an advertisement that there is a betting-house in Holland is not publishing such information in respect of a betting-house as is contemplated by sect. 1, and is therefore not prohibited by law. No possible construction of the statute can apply to a house out of the United Kingdom, and there can be no illegal user in this country of a house outside this country. Sect. 1 deals with the betting-house itself, and is the first Act which condemns the house itself, and condemns it as a common nuisance (sect. 1) and as a common gaming-house (sect. 2) within 8 & 9 Vict. c. 109. It would be contrary to every principle of construction and of international comity to extend these provisions to houses in any foreign country and to declare them common gaming-houses and nuisances. The right to search suspected houses given by sects. 11 and 12 could not be applied if a “house” applies to houses abroad; and if the true construction were that “houses” include houses abroad, it would not have been necessary specially to exclude Scotland as the Act does in sect. 20. It is necessary to show that the houses are within the jurisdiction of the court. The case of *Macnee v. Persian Investment Corporation* (62 L. T. Rep. 894; 44 Ch. Div. 306), as to lotteries, shows that a prohibition as to advertising lotteries would not extend to foreign lotteries unless specially made to do so by the statute. In the statute there is question (6 & 7 Will. 4, c. 66), there was an express prohibition against advertising “foreign and other illegal lotteries,” and it is clear that but for that express statutory prohibition there would be no prohibition against advertising foreign lotteries. An Act ought not to be so construed as to make it extend to foreign

countries; and *prima facie* when an Act is prohibited by statute it is prohibited only with regard to acts done in England, and this is especially so with regard to statutes dealing with criminal offences. This Act therefore can only apply to betting-houses in this country, and when sect. 7 prohibits the publishing of advertisements of houses opened or kept for the purpose of making bets, it refers to and is confined to houses which come within the first of the two illegal purposes set out in sect. 1, and the case of *Reg. v. Brown* (72 L. T. Rep. 22; (1895) 1 Q. B. 119) shows that that purpose must be betting with persons physically resorting to the house. The house must be a house of resort, and there must be a physical resorting to the house for the purpose of betting, and that only is the house the advertisement of which is aimed at in sect. 7. It is perfectly clear that sect. 7 does not cover this case, but is confined to advertising houses within the jurisdiction which are kept for betting with persons physically resorting thereto, and sect. 3 of the Act of 1874 carries the case no farther.

C. W. Mathews for the defendants.—The defendants were in this position: They had this contract with the plaintiff for the printing of this paper. This contract was of value to them, and they did not wish to give it up unless there were some good reason for their doing so. At the same time they did not wish in the least degree to break the law or infringe the provisions of these Acts, and accordingly, after the conviction of Mrs. Stoddart in the case of *Reg. v. Stoddart* (*ante*, p. 48; 83 L. T. Rep. 538; (1901) 1 Q. B. 177), it became necessary for the defendants to reconsider their position, which they did, and they refused to print the paper so that the point might be properly settled whether in so printing it they would be acting legally or illegally. The defendants had to look at sect. 1 of the Act of 1853 under both its heads, and they had to take into consideration that sect. 7 of the same Act was co-extensive with sect. 1, and that therefore it would be a criminal offence under sect. 7 to publish these advertisements under the circumstances. The reason of their refusal to print the advertisement was that, as they contended, if the office in Holland had been opened in this country for the same purpose for which it had been opened in Holland, it would have been illegal under sect. 1 of the Act of 1853 and sect. 3 of the Act of 1874, and in that case the publication of an advertisement relating to the same would have come within sect. 7 and have been illegal. The words in sect. 7 are very wide, and the defendants had to consider, having regard to the decision in *Reg. v. Brown* (*ubi sup.*), whether there was not a complete offence, although there was no resorting to this house. In that case Lord Russell, C.J. says: "The real gist of the offence created by the section is the opening and keeping of a house for the purpose of betting with persons resorting thereto, and the offence could be proved although no person ever resorted there." The defendants were therefore justified under sect. 7 of the Act of 1853 and sect. 3 of the Act of 1874 in refusing to print this advertisement.

PHILLIMORE, J.—In this case we are of opinion that there should be judgment for the plaintiff, and possibly on a somewhat narrow ground. The 1st section of the Betting Act

1853 (16 & 17 Vict. c. 119) deals with two different offences: first, the offence of keeping a betting-house to which persons resort for the purpose of betting. The decision of the Court for Crown Cases Reserved—whose decision upon such a point is binding on us—in the case of *Reg. v. Brown* (*ubi sup.*) says that that resort must be physical. Therefore the first part of sect. 1 makes it illegal to keep a house to which persons physically resort for the purpose of betting. That is not the class of offence which it is suggested the plaintiff Stoddart may be committing by what he is now doing. The second half of the section deals with the case of a person who keeps an office at which money is received (whether physically brought there or sent there by post or by messenger) by the owner, occupier, or keeper, "as or for the consideration for any . . . promise or agreement . . . to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race," or to certain other events. Under that half of this section—sect. 1—Mrs. Stoddart was convicted, and the conviction was upheld by the Court for the Consideration of Crown Cases Reserved in the case of *Reg. v. Stoddart* (*ubi sup.*). The circumstances under which she was convicted are precisely the same as the circumstances of the business which the plaintiff is now carrying on and which the defendants are asked to advertise, except that the plaintiff has his house of business outside the jurisdiction—namely, in the kingdom of Holland—and not inside the United Kingdom. It has been suggested and argued that the place where the plaintiff carries on his business makes all the difference, but, speaking for myself, I do not think it is necessary to get to that point. If this business had been the business which Mrs. Stoddart carried on and for which she was convicted, I still fail to see that advertising that business would, in the language of the 2nd paragraph of the amended defence, have constituted an offence against the Betting Acts 1853 and 1874, because the sections with regard to advertising are sect. 7 of the Act of 1853 and sect. 3 of the Act of 1874. When we come carefully to analyse sect. 7 of the Act of 1853, we see that it is directed against advertisements of houses kept for the first of the two purposes in sect. 1, and not against houses kept only for the purpose of the second offence under that section. The question was left to a certain extent open in the case of *Reg. v. Stoddart* (*ubi sup.*), whether the particular form of so-called competition for encouraging which Mrs. Stoddart was convicted was betting or not. For myself I think it was betting, for the reasons given in that case by my brother Wills; but it is not necessary at all to decide that point, because the offence under the first half of sect. 1 is not the offence of keeping the house open for the purpose of betting *simpliciter*, but it is the offence of keeping the house open for the purpose of betting with persons resorting thereto, which resorting, under the authority of *Reg. v. Brown* (*ubi sup.*), means a physical resorting. So that, whether this form of competition be or be not a bet, it is not a bet made by persons resorting to a place for the purpose of betting; and therefore sect. 7, which only relates to advertisements of such houses, does not make this particular publication an

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offence. Then sect. 3 of the Betting Act of 1874 was at one time thought by us to put further difficulty in the way of the plaintiff, but, again, when that section is analysed it does not do so. The 1st sub-section relates entirely to information and advice; and it makes it an offence to advertise that someone will give information or advice with respect to any such bet or wager. That 1st sub-section is as follows: [His Lordship read the section and sub-sect. 1, and proceeded:] That is not this case. I agree with the contention of counsel for the plaintiff that in the 2nd sub-section the words "with respect to any such event or contingency" are all subordinate to the words "information or advice." My brother Bruce has pointed out to me that the words in the 1st sub-section seem to show that that must be the grammatical meaning, however awkwardly it is expressed. Therefore the 2nd sub-section only deals with advertisements which point out persons or places where information or advice can be obtained, which, again, is not this case. The 3rd sub-section deals with advertisements inviting any persons to make any such bet or wager, or take any share in, or in connection with, any such bet or wager. Then we have to consider what is the meaning of "such bet or wager." It is such bet or wager, as the 1st sub-section shows, as is mentioned in the principal Act—that is, the Act of 1853. The only bets or wagers which are mentioned in the principal Act are bets or wagers made by the persons resorting to a house for the purpose of betting, or, according to the construction put on these words, physically resorting to a house for the purpose of betting. Therefore there is nothing in sect. 3 which makes the act of these defendants illegal. They are not offending against these Acts by reason of their publishing this advertisement, and therefore they have no right to break their contract, and there must be judgment for the plaintiff. In saying this, however, we pass no opinion upon the question whether or not the plaintiff Joseph Stoddart is carrying on a legal business. From what passed on a previous occasion, I should conjecture that it was hoped by this proceeding to obtain a decision from this court which might have some bearing on certain summonses pending before the alderman against the plaintiff in respect of the carrying on of his business. If that be so, nothing that we are now saying will assist or injure the hearing of these summonses. Speaking for myself, and I believe speaking with the consent of my brother, I in no way consider whether or not Joseph Stoddart, by having moved the business from London to Middleburg, has or has not escaped from the decision of the Court for the Consideration of Crown Cases Reserved in the case of *Reg. v. Stoddart (ubi sup.)*. Taking it that he is doing exactly the same thing for which Mrs. Stoddart was convicted, I still say that neither sect. 7 of the Act of 1853 nor sect. 3 of the Act of 1874 makes it illegal in the defendant company to print and publish that particular advertisement.

BRUCE, J.—I am of the same opinion, and for the same reasons. *Judgment for the plaintiff.*

Solicitors for the plaintiff, *Le Brasseur and Oakley*.

Solicitors for the defendants, *Lewis and Lewis*.

MAG. CAS.—VOL. XX.

Friday, June 7, 1901.

(Before RIDLEY and BIGHAM, JJ.)

HALL (app.) v. McWILLIAM (resp.). (a)

Lottery—Sale of chances—Proposal or scheme for sale of chances in newspaper—"Spot" competition in newspaper—Conviction—Lottery Act 1823 (4 Geo. 4, c. 60), s. 41.

It was announced in an issue of an evening newspaper belonging to a limited company and sold for the price of one halfpenny, that for a certain period in certain issues of the newspaper spots of varying size and configuration would be printed in various parts of the issues.

Some of such spots were distinguished as winning spots. It was also stated in the paper that on a specified day an announcement would appear in the paper showing the exact configuration of such spots as were declared to be winning spots; and it was stated in all the issues in question that the person who cut from the newspaper and sent to the offices of the same the portion of the newspaper containing any spot the facsimile of which had been declared to be a winning spot, would receive a prize. The winning spots were arbitrarily selected by the proprietors of the newspaper, and the winning of the prizes depended wholly upon chance.

The appellant, the printer and publisher of the newspaper, was summoned under sect. 41 of the Lotteries Act 1823 (4 Geo. 4, c. 60), for unlawfully publishing a proposal and scheme for the sale of chances in a lottery, namely, the proposal and scheme called "spots," and was convicted under the section as a rogue and vagabond.

Held, that the sale of the newspapers was the publishing a proposal and scheme for the sale of chances in a lottery, not authorised by any Act of Parliament within the meaning of the section, and that the appellant was properly convicted under the section.

CASE stated by the Lord Mayor of the city of London.

At a court of summary jurisdiction, sitting at the Mansion House, in the city of London, on the 22nd Jan. 1901, an information was preferred against the appellant under sect. 41 of 4 Geo. 4, c. 60, that he did, on the 29th Nov. 1900, unlawfully publish a certain proposal and scheme, to wit, a proposal and scheme called "Spots," for the sale of certain chances in a certain lottery not authorised by any Act of Parliament.

This information was heard before the Lord Mayor, who convicted the appellant, subject to this case for the opinion of the court.

Upon the hearing the following facts were proved or admitted.

The appellant was the printer and publisher of a certain evening newspaper called the *Sun*, and was liable to a conviction on the information if the offence charged was proved.

The *Sun* newspaper is the property of a limited liability company called "The Sol Syndicate," having offices at Temple-avenue, where the business of the newspaper is carried on.

The paper is published and sold in London as an evening newspaper at the price of a halfpenny, and the following issues—namely, the 29th Nov., the 3rd, 5th, 7th, 10th, and 12th Dec. 1900—containing the system referred to in the information,

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

K.B. Div.]

HALL (app.) v. McWILLIAM (resp.).

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were put in evidence, and were to be treated as part of this case. No other evidence as to the nature of the scheme was tendered.

What the scheme was fully appeared from the issues of the newspaper; shortly it was as follows: It was announced in an issue of the paper dated the 29th Nov. that for a certain period in certain issues of every edition of the *Sun*, spots of varying size and configuration would be printed in various parts of the said issues. Some of such spots were distinguished as winning spots.

It was further announced in the said issue that on Wednesday, the 19th Dec., an announcement would appear showing the exact configuration of such spots as were declared winning spots.

It was stated in all such issues that the person who cut out from the newspaper and sent to the offices of the *Sun* newspaper the portion of the paper containing any spot, the facsimile of which had been thus announced as a winning spot, would receive a prize.

It was further announced in the above papers that the prizes differed for different spots.

It was also announced in the papers that certain persons, whose names and addresses were given, had in fact received prizes in accordance with the scheme set forth.

It was contended on behalf of the appellant that he had not committed the offence charged on the following grounds: That he had not published any scheme for the sale of a chance, within the meaning of the Acts, and that no chance had been sold or offered for sale; that the scheme was for the sale of the newspaper in the ordinary course of business at the fixed price which had always been charged—namely, a halfpenny—and that the distribution of prizes under this scheme was gratuitous, and was the result merely of a scheme by way of legitimate advertisement, ancillary to and in furtherance of the sale of the newspaper at its regular and fixed price, and was not a scheme for the sale of a chance, so as to constitute a lottery within the meaning of the Acts.

And secondly, that to enable the purchaser of a newspaper, which contained a winning spot to acquire the prize offered, necessitated on his part the exercise of such sufficient care, skill, and vigilance as to render the acquisition of such prize by him not a mere matter of chance.

The magistrate found, as a fact, that the winning of the prizes depended wholly upon chance.

The magistrate was of opinion upon the facts above stated that the above proposal and scheme, so published by the appellant, was a lottery not authorised by any Act of Parliament, and he therefore convicted him as a rogue and vagabond and fined him 25*l.* with 10*l.* 10*s.* for costs.

The question for the opinion of the court was whether the Lord Mayor, upon the above statement of facts, came to a correct determination, and decision in point of law, and if not, what should be done in the premises.

The Lotteries Act 1823 (4 Geo. 4, c. 60)—an Act for granting to his Majesty a sum of money to be raised by lotteries—provides:

Sect. 41. If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances in any lottery or lotteries authorised by any foreign potentate or state,

or to be drawn in any foreign country, or in any lottery or lotteries, except such as are or shall be authorised by this or some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except such lottery or lotteries as shall be authorised as aforesaid, such person or persons shall, for every such offence, forfeit and pay the sum of fifty pounds, and shall also be deemed a rogue and vagabond, or rogues and vagabonds, and shall be punished as such in the manner hereinafter directed.

Marshall Hall, K.C. and Germaine for the appellant.—This is not a lottery, because under the particular statute which deals with this matter there must be a sale of a chance in the first place, and it must be exclusively chance and no skill. Those are the two points. The preamble of the Act (4 Geo. 4, c. 60) clearly shows that a competition of this kind does not come within the spirit of the Act, and that the section cannot apply to the case of a sale of a halfpenny newspaper as in this case. To bring the case within the Act there must be, first, chance; secondly, no skill; and, thirdly, the sale of a chance. The real point is that there must be the sale of a chance, and it is conceded that there must be a sale. A sale implies a consideration moving from the purchaser of the newspaper towards the seller of it. There is no consideration here for the sale of the chance; the consideration (the halfpenny) is for the sale of the newspaper, and not for the sale of the chance. No portion of this halfpenny goes to the buying of the chance; the whole of it goes to the buying of the newspaper. Generally, when there are cases of selling chances, it is possible to apportion a specific part of the sum paid to the buying of the chances; but that is not so here. No portion of the halfpenny can possibly be allocated to the chance of getting the sovereign in this case, that is, to buying the chance. In order to constitute a lottery under this section there must be a payment of at least a halfpenny, as that is the smallest coin, and there must be the payment of some coin. This is not a sale at all; it is really a gift by the proprietors to the purchaser of a paper containing a winning spot. The decision in *Caminada v. Hulton* (64 L. T. Rep. 572), is entirely in the appellant's favour, as it decided that no offence had there been committed under sect. 41 of this Act. They also referred to

Taylor v. Smetton, 11 Q. B. Div. 207.

Avory, K.C. and R. D. Muir, for the respondent, were not called upon to argue.

RIDLEY, J.—In this case the question is whether the magistrate was right in convicting the appellant under sect. 41 of the Lotteries Act 1823. [His Lordship read it.] There is no authority of an Act of Parliament which can be called in aid by the appellant in this case, so that those words in the section can have no application here, and therefore what we have to decide is whether the magistrate was right in holding that, upon the facts, the proposal and scheme so published by the appellant was a lottery. The facts are shortly these. In the *Sun* newspaper there were placed certain spots, I do not know how many or in what parts of the newspaper they were placed. A day came when a prize was given to the possessor of a spot which carried the right to a prize.

K.B.] NEW RIVER COMPANY v. ASSESSMENT COMMITTEE OF HERTFORD UNION. [K.B.]

If the purchaser of a newspaper could find that spot in the copy of the newspaper which he had bought, he would become entitled to the prize. It was not really argued that this was a case of skill, because that was not the point persisted in. If skill were really required in the discovery of the spot which entitled the owner of the spot to a prize, then the case would come within the principal in *Caminada v. Hulton* (*ubi sup.*), where the court decided that there was no lottery in that case, because there the question of skill came in, and it was necessary for anyone to win the prize to be able to select among the horses those which were likely to win the races. In that case there came in the question of skill, but in this case the point is, I think, very properly not insisted upon that anything like skill was required in the discovery of the spot. The case is different from those cases where perhaps there might be a consideration as to whether skill was required or not. Here there is no such element. The argument is that the newspaper is sold with other objects, such as the dissemination of news, and that this is but a minor portion of the scheme under which the newspaper is conducted, and that, the price of the newspaper being only one halfpenny, therefore one cannot discover that any tangible part of the sum paid for such newspaper is a purchase of a chance as distinct from the newspaper, and it is therefore contended that what has been is not within the Act of Parliament. I cannot discover any good reason for supporting any of those arguments. It seems to me to be certain that what a person buys, when he gives one halfpenny for a newspaper under these conditions, is not only the newspaper and the news which he obtains by the purchase of the paper, but also the chance which enters into his mind that he may be the fortunate possessor of the newspaper with the lucky spot upon it. I think it is impossible to suppose that is not so. It may be that the owners of the newspaper have other objects in their mind as to what they will do and how they will benefit by the offering of these prizes; but as far as the purchaser is concerned, I think he does buy with this newspaper the chance of obtaining the prize. Therefore I think there is a scheme for the sale of a ticket, chance, or chances, within the meaning of this Act. The argument for the appellant seems to assume that because the price is one halfpenny therefore you cannot say that any particular portion of that is given for a chance, when you cannot allocate what portion of the halfpenny is given for that chance. But that it enters into the mind of the purchaser of the newspaper seems to me quite certain. For these reasons I think the conviction ought to be upheld.

BIGHAM, J.—I am of the same opinion. The appellant was summoned for unlawfully publishing a certain proposal and scheme—namely, a proposal and scheme called “spots” for certain chances in a certain lottery not authorised by any Act of Parliament. Now, sect. 41 of the statute 4 Geo. 4, c. 60, provides that if any person shall publish any proposal or scheme for the sale of any chance or chances in a lottery, he shall be guilty of an offence and shall be fined in the sum mentioned in the Act. The question in this case is whether the appellant was, in the circumstances, guilty of the offence mentioned in the statute. I

think he was. What he did was to sell a newspaper to purchasers and with the newspaper to sell a chance of getting a prize in a lottery. The newspapers contained spots, apparently in different parts, and by some means or other, one of these spots was ascertained afterwards to be the winning spot, and any person who could produce a newspaper with that winning spot upon it and could point it out, received the money that he had won by his chance. I cannot understand how that is not publishing proposals for the sale of a chance. It is said that in some way or another no chance is sold because the one halfpenny that is given for the newspaper is said to be exhausted by the receipt of the newspaper by the person who pays the halfpenny. That is not accurate. What the person who buys this newspaper gets for his halfpenny is not the mere newspaper, but the chance as well. The two things—the newspaper and the chance—are sold together, and it does not make it any the less the sale of a chance that there happened to be conveyed with the chance something else—namely, the newspaper. I am therefore clearly of opinion that this offence was committed by the appellant, and that the conviction was right.

Conviction affirmed, and appeal dismissed.

Solicitor for the appellant, H. W. Chatterton.

Solicitor for the respondent, Sir H. H. Crawford.

Tuesday, June 11, 1901.

(Before DARLING and BIGHAM, JJ.)

NEW RIVER COMPANY v. ASSESSMENT COMMITTEE OF HERTFORD UNION. (a)

Rating—Water company—Intake works—Payments for intake to local authorities—Assessment of works—Principle applicable.

Where a water company is under its private Acts obliged to make capital or annual payments for the liberty to take water from a river, neither such liberty nor such payments are an element to be taken into consideration in assessing the value for rating purposes of the intake works.

The N. R. Company, under certain private Acts, in consideration of being allowed to take water from the river L., agreed to pay 42,000l. to the conservators of the river for the purpose of improving the navigation of the river, and also an annual sum to the conservators for general purposes, and a further annual sum to the Corporation of H.

The company erected certain works in the parish of St. John for the purpose of taking the water from the river L.

In assessing these works for rating purposes the assessment committee added to their annual value as based on the value of the land and the cost of erecting the works a further sum, based on these payments, for the value of the intake of water.

Held, that neither the liberty to take the water nor the payments made for such liberty could be taken into consideration in fixing the annual value of the works.

Liverpool Corporation v. Llanfyllin Union Assessment Committee (80 L. T. Rep. 667; (1899) 2 Q. B. 14) considered.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

K.B.] NEW RIVER COMPANY v. ASSESSMENT COMMITTEE OF HERTFORD UNION. [K.B.]

CASE stated by the Court of Quarter Sessions for the Hertford Division of the county of Hertford upon an appeal against a rate whereby the appellants were rated in the sums of 787*l.* plus 32*s.* 9*d.* gross, and 650*l.* plus 31*s.* 8*d.* rateable value.

1. The history of the appellant company and of their right to take water from the river Lee is contained in their charter and in the following statutes: 3 Jac. I, c. xviii.; 12 Geo. 2, c. xxxii.; Lee Navigation Improvement Act 1850 (13 & 14 Vict. c. cix.); River Lee Water Act 1855 (18 & 19 Vict. c. cxcvi.); Lee Conservancy Act 1868 (31 & 32 Vict. c. cliv.); Lee Conservancy Act 1900 (63 & 64 Vict. c. cxvii.).

2. Shortly stated, the facts appearing from the charter and statutes are as follows:—

3. The appellant company were formed under a charter granted in 1618 by King James I. for the purpose of bringing water from certain springs at Ohadwell and Amwell, in the county of Hertford, to London.

4. For many years prior to the year 1738 the appellant company had taken considerable quantities of water out of the river Lee, the point of intake being at a place called Chalk Island, in a channel of the river Lee called the Manifold Ditch, from which the water so taken flowed by means of an artificial cutting into the New River.

5. In the year 1738, by 12 Geo. 2, c. xxxii., the appellant company were permitted under sect. 5 of the Act to take a specified quantity of water from the river Lee through the Manifold Ditch, and the Manifold Ditch and the water running through it were (by sect. 11) vested in the appellant company, who were directed (by sect. 17) to pay to the trustees appointed to carry out the Act two capital sums amounting to 3250*l.* and two annual sums amounting to 350*l.* All those sums were (by sect. 18) to be applied to purposes relating to the navigation and purity of the water of the river Lee and the costs of passing the Act. The company were also required by sect. 3 of the Act to keep in repair the lock near the Ware Mills.

6. In 1850, 13 & 14 Vict. c. cix. gave the trustees of the river Lee the right to sell surplus water from the river Lee to certain water companies, and the appellant company for three years made an annual payment of 1500*l.* for water so purchased by them and supplied at an intake near Tottenham, in the county of Middlesex. The intake has not been used since the year 1855, but it might still be used.

7. In 1855, by 18 & 19 Vict. c. cxcvi., ss. 4, 5, the annual payments under the above-mentioned statutes ceased, and in lieu of such payments an annual sum of 1500*l.* and a capital sum of 42,000*l.* were directed to be paid by the appellant company. In return for these payments and other payments to be made by the East London Waterworks Company this statute (by sect. 9) vested in the appellant company and the East London Waterworks Company all the water flowing in the river Lee except so much as was required for navigation. The trustees of the river Lee were (by sect. 43) directed to expend 30,000*l.* of the capital sum of 42,000*l.* in specified improvements relating to the navigation of that river. The Act also contains provisions for the regulation of the quantity of the water to be taken by the appellant company from the river Lee through Manifold Ditch, and required the appellant company to

construct a new gauge, which new gauge, with a house or building to contain the same with the requisite machinery, was erected by the appellant company in or about the year 1859 near the point of intake.

8. In 1868, by 31 & 32 Vict. c. cliv., the appellant company were directed (by sect. 103) to pay the annual sum of 600*l.* to the Corporation of Hertford, and (by sect. 131) the appellant company and the East London Waterworks Company were directed to pay an additional aggregate yearly sum not exceeding 1000*l.* (of which the appellant company were to pay one-third to the Conservators of the River Lee)—who, by that Act, became the successors of the trustees—for purposes therein specified relating to the purity of the water of the river Lee.

9. Since 1868 the appellant company have paid to the Conservators of the River Lee, under these statutes, an annual sum of 1833*l.* 6*s.* 8*d.*, and have paid to the Corporation of Hertford an annual sum of 600*l.*

10. By the Lee Conservancy Act 1900 (63 & 64 Vict. c. cxvii.), s. 25, which received the Royal Assent on the 30th July 1900, from and after the 1st Jan. 1901 the aggregate yearly sum payable by the appellant company and the East London Waterworks Company under sect. 5 of the Act 18 & 19 Vict. c. cxcvi. (referred to in par. 7 hereof) was to be increased to 8000*l.*, of which 3750*l.* was to be paid by the appellant company, and from and after the same date the additional aggregate yearly sum payable by the two companies under sect. 131 of 31 & 32 Vict. c. cliv. (referred to in par. 8 hereof) was to be increased to 2000*l.*, and that section is to be read and construed accordingly.

11. The parish of St. John urban, in respect of which the rate in question was made, was formed under the Local Government Act 1894, and comprised a portion of the previously existing parish of St. John, Hertford (the part within the borough of Hertford), and in addition thereto a part of the liberty of Little Amwell (such part as was within the borough aforesaid).

12. From 1876 to 1894 the appellant company's property in the parish of St. John was rated at 350*l.* and in the liberty of Little Amwell at 500*l.*, and those figures had not been materially altered since 1859.

13. Upon the new parish of St. John urban being formed the property of the appellant company therein was rated at 350*l.* in respect of that portion which was in the parish of St. John, and at 300*l.* in respect of that portion which was taken from the old liberty of Little Amwell. The portion left in the old liberty of Little Amwell, which had then been constituted the new parish of Little Amwell, was rated at 200*l.* The rating of the property of the appellant company in the new parish of St. John urban therefore stood at the same valuation as in 1876.

14. Until Jan. 1900 the property of the appellant company in the parish of St. John urban had never been assessed at more than 650*l.* rateable value.

15. In Jan. 1900, by a supplemental valuation list subsequently confirmed by the assessment committee, a further sum of 3180*l.* was added to the rateable value in the assessment of the property in the occupation of the appellant company

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under an entry in which the company were rated for property described as "intake from the river Lee." On the 24th May 1900 the rate in question was made in accordance with the supplemental valuation list. The following is a copy of the said rate:

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or Situation of Property.	Estimated Extent.	Gross Estimated Rental.	Rateable value of Buildings, &c.	Amount of Rate at 1s. 2d. in the £ on Agricultural Land and 2s. 6d. in the £ on other hereditaments.
125	New River Company	New River Company	Chadwell Spring—portion of the New River gauge-house, sluice, and appurtenances	Kings Meads	a. r. p. 5 2 38	£ 787	£ 650	£ s. d. 78 10 10
126	New River Company	New River Company	Intake from river Lee	Kings Meads	—	3280	3180	384 5 0

16. The appellant company duly appealed against the rate, the grounds of their appeal, so far as they are material to this case, being—(1) that the appellant company were overrated; (2) that the appellant company did not occupy any rateable hereditament in the parish coming within the description of intake from the river Lee; and (3) that no rateable hereditament coming within that description had any existence in the parish.

17. The appeal came on for hearing on the 15th Oct. 1900, when the above-stated facts were proved or admitted.

18. It was further proved and admitted that the sum of 3180*l.* was arrived at by the professional valuer who made the supplemental valuation list by taking 4 per cent. upon the capital sum of 42,000*l.* (namely, 1680*l.*) and the annual sum of 1500*l.* directed to be paid under the above-mentioned statute of 1855, but the respondents admitted that, although these sums might be *prima facie* evidence, they were not necessarily the measure of rateable value.

19. It was also proved that the actual intake from the river Lee consisted of a certain structure with the land upon which it stood, that the appellant company had put a grating across the mouth or opening of the Manifold Ditch where water issued from the river to prevent timber and other things from floating into the intake, and that they had erected posts in the bed of the river to protect the intake, and that they were in occupation of the posts, and that in and by the item of 650*l.* the intake grating and posts were rated at their full structural value, that the area of the land was about three poles, and that its annual value as land (apart from its user as an intake) did not exceed 5*l.*, which was also included in the sum of 650*l.* It was at this point that the specified quantity of water which the appellant company were authorised to take from the river Lee entered the Manifold Ditch and flowed thence into the New River. For the respondents it was contended—(1) That beyond the rating of the

intake at its structural value and value as land it ought to be rated in an additional sum as having an enhanced value in respect of the user made of it by taking water from the river Lee into the channel of the appellant company; (2) that the sums of money which the appellant company had paid under the statutes were evidence that the land and the structure erected thereon had some additional value beyond the structural value thereof in respect of the user made of them, and that such additional value was sufficiently great to support the rate appealed against; (3) that the additional payments directed by sect. 25 of the Lee Conservancy Act 1900 were evidence to show what (in the opinion of Parliament at the date of the passing of that Act) the user of the intake was worth to the appellant company. The appellants contended—(1) That all the rateable property of the appellant company in the parish was already rated in the item 650*l.*; (2) that no addition ought to be made to the assessment of 650*l.* in respect of the water flowing over the intake or of the user of the intake by such water flowing over it; (3) that the intake ought not to be assessed upon or with reference to the moneys represented by the item 3180*l.*, which were paid by the appellant company for the purchase of water and the right to divert water from and control the water in the river Lee or with reference to the sums payable under the Act of 1900.

The Court of Quarter Sessions dismissed the appeal.

The question for the court was whether the hereditament was rateable upon the principle contended for by the respondents. If it was so rateable the judgment was to stand; if not, then either the gross and rateable values were to be reduced respectively to the sums of 787*l.* and 650*l.*, or the court was to make such other order herein as it should think just.

Marshall, K.C. (R. D. Muir with him) for the appellants.—There are two ways of assessing the value of property liable to assessment. Where the property is property which produces income, the way to assess it is by fixing the annual rent a tenant would fairly pay for it. Where the property is property which produces no income—that is, property for which no tenant could be obtained—then the value of it should be assessed on its structural value. Here the property is of the second kind. To assess its annual value its structural value must be ascertained, and then a percentage on this as a capital amount:

Reg. v. Mile End Old Town Overseers, 10 Q. B. 208;
Reg. v. New River Company, 1 M. & S. 503;
Reg. v. Miller, 2 Cowp. 619;
Reg. v. West Middlesex Waterworks Company,
 1 E. & E. 716.

The intake of water cannot be taken into consideration in assessing the value since it does not enable the companies to make any profits in the parish, and the capital amount paid for the water cannot be considered part of the cost of construction since it had nothing to do with the construction. The annual payment of 1500*l.* is simply a payment made for water received, and has nothing to do with any hereditament within the parish.

Byde for the respondents.—The intake of water is rateable on two grounds. In the first place, it is a licence held by the appellants

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in respect to a rateable hereditament, and, just like a licence to sell intoxicating liquors, it should be regarded as increasing the value of the hereditament. In the second place, the capital sum paid for improvements on the river Lee and the annual payments on that behalf may be regarded as expenses of construction, if it is to be said that we are only to look to the structural value of the hereditament:

Reg. v. Grand Junction Railway, 4 Q. B. 18;
Liverpool Corporation v. Llanfyllin Union Assessment Committee, 80 L. T. Rep. 667; (1899)
 2 Q. B. 14.

In the latter case the facts were very like the facts here. There the works in question were a reservoir, and the question was whether the money spent under their private Act in building a new church, vicarage, and school in place of the church, vicarage, and school situate on the land to be submerged by the reservoir was part of the cost of construction. The Court of Appeal held that it was.

RIDLEY, J.—This case, no doubt, is one of some importance, but I think the principle on which it ought to be decided is perfectly clear. Upon a question of this kind there is a considerable body of authority, and I think the point raised in this case is concluded by decisions that are to be found in the books—the latest to which we have been specially referred being *Liverpool Corporation v. Llanfyllin Union Assessment Committee* (*sup.*). That case was a case very similar to the present, where the subject of the rate was waterworks, and the principle already known was applied to the part of the undertaking which was not the direct earning part, but the indirect earning part. I think this principle can be traced back to the decision of *Reg. v. Mile End Old Town Overseers* (*sup.*) if not to even an earlier date—namely, that in cases like the present the rateable value is not to be arrived at by the usual rule or method of ascertaining what the hypothetical tenant of the statute will give by way of rent for the hereditament, but a different method of valuation must be adopted. In the words of Smith, L.J. in giving judgment in the Court of Appeal in *Liverpool Corporation v. Llanfyllin Union Assessment Committee* (at p. 669 L. T. Rep. and p. 20, 2 Q. B., *sup.*): “It is familiar law that where a hereditament can be compared with other hereditaments of a like nature which are the subject of letting, its rateable value may be arrived at by showing what rent tenants from year to year will in fact give for such hereditaments; but a difficulty in rating law arises with regard to hereditaments which cannot be compared with other similar hereditaments so as to ascertain the rent which a tenant will actually give for them. Therefore, inasmuch as a rateable hereditament cannot be allowed to escape from being rated because no such comparison can be made, in such cases it has come to be a recognised position that the rent which a hypothetical tenant would give for the hereditament must be estimated in some other way. In a case like the present, where no profits are earned in the parish by the use of the hereditament, a rough way of arriving at the rateable value by rule of thumb, there being no other way available, is to see what the site and the construction of the works cost, and take a percentage on the capital amount so expended as

representing the rent which a tenant would give.” Now, there is the principle clearly laid down, and in this case it was applied to hereditaments precisely similar to those which are the subject of the rate in the present case. It therefore seems to me impossible to argue that the principle does not apply to them. Applying it, the question is whether it is right that this increase of the rate, representing what is called the user of the water—I use those words simply as a short phrase, and without intending to give them any particular signification—should be added and taken into account. It is not, I think. I think there is included in the old rate all that is properly the subject of consideration in a matter like this—namely, the value of the land and the cost of the structure upon it. But it is argued that there is to be taken into account what is called in the rate the “intake.” It is not merely the intake, but, as has been contended on behalf of the respondents, the right to use the water. It was also contended that that right is attached to the land and therefore must be taken into account, because it is in some way the cost of the construction. I cannot agree with that contention. It seems to me that, assuming the right has a bearing upon the general use of the undertaking, it is no part of, and cannot logically be connected with, the construction. It was also contended that it should be taken into account as the cost of the construction because the money has to be paid. It is true the money has to be paid—the £2,000. and the annual sum; but they are not the cost of construction, nor do I think that *Liverpool Corporation v. Llanfyllin Union Assessment Committee* (*sup.*) on this point assists the respondents’ argument. Upon their behalf it has been contended that the money which has to be paid to the proprietors or corporators of the River Lee Navigation is in the same position as that which was required in the latter case to provide the new church, vicarage, and schools, and the bridges and roads in place of those which were to be covered by the water of the new reservoir. Now, the Court of Appeal dealt with that question in this way. Smith, L.J. says (at p. 669 L. T. Rep. and at 22, 2 Q. B., *sup.*): “They could not construct the works which they desired to construct as necessary for the purposes of the water supply to their city without coming under the obligation to provide a new church, vicarage, and schools in lieu of paying a pecuniary compensation for those which would be destroyed by the works”; and by that process of reasoning they arrived at the conclusion that the cost of providing these new schools, bridges, and roads was an expenditure required for the purpose of constructing the new works precisely as if it had been a payment down for the matters mentioned. In my opinion this payment to the corporators of the River Lee Conservancy cannot be treated as an expenditure of the same nature. I think, therefore, that this case is covered by authority, and it is not right to add to the rate this sum in respect of that which may be called the user of the water. But there is another objection to the rate. The right to use the water is not connected with this piece of land. It may be transferred, and there is a power still remaining and existing to transfer it. Nor, in my opinion, can it be taken into account in the same way as the particular advantages which

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result from the user of a piece of land in the hands of a tenant might. In such a case there is a tenant rated in the ordinary way, and, if a spring of water issues from his land, he must be rated on the value of the land with the right to that spring of water. But is there not the widest difference between that case and the present? It appears to me that there is, and that for these reasons the decision of the Court of Quarter Sessions was wrong, and that the rate ought to be reduced to the former figure.

BIGHAM, J.—I am of the same opinion. The rule in a case of this kind is that the value of the land and the cost of the construction of the buildings shall be ascertained and the assessment fixed upon a percentage of the amount of those two items. A question, however, sometimes arises as to what items of the cost of construction ought to be included. Such a question arose in *Liverpool Corporation v. Llanfyllin Union Assessment Committee* (sup.), and there it was held that the money which had to be paid by the local authority before the reservoir could be constructed was to be regarded as part of the cost of construction. Upon behalf of the respondents it is now contended that the decision in that case compels us to hold that they are entitled to succeed in the present case. But what is it that the respondents desire to add to the assessment? It is neither money which must be paid as a condition precedent to the construction of the buildings, nor is it part of that spent on the construction itself. It is, therefore, in my opinion, not an element to be taken into consideration.

Appeal allowed.

Solicitors for the appellants, *Thompson and Debenhams*.

Solicitors for the respondents, *J. N. Mason and Co., for T. J. Swoorder, Hertford*.

Tuesday, June 11, 1901.

(Before RIDLEY and BIGHAM, JJ.)

REX v. BURNBY. (a)

Criminal law—Permitting licensed premises to be used as brothel—Averment of commission of offence on different days—Continuing offence.

As information charged B. that he within six months then passed—namely, on the 26th, 28th, 29th, and 31st Jan., and the 1st, 4th, 5th, and 6th Feb. 1901—permitted his licensed house to be used as a brothel, contrary to sect. 15 of the Licensing Act 1872.

Held, that the information was not bad for duplicity as charging the commission of two or more offences on different and discontinuous days, and that B. might be rightly convicted on it of the offence of permitting his house to be used as a brothel since that offence was a continuing offence.

MOTION for a rule nisi for a writ of certiorari to bring up a conviction of the justices of the borough of Colchester.

The applicant, James Burnby, a licensed victualler, was summoned before the said justices on the 6th Feb. 1901 on the information of the borough head constable charging that he

On the 26th, 28th, 29th, and 31st days of Jan., and

the 1st, 4th, 5th, and 6th days of Feb. 1901, at the parish of Colchester within the borough aforesaid, there being duly licensed to sell by retail intoxicating liquors in his house and premises known by the sign of the Royal Oak there situate, unlawfully did permit his house and premises to be used as a brothel, contrary to sect. 15 of the Licensing Act 1872.

Licensing Act 1872 (35 & 36 Vict. c. 94):

Sect. 15. If any licensed person is convicted of permitting his premises to be a brothel he shall be liable to a penalty.

At the hearing the defendant's solicitor took objection that the information was bad for duplicity, on the ground that it alleged the commission of eight separate offences, and he asked that the prosecutor should elect upon which of the eight charges he should proceed. The justices overruled the objection, and after hearing the evidence convicted the defendant, in the terms of the information, of having on the said eight days permitted his house to be used as a brothel.

C. E. Jones for the applicant.—By sect. 10 of the Summary Jurisdiction Act 1848 every information "shall be for one offence only and not for two or more offences." Here, however, the information alleges eight different offences on eight separate and non-continuous days. The justices therefore had no jurisdiction to hear the case unless the information was amended and the prosecutor compelled to elect on which charge he should proceed. The justices refused to amend. [BIGHAM, J.—I cannot see why they should. The information alleges not eight separate offences, but one continuing offence—keeping a brothel—on eight different days.] Here the days are not consecutive. There was an interval of days between the separate acts alleged. If there may be an interval of days, why not one of months or years? In *Newman v. Bendyshe* (10 Ad. & E. 11), where there were several acts of selling intoxicating liquors on different days in the same information, it was held that a conviction of "the offence aforesaid" was bad since there were three offences. [RIDLEY, J.—In *Onley v. Gee* (4 L. T. Rep. 338; 30 L. J. 222, M. C.), where there were several days mentioned in the information on which it was alleged that the defendant had kept a betting-house, a conviction for keeping a betting-house on one of those days was held good.] I do not contend that if the justices had here put the prosecutor to his election on which charge he would proceed and had convicted the defendant only on that charge that the conviction would have been bad. My contention is that they convicted him not of one offence, but of several on distinct and discontinuous days.

RIDLEY, J.—I think there is no foundation for this application. This is a continuing offence, and has been so treated by the justices. If it had been a charge of the commission of a separate offence on each of the days named in the information, no doubt the information and conviction would have been bad. But it is not. One offence only is charged. The rule must be refused.

BIGHAM, J.—I am of the same opinion.

Rule refused.

Solicitors for the applicant, *Jones and Son, Colchester*.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

CR. CAS. RES.]

REX v. COSNETT—REX v. SUNDERLAND JUSTICES.

[CT. OF APP.]

CROWN CASES RESERVED.

Saturday, May 18, 1901.

(Before Lord ALVERSTONE, C.J., MATHEW, WILLS, GRANTHAM, and BIGHAM, JJ.)

REX v. COSNETT. (a)

Criminal law—False pretences—Obtaining goods—False cheque—Cheque drawn on closed account—24 & 25 Vict. c. 96, s. 88.

To obtain goods in exchange for a cheque, falsely representing that the cheque will be honoured on presentation, is to obtain goods, not credit, by false pretences. A person in payment for certain goods gave a cheque drawn on a bank at which he represented that he had an account, knowing that his account had been closed, and that the cheque would not be honoured.

Held, that the offence was not obtaining credit but goods by false pretences, and that there was evidence on which he could properly be convicted of that offence.

THE facts of this case, stated by the Deputy-Chairman of the Worcester Quarter Sessions, were, so far as they are material, as follows:—

Thomas Cosnett was indicted for obtaining goods from Thomas Travin by false pretences. The prosecutor Travin had a quantity of old iron which the prisoner had agreed to buy for £1. 17s. The iron was at the prosecutor's farm, and on making the bargain the prisoner paid 10s., and agreed to pay the balance when he removed the iron. On the 1st Jan. 1901 the prisoner came to the prosecutor's farm with a cart for the purpose of taking away the iron, and, while the iron was being loaded on to the cart, the prisoner, after some conversation about payment, wrote and gave to the prosecutor a cheque for £1. 7s., drawn on a bank at Tewkesbury, saying that the cheque was "all right." On the prosecutor presenting the cheque it was dishonoured, the fact being that the prisoner had opened an account at the bank in Aug. 1899, that the account was overdrawn in Oct. 1899 and closed by order of the manager, and that the bank had sued the prisoner for the amount of the overdraft.

It was contended in defence that the property in the iron had passed before the cheque was given, and that therefore the iron was not obtained on a representation that the cheque would be met.

The jury found, in answer to questions put to them by the deputy-chairman, (1) that the intention of the parties was that the iron should remain the prosecutor's property till the whole of the purchase money had been paid; (2) that the prosecutor had not parted with the possession or control of the goods at the time when the cheque was tendered; (3) that the prisoner was aware that the banking account had been closed in Oct. 1899, and that the cheque which he drew would not be honoured; (4) that the prosecutor parted with the iron by reason of the false statements made to him with reference to the said banking account and cheque; and (5) that the prisoner intended throughout to defraud the prosecutor. The jury found the prisoner guilty.

The question for the opinion of the court was whether, upon the facts stated and the findings of the jury, the prisoner was rightly convicted or not.

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

F. W. Sherwood for the prisoner.—There was no evidence on which the jury could find that the iron was obtained by false pretences. The evidence was that the cheque was given after the loading of the goods on to the cart had commenced, and, as the loading of the iron showed that the prosecutor had parted with the property in it, the evidence was that the goods were not obtained by giving the cheque. The offence, if the prisoner committed any, was not obtaining goods by false pretences, but obtaining credit by fraud. He referred to Archbold's Criminal Pleading, 21st edit., p. 567.

J. B. Matthews, for the Crown, was not called upon to argue.

Lord ALVERSTONE, C.J.—The prisoner was indicted for obtaining a quantity of iron by false pretences. The jury found that the bargain was that the iron was to remain the prosecutor's property until all the money had been paid. They also found that the prosecutor parted with the property; and, lastly, they found that the prosecutor parted with the property on the representation of the prisoner that the cheque would be paid when presented. The contract for sale was that the prisoner should pay 10s. on account, and the balance when he came to take away the iron. It has been argued that there was no evidence that the prisoner said that he would pay when he came for the iron. But it appears on the facts stated that while the loading was in progress the prisoner wrote the cheque in question, and on these facts I think that it is clear that the prosecutor would not have allowed the iron to go unless something had been said about payment. The conviction was clearly right; there was evidence on which the jury could find as they did.

MATHEW, WILLS, GRANTHAM, and BIGHAM, JJ. concurred.

Solicitors for the Crown, *Robbins, Billing, and Co., for Curtler, Davis, and Curtler, Worcester.*

Solicitor for the prisoner, *A. Arrowsmith Mawd, Worcester.*

Supreme Court of Judicature.

COURT OF APPEAL.

June 4 and 5, 1901.

(Before SMITH, M.R., WILLIAMS and STIRLING, L.JJ.)

REX v. SUNDERLAND JUSTICES. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Licensing—New licence—Confirming sessions—Bias of justices—Agreement between corporation and applicant for licence—Members of corporation voting as justices—Certiorari.

An order of the confirming authority under sect. 43 of the Licensing Act 1872, confirming a new licence, can be brought up on certiorari to be quashed.

Reg. v. Manchester Justices (80 L. T. Rep. 531; (1899) 1 Q. B. 571) approved.

A corporation, having purchased land upon which there was a fully licensed public-house for the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

purpose of street improvements, made an agreement with a brewery company by which the company agreed to pay 10,000*l.* to the corporation if a licence were granted to the company for a new public-house in another part of the borough, and the corporation agreed to close their public-house and not to apply for renewal of the licence after payment of the 10,000*l.* and the grant of the new licence to the company.

At the annual licensing meeting a new licence was by a majority granted to the company, and it was subsequently confirmed by the confirming authority by a majority. Some of the justices present at the licensing meeting were members of the corporation and had taken a very active part in promoting the making of the agreement with the company, and these justices were also present at the meeting of the confirming authority.

Held (reversing the decision of the King's Bench Division), that there was such a real likelihood of bias on the part of the justices who were members of the corporation that the grant of the new licence was invalid, and that a writ of *certiorari* ought to be granted to bring up the order of the confirming authority to be quashed. *Reg. v. Stockport Justices* (60 J. P. 552) overruled.

THIS was an appeal by the applicant, Foster, from an order of the Divisional Court (Lord Alverstone, C.J. and Lawrance, J.) discharging a rule *nisi* for a *certiorari* and a rule *nisi* for a *mandamus*.

The appellant, Foster, who was a ratepayer and inhabitant of Sunderland, obtained a rule *nisi* calling upon the justices of the borough of Sunderland to show cause why a writ of *certiorari* should not issue to bring up a certain order of the 27th Sept. 1900, confirming a provisional licence which had been granted to Duncan and Dalgleish Limited on the 26th Sept. 1900.

In 1899 the corporation of Sunderland bought some property in the borough for the purpose of carrying out some street improvements. A part of that property consisted of a fully licensed public-house, known as the Londonderry Hotel, which was bought for the sum of 14,600*l.*, and it was proposed to use a part of the site of this building for the purpose of widening the street. The corporation endeavoured to make arrangements for the hotel to be pulled down and for a part of the site to be used for widening the street, and for the hotel to be rebuilt upon the rest of the site and to be let to the brewers. This attempt, however, failed.

Subsequently a resolution was passed by the corporation that they should consent to the transfer or lapsing of the licence for the Londonderry Hotel and to the demolition of the hotel, and that the highways committee of the council should be instructed to negotiate accordingly and report the terms which they recommended for acceptance.

The highways committee accordingly entered into negotiations upon the matter, and tenders were invited from various brewers. Duncan and Dalgleish Limited, brewers, offered to pay 10,000*l.* to the corporation for the right to have the licence of the Londonderry Hotel put an end to, they being desirous of obtaining a licence for a new hotel in the Pallion district of Sunderland.

Ultimately a contract under seal was entered into between the corporation and Duncan and Dalgleish Limited, by which it was agreed that in the event of the brewery company making before the justices, and succeeding in, an application for a new licence for the Pallion Hotel, the company would pay to the corporation the sum of 10,000*l.*; the corporation agreed that, after payment of the sum of 10,000*l.*, and after the new hotel at Pallion was licensed and opened, the Londonderry Hotel would be closed and no further application would be made to the licensing justices for a renewal of the licence therefor; it was further agreed that, if the grant and confirmation of the new licence for the hotel at Pallion should be revoked by legal proceedings in the High Court expressly instituted for that purpose, then the sum of 10,000*l.* was to be repaid by the corporation to the company.

At the meeting of the corporation at which it was resolved to enter into that agreement, the chairman of the highways committee who had negotiated the agreement and several other members of the corporation who, as well as the chairman of the highways committee, were justices for the borough took a very active part in the discussion in order to persuade the council to enter into the agreement.

On the 20th Aug. 1900 the annual general licensing meeting for the borough of Sunderland was held. There were present seven justices of the borough who were members of the licensing committee. Of these seven justices, five were members of the corporation, including the chairman of the highways committee and others who had actively supported the adoption of the agreement.

The solicitor who represented Foster and other persons, who were objecting to the grant of the licence for the hotel of Duncan and Dalgleish Limited, objected to those justices who were members of the corporation adjudicating upon the application, but that objection was disregarded.

At that meeting three applications for new licences in the Pallion district were refused, and the meeting was adjourned.

The adjourned meeting was held on the 26th Sept., when six justices who were members of the licensing committee were present, five of whom were the before-mentioned members of the corporation. The same objection was made to the presence of those five justices and was disregarded. The application for a new licence for the hotel of Duncan and Dalgleish Limited was heard and was granted by a majority.

Upon the 27th Sept. the meeting of the confirming authority for the borough was held, and thirteen justices were present, among whom were seven members of the corporation, including the before-mentioned five members.

The confirmation of the new licence for the hotel of Duncan and Dalgleish Limited was opposed by Foster and others, but it was confirmed by a majority.

Foster thereupon obtained the rule *nisi* for a *certiorari*, and also a rule *nisi* for a *mandamus*.

The Divisional Court (Lord Alverstone, C.J. and Lawrance, J.) discharged the rule *nisi* for a *certiorari* and the rule *nisi* for a *mandamus* (*ante*, p. 221; 84 L. T. Rep. 591).

Foster appealed.

C. A. Russell, K.C. and *Blacklock* for the appellant.—The licensing committee for the borough are a committee of the borough justices, and, as there are no separate quarter sessions for the borough, the confirming body are the whole of the borough justices, by sect. 38 of the Licensing Act 1878. The borough justices are not necessarily members of the corporation, and those who are not members of the corporation could properly hear this application. [WILLIAMS, L.J. referred to *Thellusson v. Rendlesham* (7 H. L. C. 429), with reference to the fact that there would not be a quorum of the committee if the members of the corporation were disqualified.] If there is any real likelihood of bias, a justice is disqualified from acting. In *Reg. v. Rand* (L. Rep. 1 Q. B. 230) Blackburn, J. said: "Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that where there is a real bias of this sort this court would not interfere." In *Reg. v. Meyer* (34 L. T. Rep. 247; 1 Q. B. Div. 173) Blackburn, J., stating the effect of his judgment in *Reg. v. Rand* (*ubi sup.*), said: "The effect of our judgment in that case was that, though pecuniary interest in the subject-matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not *ipso facto* avoid the justices' decision; and we thought that though there was a possibility of bias in that case, yet it was not real. But we expressly excepted a real bias, saying . . ." In the case of a pecuniary interest the inference is at once drawn that there is bias; in the case of any other interest the court does not inquire whether the interest did in fact influence the man's mind, but only whether there was a real likelihood that it would do so. In *Reg. v. Hertfordshire Justices* (6 Q. B. 753) Lord Denman, C.J. said: "We cannot enter into an analysis of the different motives which may have produced the decision; it is enough to say that a single interested person has formed part of the court." The court has never entertained the question of fact as to whether the presence of an interested justice has influenced the decision at all, and that shows that it is not necessary to prove that there was in fact bias on the part of a justice; it is sufficient to show that there was a real likelihood of bias arising from some interest. The rule to be deduced from all the cases is that, when it is alleged that a justice is disqualified from acting by reason of some interest which is not a pecuniary interest, it must be shown that the interest is of such a kind that there is a reasonable likelihood that it will influence the mind of the justice. The case of *Reg. v. Stockport Justices* (60 J. P. 552) was wrongly decided, and ought to be overruled. A writ of *certiorari* can be granted to bring up an order of justices acting as the confirming authority under sect. 43 of the Licensing Act 1872:

Reg. v. Manchester Justices, 80 L. T. Rep. 531; (1899) 1 Q. B. 571;

Reg. v. Sharman, 78 L. T. Rep. 320; (1898) 1 Q. B. 578.

They cited also

Reg. v. Cumberland Justices, 58 L. T. Rep. 491;

Reg. v. Huon, 12 Times L. Rep. 323;

Attorney-General v. Willett, 16 J. P. 643;

Reg. v. Fraser, 57 J. P. 500.

E. Shortt for the licensing justices.—Neither *certiorari* nor *mandamus* will lie in a case of this kind. First of all, however, there was no bias in this case, within the rule laid down by the authorities, which could disqualify any of the justices from acting. The consideration for the promise of the brewers to pay 10,000*l.* to the corporation was the agreement that the licence which the corporation had should be surrendered in order that the brewers might be able to say that another licence would be surrendered when they applied for the new licence at Pallion, and that therefore the number of licences would not be increased if a new licence was granted to them. In order to disqualify a justice from acting, the alleged bias must be a real and substantial bias. Now, here, the corporation were bound by their agreement not to oppose the granting of a new licence to the brewers, but that was the act of the corporation and in no sense the act of the individual members. Any individual member of the corporation was perfectly free to act as a justice in the way which might seem right to him. The corporation would not be responsible for the action of any member. The interest of a justice must be substantial in order to disqualify him. In *Reg. v. Meyer* (34 L. T. Rep. 247; 1 Q. B. Div. 173) Blackburn, J. said: "But though disqualifying interest is not confined to pecuniary interest, the interest, if not pecuniary, must be substantial." The interest must be so substantial that the court ought to assume that there was a real likelihood and not a mere possibility of bias:

Reg. v. Rand, L. Rep. 1 Q. B. 230.

In this case, the justices who were members of the corporation had no personal interest in the matter at all, and had no desire one way or the other with regard to the granting of a new licence to the brewers. The mere desire as a member of the corporation to have certain improvements carried out in a way as beneficial to the ratepayers as possible is not such an interest as creates a disqualification. There is no evidence at all in this case of any such likelihood of bias on the part of the justices who were members of the corporation as would disqualify them from acting. *Certiorari* will not lie to bring up an order of the confirming authority to be quashed. The confirming authority is a body of licensing justices created by the Act of George IV. By the Act of 1872 they elect a committee from their number to take the first steps in licensing proceedings, and they only sit as the whole body of justices for the purpose of confirming new licences; they are still, when so acting, the licensing justices sitting at the licensing meeting. The confirming meeting, if a new licence is confirmed, grants a certificate which is signed on behalf of the majority who voted for the confirmation. There is no order, or determination, or record of any kind which can be brought up by *certiorari*. The confirming authority is in exactly the same position as the licensing committee, and is not a court at all:

Boulter v. Kent Justices, 77 L. T. Rep. 288; (1897) A. C. 556.

The confirming authority acts under sect. 38 of the Act of 1872, and is a meeting of the licensing justices. [SMITH, M.B. referred to *Reg. v. Cumberland Justices* (58 L. T. Rep. 491).] It is true that, under sect. 43 of the Act of 1872, the

confirming authority has power to give costs to the successful party, but that does not make the confirming authority any more a court than the licensing committee. The applicant and the objector are not parties in the ordinary sense; the objector appears in the public interest to give information to the meeting and is more like a witness than a party, and the justices have power to order the payment of the expenses of such witnesses. There is no *lis inter partes* in proceedings before the confirming authority. If there were a *lis*, each party ought to have the same remedy if he is aggrieved, but if a certificate of confirmation is not granted there is absolutely nothing which the applicant can bring up by *certiorari*. It cannot be supposed that the Legislature intended to create a *lis inter partes* without giving to both parties the same remedy if aggrieved. In the case of *Reg. v. Sharman* (78 L. T. Rep. 320; (1898) 1 Q. B. 578) it was held by Wright and Darling, JJ. that *certiorari* would not lie in the case of a meeting of licensing justices. With regard to the second rule, *mandamus* will not lie.

E. Tindal Atkinson, K.C. and E. H. Lloyd for the brewers.—A *mandamus* will not lie in cases of this kind. *Certiorari* will not lie, because in order to establish a right to a writ of *certiorari* there must be some order which can be brought before the court. The case must be one in which some order must be made, whichever party is successful. The certificate of the confirming authority is not an order in any sense. That was said by Lord Herschell in *Boulter v. Kent Justices* (*ubi sup.*). Sect. 43 of the Act of 1872 only makes a statutory addition to the previous jurisdiction of the licensing justices and gives power to grant costs. The mere right to grant costs does not confer upon that tribunal the character of a court. If these proceedings are a subject for *certiorari*, then the court could order the whole proceedings to be brought into the King's Bench Division for trial, and there hear the matter and grant a licence. No one has ever heard of such a proceeding. With regard to the other point, it seems to be contended that members of the corporation are disqualified from acting as justices because as members they have expressed an opinion upon the matter. That is not sufficient. No judge is disqualified because he has expressed an opinion, however strongly, upon the matter. Bias must be caused by some external matter which does not touch the merits of the case. In *Reg. v. Cumberland Justices* (58 L. T. Rep. 491), to which the Master of the Rolls has referred, the justice complained of was in fact a litigant as a member of the board of guardians.

Russell, K.C. was not called upon to reply.

SMITH, M.R.—This case has been well argued, and I agree that it is a case which requires a good deal of consideration, but, having ascertained the facts, I think there is no difficulty in ascertaining what the rule is with regard to the first point. The question then is to ascertain clearly what the facts are, in order to ascertain whether or not the justices in question, who sat at the licensing meeting and also at the meeting of the confirming authority, were so biased as not to be capable of making the orders which they did make, and which are now being brought up for

the purpose of being quashed by writ of *certiorari*. This is an appeal to this court against the refusal of the King's Bench Division to quash two orders which have been brought up upon *certiorari*. A rule *nisi* was obtained, and we are asked to make that rule *nisi* absolute. The applicant, Mr. Foster, who, I understand, is a ratepayer of Sunderland, appeals to this court, and contends that that rule *nisi* ought to have been made absolute; in other words, that those two orders ought to have been quashed on the ground of bias in the justices who made those orders. I think it will be convenient for me to point out, in the first instance, what these two orders are before I come to the facts of the case. The first order states that at the meeting of the licensing committee for the county borough of Sunderland, held on the 26th Sept 1900, six of the justices of the borough, being the majority of the members of the licensing committee appointed for the borough then present, did thereby grant to John Duncan a provisional grant authorising him, after those presents and the order of confirmation thereunder written should have been declared to be final by an order of the licensing justices of the borough to be made in pursuance of sect. 22 of the Licensing Act 1874, to apply for and hold any of the excise licences that may be held by a publican for the sale by retail in the premises in question of all intoxicating liquors to be consumed on the premises. The confirming order states that at a special sessions of the justices of the county borough of Sunderland eight of the said justices, being the majority of the justices then assembled, did thereby confirm the within provisional grant. Now, it is said by the applicant that the justices who made those orders, whether as the original licensing committee or as the confirming authority, were incapacitated from sitting on the bench and making these orders by reason of bias. With regard to the confirming meeting of justices, I understand there were thirteen present, and they voted by eight to five in favour of the licence being granted to the Pallion Hotel. Now, before I come to the rule as to what constitutes a real bias, I wish to state specifically what I understand to be the facts of the case, because they are very important. In my judgment, in all these cases, when the decision of the justices is impeached on the ground of the bias of the justices, it is always a question of fact as to whether or not, as I understand the rule to be, there was a likelihood of there being a real bias in the justices. That is a question of fact and a question of inference to be drawn from the admitted facts. If there is a likelihood of there being a real bias in the justices, then, in my opinion, the law is undoubtedly that these justices are incapacitated from sitting on the judgment seat. That seems to be in accord with natural justice and common sense. Now, that that is the rule I will show presently by citing three or four cases from which this rule is to be deduced. Now, what are the facts? There was a street in Sunderland which was too narrow, and it was thought desirable for the town of Sunderland, and it was desired by the corporation of Sunderland, to widen that street. There was in the way a large hotel called the Londonderry Hotel, which was a fully licensed house, and the street could not be widened in the manner that was proposed while that hotel continued to stand as it was. It was thought that

they might pull down that portion of the hotel which was contiguous to the proposed new street, and then rebuild and relet it as an hotel to the brewers. But those negotiations did not come to anything, and fell through. It was suggested later on that if they could get the brewers to come forward and give a large sum of money to the corporation, if they could get a licence for the Pallion Hotel, that would be a very effective way of recouping the corporation of Sunderland for the 14,600*l.* which I understand they paid for the Londonderry Hotel. They would get in that way a large sum of money towards that outlay, and it would be a desirable thing for the corporation of Sunderland to get the improvement carried out by means of this sum of money to be paid by the brewers to the corporation. Now, there appears upon the documents, as it seems to me, strong evidence that certain members, who afterwards sat upon the judgment seat when this licence was granted, took a very keen and lively interest in getting the brewers bound by agreement to pay 10,000*l.* to the corporation if they could get a new licence for the Pallion Hotel. I have only to read the report of the speeches that were made by Mr. Gibson at a meeting of the corporation; he is one of those who sat upon the bench and is said to have been biassed. One cannot read those speeches through without seeing that he took a very lively interest and a very keen part in getting that agreement made with the brewers. At this meeting there was discussed the question of what other brewers would be willing to give, and the question was discussed whether those offers should be accepted or not, and at last Mr. Alderman Reed proposed as an amendment—he is one of the justices who sat upon the bench and whose capacity is impeached—that, as the matter with Vaux and Co. had fallen through, the council accept the tender of Duncan and Dalgleish of 10,000*l.* for the licence. Mr. Gibson and Mr. Reed were there, and I believe there were others there of those who subsequently sat upon the bench. I cannot read this without coming to the conclusion that they were all most interested to get, if they could, the brewers (Duncan and Dalgleish) bound by this agreement to pay this 10,000*l.* to the corporation. I hold as a matter of fact that that is an inference which I can draw for myself. Then the agreement was made. What is the upshot of the agreement? The agreement, it seems to me, paraphrased is this: Duncan and Dalgleish agree in writing with the corporation of Sunderland, at the instance of some of these gentlemen who afterwards sat upon the judgment seat, that they will pay the corporation 10,000*l.* if they can get from the licensing committee the grant of a licence for the new house at Pallion, but if for any reason thereafter that new licence is not granted to the Pallion, or does not hold good, then the corporation must return that 10,000*l.* to the brewers. That is the agreement which was keenly debated and in which a very lively interest was shown by these gentlemen who afterwards sat upon the judgment seat. The agreement was entered into in writing and was executed. They afterwards sat upon the judgment seat, and the result was that, at the meeting at which they were present, by a majority this new licence was granted to the Pallion Hotel. Now Mr. Foster comes forward and says that the justices who took

that active part in getting this agreement entered into between the brewers and the corporation were so interested that it would be likely that they would have a real bias when sitting upon the judgment seat in granting a licence to the Pallion Hotel so that the 10,000*l.* should come to the corporation; and that therefore their order ought to be brought up and quashed because it is an order made by interested persons. Now, I say nothing invidious against these gentlemen at all. The whole question is whether or not they have come within the rule. What is the rule with regard to bias? A justice of the peace personally or pecuniarily interested in the matter cannot sit upon the judgment seat. That has been decided, but that is not this case. A justice of the peace cannot be a litigant and a judge in his own matter—that is, in a matter in which he is concerned—that is bias. That is not this case. Is there any other bias which disqualifies a justice from sitting on the judgment seat and adjudicating upon such a case as this? Now, there are perhaps three cases to which I ought to call attention with regard to this question. First of all there is the case of *Reg. v. Rand* (L. Rep. 1 Q. B. 230). There Blackburn, J. delivered the judgment of the court, composed of Cockburn, C.J. and Blackburn and Shee, J.J., and he said: "The question which we have to determine is whether this disqualifies the justices from acting in what was certainly a judicial inquiry; and we think it does not. There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is; for that might be held an interest. But the only way in which the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that where there is a real bias of this sort this court would not interfere." Now, to apply to the present case the rule that "wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties." Can I say judicially that I am convinced that there is not a real likelihood here that these gentlemen, who have taken such an interest in getting this 10,000*l.* agreement entered into by the brewers, would have a bias in favour of one of the parties, namely, in favour of the brewers who have agreed in writing to give the 10,000*l.* if they get the licence from the justices, that is, to give or withhold the 10,000*l.* conditionally upon obtaining a licence? I cannot say there was not. So much for the case of *Reg. v. Rand*. Then the case of *Reg. v. Rand* came up again in the case of *Reg. v. Meyer* (34 L. T. Rep. 247; 1 Q. B. Div. 173), and there again Blackburn, J. restates what he had stated in *Reg. v. Rand*. He says there: "But the disqualification in the present instance

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is not on the ground of pecuniary interest. The question is, Was Mr. Meyer really substantially interested, though not in a pecuniary sense, in the proceedings as to which these informations were one step, so as to be likely to have a real bias in the matter? Now, it is impossible to read Mr. Harrison's affidavit, which is really and substantially uncontradicted, without seeing Mr. Meyer had such an interest. In the case of a justice having any pecuniary interest the court were compelled to quash the conviction; but though disqualifying interest is not confined to pecuniary interest, the interest, if not pecuniary, must be substantial. In *Reg. v. Band* we held that there was no ground for quashing the certificate of the justices. The effect of our judgment in that case was that, though pecuniary interest in the subject-matter of dispute, however small, disqualifies the justices, yet the mere possibility of bias did not *ipso facto* avoid the justices' decision; and we thought that, though there was a possibility of bias in that case, yet it was not real. But we expressly excepted a real bias, saying 'that we must not be understood to say that where there is a real bias this court would not interfere.' Now, I have laid down the law, and I have already said what I think is the true inference to be drawn from the facts. The other case to which I wish to refer seems to me to go rather further than Blackburn, J. went. I am alluding to the judgment of Lord Russell, C.J. in *Reg. v. Hain* (12 Times L. Rep. 323), who said: "There was no doubt about the law that the decisions of justices should be carefully scrutinised when they were acting under circumstances which indicated the possibility of their being biased." Without referring to what I and my brother Mathew said in *Reg. v. Cumberland Justices* (58 L. T. Rep. 491), it seems to me that that case goes a considerable way towards supporting the judgment I am giving in the present case—namely, that these gentlemen did so interest themselves in and about getting this agreement signed by the brewers, that they have thereby incapacitated themselves from sitting on the judgment seat. I wish to add this, that it seems to me to be of importance, not only in this court, but in every court, that a man who is going to sit on the judgment seat should not lay himself open even to the statement being made by the other side that he is so interested in the matter that he might possibly have a bias. I therefore have come to the conclusion here, after finding out what the rule is and applying it to the facts of this case, that this rule for a *certiorari* ought to have been made absolute and not discharged, as it was in the King's Bench Division. Another point was taken. It is said that this is not a proper matter for *certiorari*. Before the decision in *Boulter v. Kent Justices* (77 L. T. Rep. 288; (1897) A. C. 556) it is clear from Blackburn, J.'s decisions that this class of certificate was a matter for *certiorari*, and I have no doubt that it was. The point taken was that the decision in *Boulter v. Kent Justices* (*ubi sup.*) has altered all that. Now, as I have said during the argument, I do not know what other judges may do, but I am not myself going to be a party to extending the case of *Reg. v. Boulter*. That was a case which had reference to a licensing committee and a licensing committee alone, and I quite agree that the House of Lords have held that a

licensing committee is not a court. I think it follows that, if it is not a court, *certiorari* possibly would not lie. I understand that Channell, J. said in *Reg. v. Manchester Justices* (80 L. T. Rep. 531; (1899) 1 Q. B. 571) that, with regard to the confirming order, *certiorari* will lie, and I agree with him on two grounds. First of all, in my opinion, clearly before *Reg. v. Kent Justices* (*ubi sup.*) it would lie, and, in my opinion, that case does not touch the confirming sessions; and the main reason for the distinction which I would draw between the confirming sessions and the original sessions is that in the original sessions there is no party. It is pointed out by Lord Herschell in the House of Lords in that case that there was no party, because on one side there was the applicant and on the other side there was all the world. With regard to the confirming authority, it is enacted by sect. 43 of the Licensing Act 1872 that "Any person who appears before the licensing justices and opposes the grant of a new licence and no other person may appear and oppose the confirmation of such grant by the confirming authority in counties or boroughs, and the confirming authority may award such costs as they shall deem just to the party" who shall succeed in the proceedings before them. There we find the applicant and the party, and a legislative enactment by which the confirming authority are entitled to award costs. It seems to me that there is a great distinction between a meeting of the confirming authority and the annual licensing meeting, and I agree with my brother Channell with regard to that. Then it was said that there was no order to be brought up and quashed by *certiorari*. Though the order of the confirming authority merely states that the justices confirm the provisional grant of a licence by the licensing committee, the real meaning of that is that the confirming authority make an order that there shall be a licence granted to this Pallion Hotel. Then the appellant says that the justices of Sunderland, who made that order, had no jurisdiction to make it on the ground of bias. For these reasons I think that this appeal must be allowed.

WILLIAMS, L.J.—I agree. This is an appeal from the decision of the Divisional Court, consisting of the Lord Chief Justice and Lawrence, J. I want to say, first, that I am not at all clear myself that the Divisional Court could have properly arrived at any other decision than that at which they did arrive, because the Divisional Court were bound by the decision of the Divisional Court in the case of *Reg. v. Stockport Justices* (60 J. P. 552), and Mr. Russell in arguing this case very properly conceded that it was not possible to draw any distinction between the facts of that case and the facts in this case. In this court, however, we are not bound by the decision in that case. We have to decide the question for ourselves. Now, I will first deal with the technical objection which is made that this is a case in which a *certiorari* will not lie. It appears to me that it is quite sufficient to say that I entirely agree with the judgment of Channell, J. in the case of *Reg. v. Manchester Justices* (*ubi sup.*), and I agree with him for the very reason that he gives—that is to say, it is perfectly plain to my mind, whatever was decided in *Boulter v. Kent Justices* (*ubi sup.*), that that decision applies only to the proceedings of the licensing com-

mittee, and has no application whatsoever to the proceedings of the confirming justices. When one looks at the terms of sect 43 of the Licensing Act of 1872 and finds a provision that the confirming authority may award such costs as they shall deem just to the party who shall succeed in the proceedings before them, it is to my mind impossible to say that there is not a *lis*, or that there is not a *lis* with parties, or that, however narrowly the line may be drawn as to when *certiorari* will lie, a *certiorari* would not lie in such a case as the order of the confirming justices under sect. 43 of the Act of 1872. I wish to add for myself that I do not regard the case of *Boulter v. Kent Justices* (*ubi sup.*) as having decided that *certiorari* will only lie when there is an order of a court properly so called. It is not necessary to decide it in this case, but all I can say, speaking of one's instinctive knowledge of the common law, is that I had always conceived the common law to be that, wherever a body, whether justices or otherwise, had under the provisions of a statute to grant or withhold a statutory certificate, and on looking at the section it appeared that they had to exercise their judicial discretion in so doing, a *certiorari* would lie whether or not the body upon whom the statute imposed the duty of granting or withholding the certificate were or were not a court. Now, having said this about *certiorari*, I will say a word or two about the merits of this case. To my mind this is happily one of those cases in which, instead of having a conflict of cases, or cases which it is difficult to reconcile, we have a continuous series of authorities which is absolutely unchanged in its colour and flow, and, if one takes the two decisions of Blackburn, J. in *Reg. v. Rand* (*ubi sup.*) and *Reg. v. Meyer* (*ubi sup.*), one really has the whole law laid down. When is it that a justice or a judge is disqualified from acting? In the first place, he is disqualified from acting if he has an interest. The moment one finds a justice with an interest—that is to say, an interest which is pecuniary or capable of pecuniary measure—that alone is sufficient. The law then makes a presumption that he is biased. The law, for reasons of policy which hardly require an explanation, does not think it convenient, when once a pecuniary interest is admitted, to go into the question whether or not the judge, upon the occasion of the particular trial, acted partially or impartially; it presumes bias from the very fact of the pecuniary interest. Now, this is not a case where the justices have personally any pecuniary interest at all. The utmost which could be said would be that they had a pecuniary interest as trustees. I do not think that the pecuniary interest as trustees, on the authorities, is sufficient to raise this legal presumption. But, then, is there any other case besides the case of interest in which a justice is disqualified from acting? The answer, on looking at the case of *Reg. v. Rand* (*ubi sup.*), is that clearly there is another case, and that is the case where the objection is not in the nature of interest, but, to use the expression of Blackburn, J., “of a challenge to the favour,” and in such a case, the presumption not arising, we have to ask ourselves whether there is a real likelihood that the judge, from the circumstances raising this challenge to the favour, would have a bias in favour of one of the parties. That being so, before I

answer that question, I look to the facts of this case. The corporation, being minded to widen this street, had purchased the Londonderry Hotel for the purpose of pulling down a portion of it and widening the street. They had purchased it for a sum of 14,600*l.*, and they arrived at the conclusion that they could not conveniently, even if they could legally, carry on the business of this hotel, and I do not know whether, if the street had been widened, or as soon as it was widened, it would have been physically possible to do so. In that state of things, having a very valuable licence to sell, they invited the brewers and others within the district to tender for what has been called a surrender by the corporation of this licence. It was not strictly speaking a surrender, and the only possible advantage to be gained by the person whose tender was accepted and who made the payment was that, if the corporation agreed not to apply for a renewal, or to pull down or demolish the Londonderry Hotel, when the person making the payment applied for a new licence in this district he would be able to urge as one of the matters in favour of a grant of the licence, that the grant of the licence to him would not increase the number of licences in the district. But I do not think one ought to leave out of consideration, when one is going through these facts, that in this district, which has been called the Pallion district, it was perfectly plain that the corporation were well aware that there were several persons who would be disposed to open a new hotel or public-house if they could obtain a licence. I think it is perfectly plain that the corporation were aware that there was competition to get a new licence for this Pallion district. I presume that it is probably an increasing district. Under these circumstances an agreement was entered into by the corporation for the payment of 10,000*l.*, which sum was only to be paid when the new licence had been granted by the licensing committee and confirmed by the confirming body, and which sum was to be returned in the event of the High Court quashing the licence. The question is whether the magistrates, who were actively engaged in the negotiation of this agreement under which this 10,000*l.* was to be paid, had become thereby disqualified from acting as justices in the matter of the confirmation of this licence under the 43rd section of the Act of 1872. In other words, one has to ask oneself whether in these circumstances there is a real likelihood that the justices would, by reason of the part they had taken in the negotiation of this agreement, have a bias in favour of this particular applicant for this new licence for an hotel in the Pallion district. To my mind it is really not possible to draw any other conclusion than the conclusion that there is a real likelihood that these justices would have a bias. I do not know that one adds to it by stating it in different words, because the substance of the law is just the same when it is stated by Blackburn, J. in his later judgment of *Reg. v. Meyer* (*ubi sup.*). The mere possibility or mere suspicion that a judge might be biased is not sufficient. That was decided in the case of *Reg. v. Dean and Chapter of Rochester* (17 Q. B. 1). It cannot be said here that there is a mere possibility or mere suspicion. To my mind one must judge of these things as reasonable men would judge of

them in the conduct of their own business; and can anyone doubt that a man in the conduct of his own business would infallibly draw from these circumstances the inference that these justices, who negotiated this agreement, would have a real bias in favour of the granting of a licence to these particular persons? Under these circumstances I entirely agree with the judgment which has been delivered by my Lord, and I should not have added anything except that the case is one of considerable general importance in form and, as I have already said, in substance, by reason of the Divisional Court being bound by the case of *Reg. v. Stockport Justices (ubi sup.)*, which we are overruling.

STIRLING, L.J.—I am of the same opinion. The question to which we have to address ourselves is, I apprehend, that which is stated in the judgment of Blackburn, J. in the case of *Reg. v. Rand (ubi sup.)*—namely, whether there is in this case a real likelihood that the justices would have a bias in favour of one of the parties. The nature of the bias is indicated in that judgment by the reference which the learned judge there makes to a bias in favour of kindred. That is an illustration which he gives, though he includes in it other cases. Now, what is said here to give rise to the bias is that a contract was entered into on the 22nd Aug. 1900 between the corporation of Sunderland of the one part and a limited company, Duncan and Dalgleish, of the other part, who are brewers, by which it was agreed that in the event of the brewery company making before the justices and succeeding in an application for a licence, the brewery company would pay over to the corporation the sum of 10,000*l.* The consideration on the part of the corporation receiving this 10,000*l.* was an agreement on their part that, after payment of the sum of 10,000*l.*, and after the premises which were licensed had been opened under the licence so obtained, then a certain property known as the Londonderry Hotel, which was the property of the corporation, would be closed, and that no further application would be made to the licensing justices for a renewal of the licence which had been granted for that property. There was a further stipulation in the agreement that, if the grant and confirmation of the licence should be revoked by legal proceedings, then the sum of 10,000*l.* was to be repaid. Now, the Londonderry Hotel, as I have said, was the property of the corporation, and it came to be the property of the corporation in this way. The corporation were improving the streets of the borough, and part, not the whole, of this licensed hotel was required for the purposes of the improvements. In order to enable improvements to be made, it was found necessary that the corporation should buy the whole hotel, and the corporation did buy it, paying for it a sum of over 14,600*l.* This took place some time in the year 1899. They subsequently made attempts to sell so much of the hotel and of the site of it as was not required for the purposes of the proposed improvements, but they failed, and after considerable negotiation this contract, to which I have already referred, was entered into. Now, that contract was approved at a meeting of the corporation which was held, I think, on the same day, the 22nd Aug., and on behalf of the respondent justices a short report of the proceedings at that meeting

has been put in evidence. Looking at that report, it is impossible not to see that the proposal to enter into this contract was a matter of keen interest amongst the members of the corporation who were present upon that occasion, and among them I observe that a Mr. Atkinson Gibson, who was chairman of the highways committee, took an active part and so also did another gentleman—namely, Mr. Alderman Reed, who moved in point of fact that this contract should be entered into; and at the close of the discussion Mr. Gibson put forcibly to the members of the corporation the reasons which appeared to him to be weighty for the acceptance of the proposals which had been made. He said: "As a matter of fact, the corporation had paid some 14,000*l.* for the Londonderry and had purchased the licence. Were they as trustees of the ratepayers, if the licence could be surrendered for a certain sum of money, going to throw the chance away? Certainly not." Now, after the discussion had been closed with that speech, the matter was put to the vote, and the proposal that this contract should be entered into was accepted. The matter then had to come before the licensing justices, and the first stage is that it comes before the licensing committee. That committee, as I understand, consisted of seven justices, five of whom were members of the corporation, and amongst them were the two gentlemen to whom I have referred—Mr. Atkinson Gibson and Mr. Reed. At that meeting the proposal to grant a licence, on which the whole contract hinges, was accepted by a majority. Again, at the meeting of the confirming justices which was afterwards held, thirteen justices were present, of whom seven were members of the corporation, again including Mr. Atkinson Gibson and Mr. Reed, and that proposition was carried by eight to five. Now, the question to be decided is that which I have already stated, and it raises a short point, though perhaps not an easy point. Really in this case we have each of us to perform the functions of a jury, and apply our minds to the question which I have already stated, whether there was a real likelihood that the justices would be biased in considering this application which came before them. It seems to me that the answer to that question must be in the affirmative, and that, having regard to the active part which had been taken by Mr. Atkinson Gibson and Mr. Reed, and to the obvious feeling of interest in the whole matter which is shown by the discussion which took place at the meeting to sanction the contract being entered into, I cannot but feel that the securing of 10,000*l.* for the funds of the corporation was a matter which must have weighed in the minds of those who had taken so active a part in getting this contract entered into by the corporation. For these reasons I think that on the merits of the case the appeal ought to be allowed. As regards the technical question, whether this is a case in which a writ of *certiorari* ought to be granted, I do not think I can usefully add anything to that which has already been said by my Lords.

SMITH, M.R.—I omitted to deal with the case of *Reg. v. Stockport Justices (ubi sup.)*, and I wish to say that I agree with what Williams, L.J. has said. I do not see how the Lord Chief Justice and Lawrance, J., sitting as a divisional court, could have held otherwise than they did. In this

court we can draw our own inferences of fact, and have done so.

Appeal allowed. Rule nisi for a certiorari made absolute.

Solicitors for the appellant, *Hickin, Smith, and Capel-Cure*, for *J. S. Nicholson*, Sunderland.

Solicitors for the justices, *Tufnell, Southgate, and Son*, for *C. W. P. Barker*, Sunderland.

Solicitors for Duncan and Dalgleish Limited, *J. E. and H. Scott*, for *William Bell and Sons*, Sunderland.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 29, July 10 and 11, 1901.

(Before BYRNE, J.)

ATTORNEY-GENERAL v. TAMWORTH RURAL DISTRICT COUNCIL. (a)

Inclosure award—Jurisdiction of commissioner—Watercourse—Repairing and cleansing—Highway authority—Inclosure Act (52 Geo. 3, c. xiii.).

An Inclosure Act provided that the commissioner should set out such watercourses as he should think proper, and should order and direct by whom and at whose expense such watercourses should be repaired and cleansed. The Act further provided that the commissioner should assign land for the getting of materials for repairing public roads. The commissioner, in pursuance of such Act, by his award appointed certain roads to be set out, and awarded to the surveyor of highways land for the getting of materials for the repair of public roads. He further ordered that a watercourse should be made, and directed that such watercourse should for ever thereafter be repaired and cleansed by the surveyor of highways for the time being, the expenses attendant upon such repairing and cleansing to be paid out of a rate to be made for the repair of highways in the township.

Held, that it was within the jurisdiction of the commissioner to order the surveyor of highways to repair and cleanse the watercourse and to raise the expenses of so doing by means of a rate.

SPECIAL CASE stated by consent for the opinion of the court pursuant to Order XXXIV.

The plaintiffs Baron Norton, John Norman, and Frederick Smith Limited and the plaintiffs George Marshall Turner, George Edwards, and Thomas Satchwell James (as trustees under the will of George Turner, deceased) are the owners of land situate in the township of Bodymoor Heath in the parish of Kingsbury, in the county of Warwick, through which land run the drains and watercourses hereinafter mentioned.

By virtue of an Act of 52 Geo. 3, intituled "An Act for inclosing lands in the township of Bodymoor Heath or Heath Houses, in the county of Warwick," Robert Benton of Dunton, Curdworth, Warwickshire, was appointed the commissioner for valuing, dividing, setting out, allotting, and inclosing the commons and waste lands within Bodymoor Heath or Heath Houses, and for putting the Act in execution, subject to the rules

and directions thereafter mentioned and contained, and also subject to the powers, provisions, rules, and regulations contained in the Act of 41 Geo. 3, intituled "An Act for consolidating in one Act certain provisions usually inserted in Acts of inclosure and for facilitating the mode of proving the several facts usually required on the passing of such Acts," except in such cases where the same are altered or varied by the first-mentioned Act.

The first-mentioned Act, amongst other things, provided as follows—that is to say:

And be it further enacted that the said commissioners shall and may scour out and widen all such brooks, streams, ditches, watercourses, tunnels, and bridges within the said manor and liberty, hamlet, or township, and also shall and may set out, order, and direct such new ditches, drains, watercourses, tunnels, watergates, banks, and bridges to be made of such depth and breadth, and in such situations and directions as the said commissioner shall think proper as well as in, through, over, and upon the commons and waste lands hereby directed to be divided and inclosed as aforesaid as also in, through, and over any ancient inclosures or other lands adjoining thereto or any part or parts thereof (making such satisfaction to the owners, lessees, or tenants of such ancient inclosures or other lands or grounds for the damage, if any, done thereby as he shall judge reasonable), and the said commissioner shall and may and he is hereby authorised and required in and by his general award to order and direct by whom and at whose expense and at what times and in what manner the said brooks, ditches, drains, watercourses, tunnels, watergates, banks, and bridges shall be thereafter repaired, cleansed, scoured, and maintained. Provided always that no such brook or stream shall be diverted or turned without the consent of the owner or owners of the ancient inclosed lands and grounds from which any such brook or stream shall be diverted or into which any such brook or stream shall be turned.

The same Act also provided that in case the money raised by sale of certain lands should not be sufficient to defray all the expenses of carrying such Act and the Act of 41 Geo. 3 into execution, then the deficiency should be borne and defrayed by the several persons to whom any allotment or allotments should be made in respect of their right of common, and should be paid in such shares and proportions and at such time and place and to such person or persons as the commissioner should appoint either before or after the execution of his award. And that the commissioner should adjust and settle the costs, charges, and expenses of obtaining and executing the first-mentioned Act and also regulate the expenses attending the sale therein directed to be made towards defraying the same, as well as such rate or rates as he might have occasion to make in pursuance of such Act, so and in such manner and proportions as that such persons as were interested in the commons and waste lands respectively or any part or parts thereof only should not be charged more than a fair and just proportion according to the extent of their respective rights therein, but that the charges and expenses might be borne and paid by the persons interested in the commons and waste lands respectively in due and just proportions.

On the 30th Jan. 1815 the commissioner duly made his general award.

After appointing and awarding an open drain or watercourse of the breadth of 14ft. and of the

depth of 7ft. (providing a necessary fall for the water) through the commons and waste lands, the commissioner continued:

And I do order and direct that the said open drain or watercourse together with the bridges over the same and also the continuation therefrom of the aforesaid ancient watercourse running from the east of the said heath called Bodymoor Heath to the level of the river Thame and every part thereof shall for ever hereafter be repaired, cleansed, scoured, and maintained by the surveyors of the highways for the time being of the said manor and liberty, hamlet, or township of Bodymoor Heath or Heath Houses, who shall cleanse and scour the same at least once in every two years between the months of August and December, and the expenses attendant upon the cleansing, scouring, and maintaining the said drains, watercourses, and bridges over the same shall from time to time be paid and discharged by a rate and rates to be assessed and collected within and upon the said manor and liberty, hamlet, or township of Bodymoor Heath or Heath Houses in the like manner and proportion as the rates are or can be assessed, made, and collected thereon for the repairs of the highways therein.

The drain or watercourse was not made throughout its entire length of the width or depth mentioned in the award, and its present breadth is from 4ft. to 15ft., and its present depth from 2ft. 6in. to 5ft.

The area of the township is about 650 acres, and the area of the commons and waste lands by the first-mentioned Act directed to be divided and inclosed is 140a. 1r. 10p. (exclusive of the roads set out in the award).

Bodymoor Heath was a place maintaining its own highways and appointing its own surveyor of highways separately from the remainder of the parish of Kingsbury until the powers, duties, and liabilities of such surveyor were transferred to the defendants by virtue of sect. 25 (1) of the Local Government Act 1894—namely, on the 29th Sept. 1897.

No special or separate rate in the nature of a highway rate or otherwise has been levied on Bodymoor Heath or any part thereof for the purpose of defraying the expenses of cleansing, scouring, or maintaining the drain or watercourse, but the same and the continuation thereof have been cleansed or scoured to a certain extent and at such periods as have been from time to time considered requisite by the surveyor of highways of the township, and the expenses thereof have been paid out of the highway rates of such township. Such expenses during the years 1888 to 1897 inclusive amounted to the sum of 22l. 6s. 8d.

There are two bridges over the drain or watercourse, and such bridges have been from time to time repaired by the surveyor of highways. One of the bridges is now maintained by the defendants as part of the highway.

The drain or watercourse and the continuation therefrom have not been cleansed, scoured, or maintained by the defendants, and they are now choked and out of repair, by reason whereof the drainage of the area does not flow to the surface of the drain and watercourse in the river Thame, but floods the lands of the relator plaintiffs and the highway, and creates a nuisance to them and to the public.

It was contended on the part of the plaintiffs that by virtue of the award it was formerly the duty of the surveyor of highways of the Bodymoor Heath to cleanse, scour, and maintain the drains and watercourses, and to defray the expenses

thereof by means of a rate and rates to be assessed and collected within and upon the township in like manner and proportion as the rates are or can be assessed, made, and collected thereon for the repair of the highways therein, and that by virtue of such award and the Local Government Act 1894 it is now the duty of the defendants to cleanse, scour, and maintain the drains and watercourses, and to defray the expenses thereof in the manner provided by the award.

It was contended on the part of the defendants that if and so far as the award imposed upon the surveyor of highways of the township any duty or authority to cleanse, scour, or maintain the drain and watercourse, or to defray the expenses thereof by means of highway rates or rates to be made or levied in the same manner as highway rates on the township, the award was *ultra vires* and invalid. That the award did not direct the surveyors to defray the expenses by means of highway rates or rates to be made or levied in the same manner as highway rates on the township. And that the defendants have no duty or authority to cleanse, scour, or maintain the drains or watercourses, or to defray the expenses thereof as highway expenses or otherwise.

The question for the opinion of the court was whether the plaintiffs were by virtue of the award entitled to have the drain and watercourse and the continuation thereof, cleansed, scoured, and maintained by the defendants as successors of the surveyors of highways of Bodymoor Heath, and to have the expenses thereof defrayed out of a rate or rates to be levied in the manner provided in the award.

Macmorran, K.C. and *C. Fleetwood Pritchard* for the plaintiffs.—The Act expressly empowered the commissioner to direct the watercourses set out by him to be repaired by any person or persons interested in the inclosure. It may be *ultra vires* to require roads to be repaired by the local authority, but the principle of roads does not apply to watercourses. The watercourse is for public benefit:

Micklethwait v. Vincent, 69 L. T. Rep. 57;

Re v. Cottingham, 6 Term Rep. 20;

Re v. Wright, 3 B. & Ad. 681;

Danby v. Watson, 36 L. T. Rep. 412.

The award does not order the defendants to pay for the cleansing and scouring out of the highway rates, but out of a rate to be levied in the same way as a highway rate. [*BYRNE, J.* referred to *North-Eastern Railway Company v. Lord Hastings* (82 L. T. Rep. 429; (1900) A. C. 260.)]

Hugo Young, K.C. and *Alexander Glen* for the defendants.—The watercourse did not benefit the whole of the township, and, on the other hand, people outside the township were benefited. The burden of keeping the watercourse in good order must be put upon those persons benefited:

Re v. Cottingham (*ubi sup.*).

By his award the commissioner not only made the defendants liable for the repair of the new watercourse, but also for the repair of the old ditch outside the township. This was *ultra vires* as he put on the defendants a liability which he had no power to put on anybody. The Act did not give the commissioner power to allow a rate

to be levied. The fact that the surveyor of highways has kept the watercourse in order for some years is no reason why he should continue to do so:

North-Eastern Railway Company v. Lord Hastings
(ubi sup.);

Falmouth v. Richardson, 3 B. & C. 837.

Macmorran, K.O., in reply, referred to

3 & 4 Will. 4, c. 35;

Danby v. Watson (ubi sup.);

Haggerston v. Dugmore, 1 B. & Ald. 82.

The award imposes the duty of cleansing and repairing the ancient watercourse, authorises the making of new drains outside the township, and the making of new drains on land adjoining thereto.

BYENE, J.—In this case the question is raised on a special case, and it is as to whether the plaintiffs are entitled by virtue of a certain award to have a drain or watercourse cleansed, scoured, and maintained by the defendants, the Tamworth Rural District Council, as successors of the Surveyor of Highways of the Township of Bodymoor Heath, and to have the expenses defrayed out of a rate or rates to be levied in the manner provided in the award. It is admitted that whatever the liabilities in respect of this matter on the surveyor of highways of the township of Bodymoor Heath were, such liabilities now rest upon the defendants in this case. The question arises in this way: There was an Act passed of 52 Geo. 3 for inclosing lands in the township of Bodymoor Heath or Heath Houses, in the county of Warwick, and a commissioner was appointed in the usual way with the ordinary powers. [His Lordship then read the provision of the Act of 52 Geo. 3 set out above.] The Act contains a provision which I do not think is set out in the special case, but I think it is material, to this effect: "And be it further enacted that the said commissioner shall assign, set out, and appoint as many convenient parts or pieces of the said lands and grounds hereby intended to be inclosed, not exceeding two acres in the whole, as he shall think proper for the getting of stone and gravel or other materials for repairing the public roads and ways to be set out by virtue of this and the said recited Act, and for the use of the inhabitants of the said manor and liberty, hamlet, or township of Bodymoor Heath or Heath Houses for repairing their ancient roads, and that the herbage growing and renewing in and upon the said parts and pieces of ground shall be and hereby is vested in the surveyor of the highways of the said manor and liberty, hamlet, or township for the time being, in trust to let and set the same for the best rent he can get, and to apply the rents and profits thereof in repairing the said public ways and roads, and to account to the inhabitants of the said manor and liberty, hamlet, or township touching the application thereof annually." Then there was a provision that in case the money raised by sale as directed in the Act should not be sufficient to defray expenses, the deficiency was to be borne by the persons taking allotments in respect of their right of common. Then in 1815 the award was made in pursuance of the Act, and by that award the commissioners, amongst other things, appointed certain roads to be set out, and awarded to the surveyor "for the getting gravel, stone, or other materials for

repairing the public roads and ways hereinbefore set out and appointed, and for the use of the inhabitants of the manor and liberty, hamlet, or township of Bodymoor Heath or Heath Houses aforesaid, for repairing their ancient roads, which said described allotment is to be subject to the hereinbefore described private carriage and drift road through and over the same, and I do direct that the hedges, ditches, mounds, and fences of the said described allotment against the said public carriage road shall be made and for ever hereafter maintained and kept in repair by the surveyor of the said public road and ways for the time being." Then by the same award the commissioner appointed and awarded the following drain and watercourse in and through the said commons and waste lands—that is to say, an open drain or watercourse of the breadth of 14ft. and of the depth of 7ft. (preserving a necessary fall for the water). Then he proceeds to describe the line of this new drain or watercourse, and, after giving his description, goes on, "and which said open drain or watercourse is continued thence under the first hereinbefore described public carriage road nearly in the same north-east direction to near the north-east end of the said heath, called Bodymoor Heath, then turning to the south-east into the ancient watercourse (at the east corner of the said heath called Bodymoor Heath) that runneth between the ancient inclosed land belonging . . ." &c. Then the commissioner proceeds to award as follows: "I do order and direct that the said open drain or watercourse together with the bridges over the same and also the continuation thereof of the aforesaid ancient watercourse running from the said east corner of the said heath called Bodymoor Heath to the level of the river Thame and every part thereof shall for ever hereafter be repaired, cleansed, scoured, and maintained by the surveyor of the highways for the time being of the said manor and liberty, hamlet, or township of Bodymoor Heath or Heath Houses, who shall cleanse and scour the same at least once in every two years between the months of August and December, and the expenses attendant upon the cleansing, scouring, and maintaining the said drains and watercourses together with the bridges over the same shall from time to time be paid and discharged by a rate and rates to be assessed and collected within and upon the said manor and liberty, hamlet, or township of Bodymoor Heath or Heath Houses, in the like manner and proportion as the rates are or can be assessed, made, and collected thereon for the repairs of the highways therein." Now, from the date of the actual making of this new watercourse (which must have been shortly after the date of the award, I suppose) up to quite recently the whole of the watercourse was maintained, repaired, and cleansed by the surveyor of the highways for the time being, by and out of a rate which was levied for the repair of the highways. Probably in consequence of the new body constituted taking the place of the old surveyor of highways, I suppose some inquiries have been made, and now the question has been raised on the part of the defendants—who succeed, as I have said, to his duties and liabilities in this respect—whether this was not *ultra vires* of the commissioner to award that the watercourse was to be kept in repair and scoured by the surveyor

of highways, and out of a rate to be levied as mentioned in the award. In fact, there has been neglect of late, and the watercourse is choked and out of repair, by reason whereof the lands of the plaintiffs, who are relators, are flooded, and also a highway is flooded and a nuisance is created to them and to the public. So that the neglect of repairing and keeping in order this watercourse is not merely a nuisance by flooding of the lands belonging to private owners, but does an injury to the public and to the public highways. Now, one thing is to be observed from reading this Act: that the surveyor of highways was one of the persons who was within the regard of the Legislature when the Act was passed, and he was to be a person to whom an allotment was to be made. An allotment was to be made in aid of a public duty to be performed by him, falling upon him, and for the benefit of the public; and it was providing not merely for the repair of new public roads to be set out, but also of the ancient roads. I think, therefore, that the surveyor of highways was, as representing the public within the district, a party to the award, and accordingly under the award an inclosure is allotted to him for the purposes contemplated by the Act of Parliament. Now, of course, it is a strong thing, after a long period of years like this, when the public authority and the individuals have acted upon a certain footing that a certain award under an Inclosure Act was binding effectually and *intra vires*—it is a strong thing after this long lapse of years to say they have all been acting under a misapprehension, and that the right now sought to be asserted is the true construction of what might be done rather than that which has been acted upon for so many years. But at the same time I am not able to say that the question may not now be raised, for, as at present advised, I think it is competent now for the defendant body to raise the question. Then comes the further point: Was this *ultra vires* of the commissioner at all? I have come to the conclusion that it was not. The case that was mainly relied on pointing the other way is the case of *Rees v. Inhabitants of Cottingham (ubi sup.)*. In that case there were certain commissioners who had been appointed to set out and appoint public and private roads and ways, and also such ditches, fences, banks, drains, &c., "as they should think convenient in, over, and upon the said lands and grounds directed to be inclosed; that such public roads should at all times afterwards be repaired in such manner as other public roads are, or should be by law, directed to be repaired," and also "all the private ways, ditches, fences, banks, drains, &c., so to be erected and appointed as aforesaid should be made and provided and at all times afterwards repaired, &c., by such person or persons and in such manner as the commissioners should by their award direct or appoint." The commissioners had in that case awarded that the private roads set out in pursuance of the Act should be repaired as if they were public highways. There was an indictment and there was a plea "That no allotment was made to or to the use or benefit of the inhabitants of the parish in pursuance of the Act; and that at the time of making the award under it the inhabitants of the parish were not liable to repair the private road in question, or any other private road leading out of the North Carr-road." Kenyon, C.J. in his judg-

ment says: "The case is shortly this: Certain persons who were entitled to a right of common applied to the Legislature for the sake of their private emolument for power to divide this common; and in the Act commissioners were named by them to take care of their interest; but the parish derive no benefit whatever from the inclosure—they have no allotment under it; and it is now contended that the Legislature meant that the parish, who derive no benefit from the Act, should be subject to the burden of repairing this road." Then he proceeds to give reasons why this would be a most improbable intention on the part of the Legislature, and he says: "The question is whether the words 'person and persons' extend to any strangers that the commissioners should name—the inhabitants of Cornwall or Yorkshire, for instance—or whether they must be confined to such persons as are interested in the inclosure? Common sense requires that the latter sense should be adopted." Ashurst, J. again says: "It would be a great injustice to construe the words 'person or persons' in the sense contended for by the prosecutors." He thinks the Legislature intended the private roads should be repaired by such persons as receive a benefit from the allotments under the Act. Grose, J. says: "This cannot be understood to mean any persons in any distant part of the kingdom, but such persons interested in the inclosure as the commissioners thought ought to bear the burden." Now, the essential difference between that case and the one I have to deal with is that in the present case the surveyor of highways was a person in whose favour an allotment was made. He was a person interested in the inclosure, and the public were interested in the inclosure, and the public benefited by it. Apart from this question of the injury to the highways occasioned by reason of there being no such drainage, there was the fact that they had this assistance in the repair of their ancient highways as well as the new highways that were set out under the Act. Now, it appears to me that that being so, I think it was conceded that the commissioner could (but if not, it seemed to be almost impossible to contend that the commissioner could not), if he had been so minded, have awarded that the surveyor was to bear at least a portion of the expenses, because he is a person taking an actual allotment under the Act; but, apart from that question, it appears to me if you get to that point, that there is clear jurisdiction on the part of the commissioner to award that the surveyor of highways should have imposed upon him the duty of cleansing and repairing, and (which is a separate point) should have the power given to him to levy a rate for the purpose. Now, several arguments have been addressed from the contrary point of view. It has been said in the first place that there may have been a sale of this allotment which was made to the surveyor of highways, but one complete answer to that appears to be that the power to sell was not given until 1836, which was many years after the date of this award. Then another point is as to the ancient watercourse, and it is said that the imposition of the duty of cleansing that portion of it was *ultra vires*. Here I agree there is some obscurity and some difficulty in construing the Act, but the parties appear to me to have treated it, and that probably was the meaning, that this ancient water-

course was to be regarded as a portion of the watercourse which was set out in this way: that the old watercourse was adopted as a continuation of the new watercourse to be laid out, and I see no reason for saying that the duty to scour and repair might not be imposed upon that, even although some portion of it might be outside the township, as was purported to be imposed and has been acted upon ever since until recently. One other observation I want to make is this: I think it is extremely probable that at the date of this award the surveyor of highways, acting on behalf of the public, deemed it to be to the advantage of the public, whom he represented, to have the control of this watercourse, because, having the control of the watercourse and being able to impose a rate for the purpose of paying for it, he would be able to see that it was kept in order, and that the highways were not flooded; whereas, if it were left to a number of private owners to do, there might be a difficulty in getting it satisfactorily done, and there might be a trouble in pursuing them and taking the necessary proceedings to make them carry it out; and what appears to me to be, as I said, extremely probable is that he was taking that view at that time and was desirous that the duty should be imposed upon him. Well, if there is a right to impose the duty upon him, and the manner in which it was to be done is given, I see no reason why the commissioner should not give him a right to impose or levy a rate for the purpose of repairing and cleansing. What has been done is, I am told, that there has been no rate levied, but that it has been paid for out of the rate which was levied for the purpose of repairing the highways. A case has been cited showing the reluctance with which the court will go into the question of upsetting what has been done under an award, and into the question of considering whether a thing was *ultra vires* under an award made so many years ago as the present one was. I think every consideration points the same way: that this award was on the true construction of the Act of Parliament within the powers conferred by the Act. In answer to the question set out in the special case, I decide that the plaintiffs are by virtue of the said award entitled to have the said drain and watercourse and the said continuation thereof cleansed, scoured, and maintained by the defendants as successors of the surveyors of highways of the said township of Bodymoor Heath, and to have the expenses thereof defrayed out of a special rate to be levied for the purpose.

Judgment for the plaintiffs with costs.

Solicitors for the plaintiffs, *Paines, Blyth, and Huxtable*.

Solicitors for the defendants, *Radford and Frankland*, agents for *Howard Cant and Cheatle*, Birmingham.

Thursday, Aug. 8, 1901.

(Before BYRNE, J.)

KING'S COLLEGE, CAMBRIDGE v. UXBRIDGE RURAL DISTRICT COUNCIL. (a)

Public health—Sewers—Erection of pumping station—Apparatus for disposing of sewage—Necessity of purchasing land—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 16, 27.

A pumping station erected on land belonging to a private individual for the purpose of pumping sewage along a sewer is not itself a "sewer" within the meaning of sect. 16 of the Public Health Act 1875 so as to entitle the local authority to erect it on the land after giving reasonable notice to the landowner. It is an apparatus for disposing of sewage within sect. 27 of the Act, under which the local authority must purchase the land required for its erection.

THIS was an application on behalf of the Provost and Scholars of King's College, Cambridge, as lords of the manor of Ruislip, and of R. H. Deane, an adjoining owner, for an interim injunction to restrain the defendant council from proceeding with the erection of a pumping station upon a certain strip of uninclosed land in the parish of Ruislip, on the north side of the high road from Uxbridge to London, belonging to one of the plaintiffs, and from otherwise trespassing on the said strip of land.

The defendant council had resolved to carry out a scheme for the disposal of the sewage of the parish of Ruislip, which included the town of Northwood, the hamlet of Eastcote, and the village of Ruislip, by which the sewage of the whole parish was to be conveyed to one common outfall for treatment.

Owing to the levels, the sewage of the parish of Eastcote could not be conveyed to the outfall site entirely by gravitation, and it was necessary to lift it and pump it along a rising main from Eastcote village to Ruislip village, and for this a pumping station somewhere near the spot in question was necessary.

The defendant council, without notice to the plaintiffs and alleging that this strip was part of the highway, had entered upon and were proceeding to erect a pumping station thereon.

The plaintiffs claimed this strip of land, and contended that the proposed erection would seriously damage the adjoining land which was coming into the market for building purposes, and that the effect of the proposed building would be very detrimental to them.

The pumping station was erected partly below and partly above ground and, defendants contended, was not intended or adapted to be used for receiving, storing, disinfecting, distributing, or otherwise disposing of the sewage within the provisions of sect. 27 of the Public Health Act 1875 (38 & 39 Vict. c. 55), but was essentially a part of the sewerage system of the district, as without some such means it was impossible for the present system of sewerage to deliver the Eastcote sewage on to the outfall site.

Norton, K.C. and R. J. Parker for the plaintiffs.—The strip of land belongs to us, and is not part of the highway. Where there are uninclosed spaces by the sides of a metalled highway there is

(a) Reported by E. L. HOPKINS, Esq., Barrister-at-Law.

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no invariable presumption that the highway extends to the fence on either side:

Belmore (Countess of) v. Kent County Council, ante, p. 180; 84 L. T. Rep. 523; (1901) 1 Ch. 873;
Curtis v. Kesteven County Council, 63 L. T. Rep. 543; 45 Ch. Div. 504.

This pumping station is an apparatus for the distributing or otherwise disposing of sewage for which, under sect. 27 of the Public Health Act, land would have to be purchased. A pumping station is not a "sewer" within the meaning of sect. 4 of the Public Health Act 1875, which, under sect. 16, could be carried through or under any turnpike road or street. Further, no notice as required by sect. 16 has been given. The pumping station is partly above and partly below ground, and so is different from the case of a manhole. This case can be distinguished from the case of *Swanston v. Twickenham Local Board* (40 L. T. Rep. 734; 11 Ch. Div. 838).

Levett, K.O. and Lushington for the defendant council.—The ownership of the land has not been made out; this strip is part of the highway. The whole question is whether the pumping station comes within sect. 16 or sect. 27 of the Public Health Act 1875. The word "sewer" includes the whole apparatus, and a pumping station is as much a part of the apparatus as a pipe is; it is part of the sewerage system which we are entitled, by sect. 16, to carry under the road:

Poplar Board of Works v. Knight, El. Bl. & El. 408. The whole of the sewer need not be underground:

Roderick v. Aston Local Board, 36 L. T. Rep. 328; 5 Ch. Div. 328.

The question whether the sewer shall be above or below ground is left to the discretion of the sanitary authorities:

Hutchings v. Seaford Urban District Council, 43 Sol. J. 41.

This case comes within sect. 16. It is not a case for injunction; at the utmost it is only a question of compensation for any damage done.

BYRNE, J.—This is an application for an injunction to restrain the defendants from using a certain strip of land for the erection of a pumping station to raise sewage from Eastcote to Ruislip. The strip of land in question, has, in my opinion, been proved to belong either to the lords of the manor or to the adjoining owners; it does not matter which for the purposes of this application, as both are present as co-plaintiffs. The question for decision is whether the defendant council had any right, without giving any notice to the plaintiffs, to go on to this land for the purpose of constructing this pumping station, and, in my opinion, the defendant council had no such right. The question appears to be whether the work the defendants are now doing is within sect. 16 of the Public Health Act, which provides that any local authority may carry any sewer through, across, or under any turnpike road, or any street, or place laid out as, or intended for, a street, and, after giving reasonable notice to the owner or occupier, into, through, or under any lands whatsoever within their district. No notice has been given, and a local authority has no right to carry a sewer under private property, as this is, without notice; but then a further point has been raised—namely, Is this pumping station

a "sewer" at all, or is it not rather, within the provisions of sect. 27 of the Act, an apparatus for the "receiving, storing, disinfecting, distributing, or otherwise disposing of sewage" for which land could and would have to be purchased? If provision is made outside a sewer for purposes of taking in and removing sewage matter, that is receiving and otherwise disposing of sewage, and, in my opinion, sect. 27 applies to works such as the present. I do not think sect. 16 applies to such large works as referred to in the present case. For these reasons, I think that what has been done has not been legally done, and that the plaintiffs have made out their case for an interim injunction to restrain the defendants from entering upon or taking this land, otherwise than strictly in accordance with their statutory powers.

Solicitors: *Withers and Withers; Woodbridge and Sons.*

June 11 and 12, 1901.

(Before BUCKLEY, J.)

W. H. CHAPLIN AND CO. LIMITED v. MAYOR OF THE CITY OF WESTMINSTER. (a)

Highway—Obstruction—Right of access from adjoining premises—Public or private right—Local authority—Powers—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 130.

The owner of premises abutting on a highway enjoys, as a private right, the right of stepping from his premises on to the highway or from the highway on to his premises. His right, however, when he has stepped on to the highway and is using the highway is a right enjoyed by him in common with other members of the public entitled to its use.

Where a local authority acting bonâ fide in the exercise of statutory powers proposed to erect a lamp post on a public pavement and near the kerb, it was held that they could not be restrained at the suit of persons who alleged that the lamp post would affect their convenience in conveying goods from vans in the public roadway across the pavement to their premises.

IN 1899 the vestry of St. Martin-in-the-Fields determined to light Villiers-street, Strand, by electricity, and for that purpose to erect standards or lamp posts to hold the lights. Villiers-street ran on a considerable slope north and south on the east side of Charing Cross station.

The plaintiffs were wine and spirit merchants, and lessees of cellars which ran for a considerable distance along Villiers-street, under and on either side of Craven-passageway—a passage way which ran at right angles from Villiers-street under the station. Their offices were situate on the western side of Villiers-street to the south of Craven-passageway. The frontage of the plaintiffs' premises on to Villiers-street was 37ft. 6in. and Craven-passageway was about 30ft. wide.

For the purpose of lighting Villiers-street the vestry were about to erect one of their standard lamp posts opposite the centre of Craven-passageway, and on the pavement on the west side of Villiers-street near the kerb.

The plaintiffs brought this action originally against the vestry and their contractors, and con-

(a) Reported by H. PROCTER, Esq., Barrister-at-Law.

tinued it by amendment against the present defendants alone, the corporation of the city of Westminster having replaced the vestry. The plaintiffs claimed an injunction to restrain the defendants from erecting any structure or post on the west side of Villiers-street in such a position as to cause obstruction to the plaintiffs as occupiers of the above-mentioned premises.

Certain communications had taken place between the parties, and the plaintiffs suggested that this lamp, if one was to be erected in this position, should be suspended upon a bracket from their premises, and they offered facilities for that purpose.

The plaintiffs in the course of their business often had three vans standing in the roadway of Villiers-street, near their premises. One van usually stood at the southern end of their offices for the purpose of receiving empties; the centre van was used for unloading heavy casks, and the northern one for unloading cases of wine which were carried by hand. The plaintiffs alleged that, having regard to this arrangement of vans, the lamp post would be so near the point where the slide or pulley used for the purpose of unloading the heavy casks from the centre van was usually placed, as to be a source of danger to the men engaged in unloading.

As a test a model of the lamp post was put up on the proposed site, and stood there for a couple of months.

H. Terrell, K.C., Hatfield Green, and E. J. M. Chaplin for the plaintiffs.

Asbury, K.C. and A. à B. Terrell for the defendants.

The following authorities were referred to :

Vernon v. Vestry of St. James, Westminster, 42 L. T. Rep. 82; 16 Ch. Div. 449;

Baird v. Tunbridge Wells Corporation, 71 L. T. Rep. 211; (1894) 2 Q. B. 867;

Goldberg and Son Limited v. Liverpool Corporation, 82 L. T. Rep. 362;

Hammermith and City Railway Company v. Brand, 21 L. T. Rep. 238; L. Rep. 4 H. L. 171;

London, Brighton, and South Coast Railway Company v. Truman, 54 L. T. Rep. 250; 11 App. Cas. 45;

Metropolitan Asylum District v. Hill, 44 L. T. Rep. 653; 6 App. Cas. 193;

Fritz v. Hobson, 42 L. T. Rep. 225; 14 Ch. Div. 542;

Lyon v. Fishmongers' Company, 35 L. T. Rep. 569; 1 App. Cas. 662;

Attorney-General v. Conservators of the River Thames, 8 L. T. Rep. 9; 1 H. & M. 1;

Rose v. Groves, 5 Man. & G. 613.

BUCKLEY, J. (after referring to the facts and to the suggestion as to a bracket, continued:—) Having regard to what I have to say it does not, I think, lie within my province to ascertain whether the defendants might, or might not, reasonably have accepted that suggestion. The defendants say that the position of this standard lamp is the most convenient—in fact, the only convenient—position for it, and unless I can review, which I think I cannot, their discretion in that respect, I do not think I can have any regard to whether or not the suggestion the plaintiffs made was reasonable or not. It is for the defendants to determine where the posts, or brackets, or whatever they are, are to be placed. The only thing for me to determine is whether the plaintiffs

have a legal right to restrain the defendants from doing that which the defendants, in their discretion, say is the proper way of dealing with this matter. The plaintiffs set up, as it seems to me, a right to have a particular portion of the highway so kept as that they shall be in a position to exercise an alleged right of using it to the maximum of their own convenience in the discharge to be made from three vans at a time. It does not seem to me that they have any such right. What is their right? It has been put forward that they have some private right. It seems to me that that is wrong. The right which they here seek to exercise is a right which they enjoy in common with all other members of the public to use this highway. They have an individual interest which enables them to sue without joining the Attorney-General, in that they are persons who, by reason of the neighbourhood of their own premises, use this portion of the highway more than others. They have a special and individual interest in the public right to this portion of the highway, and they are entitled to sue without joining the Attorney-General, because they sue in respect of that individual interest; but the right which they seek to exercise is not a private right, but a public right. A person who owns premises abutting on a highway enjoys, as a private right, the right of stepping from his own premises on to the highway, and if any obstruction be placed in his doorway, or gateway, or, if it be a river, at the edge of his wharf so as to prevent him from stepping from his own premises on to the highway, or obtaining access from his own premises to the highway, that obstruction would be an interference with a private right. But immediately that he has stepped on to the highway, and is using the highway, what he is using is not a private right, but a public right. Now, for that I will only refer to three cases to show that that is the law. In *Attorney-General v. Conservators of the River Thames* (*ubi sup.*), Page-Wood, V.C. says this, at p. 32: "Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private, as distinguished from the public, right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." Then a little further on, in dealing with the facts of the particular case with which he had to deal—namely, access to a wharf—the Vice-Chancellor said this: "But, in truth, the access is not blocked up. The wharf will not be as readily and easily approached, and perhaps not at all by the same route; but that is a mere interruption to the navigation of the river which they enjoy in common with the public, and not as part of their special right of access." There you have the two things contrasted—the right of stepping from the private property on to the highway, or from the highway on to the private property, and the right of access to the private property by the use of the highway. One is a private right and the other is a public right. That passage in the judgment of Page-Wood, V.C. was read and approved by Lord Cairns in

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the House of Lords in *Lyon v. Fishmongers' Company* (*ubi sup.*), and it was again referred to, and acted upon, by Fry, J. in the case of *Frits v. Hobson* (*ubi sup.*). I am reading from the head-note in *Attorney-General v. Conservators of the River Thames*, which correctly, I think, reproduces the judgment from p. 33. It is stated that it was there held, "That the right of access to a wharf was a private right within this saving; but that a pier, which rendered the approach to a wharf less convenient without rendering access impossible, was an interference, not with the private right of access, but with the public right of navigation enjoyed by the wharf owner in common with the rest of the public." It appears to me that that authority is precisely in point upon the question which I have to consider here. The lamp post, which is set up near to the plaintiffs' premises, is an obstruction to the highway adjoining these premises, but is no obstruction to this private right of stepping from the highway on to their own premises. Now, what the plaintiffs are here complaining of is this: They say the erection of this standard on the pavement near to their premises will be an obstruction to the highway, and, as such, of course a common law nuisance. They are entitled to complain of that as members of the public, and they are entitled to sue in their own name in respect of it, because they are individuals interested in the interference with their public right. But what is the public right? Under the Metropolitan Management Act, sect. 130, a statutory duty is cast upon the defendants to cause their streets to be lighted, and the section provides that they "for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street," so that there is here cast upon the defendants a statutory duty to do an act and to erect such obstructions in the highway as are necessary for the purpose of doing that act. Now, what is it they are doing? It is not suggested for a moment that they are not acting perfectly *bona fide*. Their *bona fides* is not questioned at all. What they say is this, and it commends itself to one's common sense, if one had to consider it. Directly they put up a fixed obstruction the cardinal question is, How far is that obstruction from the next fixed obstruction? The proximity of two fixed points will, to a greater or less extent, of course, increase the difficulty of circulation. They say this particular fixed point is at a greater distance than any other situation they can take from another fixed point. If they put it in the middle of Craven-passage, at the edge of the kerb or pavement, it is at a greater distance from the plaintiffs' premises, and at a greater distance from the next adjoining premises to the north, than if placed anywhere else. That is the best place to put it. Then, also, this has to be considered—that if they put it rather more to the north or south, that is, not immediately opposite Craven-passage, it would not light the passage as well. The duty of lighting the passage is not cast upon the defendants, but on the railway company; but the defendants might very well regard the fact that, if they put their lamp at the side, it would cast a shadow down the passage. They are selecting a position, therefore, which they, in their discretion, think is the best for the convenience of the public. Now, what is the plaintiffs' right in this respect?

Their right is so to use this portion of the highway for loading or unloading their goods as to enjoy the highway reasonably in common with other members of the public entitled to its use. The highway is a thing which, under the statute, is to be, among other things, lighted, and lighted, if necessary, by fixed obstructions placed in the highway, and it appears to me that the plaintiffs' right in respect of the highway is to enjoy that reasonably with all other members of the public, and that they cannot set up an individual interest in the public right to use the highway, in common with other members of the public, against the reasonable use by the defendants of the statutory authority given to them to obstruct the highway by lamp posts where they think it necessary. I agree that the local authority must not so use their power as to commit a nuisance. They ought to use it so as to benefit all the members of the public whom they have to consider reasonably according to the best of their judgment, and I think that they may, for the benefit of all, affect, to some extent, the convenience of one. Now, that is the most the plaintiffs can say that the defendants are doing. Of course, it is obvious that to place a post at this particular position, will *pro tanto*, affect the elasticity of the plaintiffs' operations in discharging their goods; but that is all you can say that it does. [His Lordship referred to the evidence, and continued:] The test which was applied clearly showed, I think, that the placing of the post there was no serious obstruction to the plaintiffs at all. I arrive, therefore, at the conclusion of fact, if it turns on that, that the erection of the post here is in no reasonable sense an obstruction to the plaintiffs in doing that which they seek to do in respect of their business at the entrance to this passage. It seems to me, therefore, both on the law and on the facts, the plaintiffs fail, and, although I regret they did not come to some arrangement as to what was really a trifling matter without this action ever having been brought into court, still, as I am here simply to try the legal right, and the plaintiffs fail, I must dismiss the action with costs to be taxed as between solicitor and client.

Solicitors: Dale, Newman, and Hood; Fladgate and Co.

KING'S BENCH DIVISION.

Monday, June 17, 1901.

(Before RIDLEY and BIGHAM, JJ.)

THRELKELD (app.) v. SMITH (resp.) (a)

Criminal law—Deer—"Kept or being in" a forest—"Lawfully come by"—Larceny Act 1861 (24 & 25 Vict. c. 96), ss. 12, 14.

When a person in possession of a deer or part of a deer shows that he obtained it by killing outside a forest, chase, or purlieu a deer usually "kept or being" in such forest, chase, or purlieu, this is sufficient to satisfy the justice that he came lawfully by it, within sect. 14 of the Larceny Act, even though the land on which the deer was killed belonged to a third person and the killing of the deer was an invasion of such person's private rights.

CASE stated by the justices of the county of Westmorland.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

On the 4th March 1901 an information preferred against the appellant (Threlkeld) by the respondent (Smith), the superintendent of police, under sect. 14 of the Larceny Act 1861 was heard and determined by the justices, who convicted the appellant and fined him 5*l*.

Larceny Act 1861 (24 & 25 Vict. c. 96):

Sect. 12. Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum not exceeding fifty pounds as to the justices shall seem meet.

Sect. 13. Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.

Sect. 14. If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer shall be found in the possession of any person or on the premises of any person with his knowledge and such person, being taken or summoned before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit and pay any sum not exceeding twenty pounds, and if any such person shall not under the said provisions be liable to conviction, then for the discovery of the party who actually killed or stole such deer, the justice, at his discretion, as the evidence given and the circumstances of the case require, may summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is hereinbefore last mentioned.

The facts as found in the case stated were as follows:—

J. E. Hasell was the lord of the barony of Barton, in Westmorland, and was also the owner of the uninclosed common and forest of Martindale, in which he kept a herd of some 400 wild red deer, which ranged over an area of about ten miles long by four or five miles wide on their own ground, which was uninclosed.

The Earl of Lonsdale was the lord of the manor of Bampton, which adjoined the barony of Barton.

On the 18th Feb. the appellant shot a deer which had strayed from Hasell's herd in the forest of Martindale on to the common belonging to Lord Lonsdale, and carried it away and concealed it within the building of his farm.

On the 25th Feb. the police, acting under a search warrant, found the body of the deer in the place in which the appellant had concealed it.

On these facts it was contended on behalf of the appellant before the justices that the appellant ought not to be convicted for the following reasons: (1) That the deer, being wild and unreclaimed, belonged to the class of animals *feræ naturæ*; that any man may seize and keep for his own use animals *feræ naturæ* which have escaped from captivity, and that the property in such animals is gone when off the owner's land,

even though driven off by a trespasser, and therefore at common law there can be no larceny of a deer; (2) that, therefore, the prosecution had to bring themselves strictly within sects. 12 and 13 of the Larceny Act 1861, and that these did not apply to this case, the words "kept or being" used in those sections not applying, inasmuch as the deer when killed was neither in the inclosed nor in the uninclosed part of the forest, chase, or purlieu; (3) that the deer not being the subject of larceny at common law, and sects. 12 and 13 of the Larceny Act (as it was submitted) not applying, and Hasell having no property in the deer at the place where it was killed, the appellant had committed no offence against either the common or statute law.

For the respondent it was contended that deer are not necessarily animals *feræ naturæ*, but even if they are not the subject of larceny at common law, yet sect. 14 of the Larceny Act 1861 applied.

The magistrates were of opinion that the appellant had not satisfied them that he had come lawfully by the deer for the reasons following: (1) He had not shown that he had the right of shooting on the common in the manor of Bampton; and (2) that he had unlawfully killed a deer "kept" in the uninclosed part of a forest, chase, or purlieu within the meaning of sect. 12 of the Larceny Act 1861, there being a difference between the word "kept" and the word "being."

The question for the opinion of the court was whether the justices were right in point of law in finding that the appellant had not satisfied them that he came lawfully by the deer.

T. Sheppard Little for the appellant.—The justices had no jurisdiction to convict the appellant under sect. 14 of the Larceny Act 1861 unless the deer when it was killed was "kept or being in the uninclosed part of any forest, chase, or purlieu." Here neither was the case. It had strayed or escaped from the forest, and was on the land of Lord Lonsdale. Sects. 12 and 13 of the Act do not make it an offence to kill deer in uninclosed land which is not a forest, chase, or purlieu, and, unless it is an offence to kill the deer under these sections, it could not be unlawfully in the possession of the appellant within sect. 14. No doubt, since Lord Lonsdale was the owner of the common land on which it was killed, as against him the appellant was wrongfully in possession of it, and a civil action at the instance of Lord Lonsdale would lie against him for it, but that does not make the possession unlawful within sect. 14:

Reg. v. Ros, 22 L. T. Rep. 414;

Reg. v. King, 13 L. J. 43, M. C.

Danckwerts, K.C. for the respondent.—The appellant killed the deer when it was a deer "kept or being" in an uninclosed forest within sect. 12. Some meaning must be given to the word "kept." I submit that it is used to indicate that the deer in question usually lived in the forest, while "being" means that the deer in question, whether usually kept or living there, was actually in the forest when it was killed. In this sense the deer here, though actually outside the forest when killed, was one of the deer kept in the forest. I contend, further, that, in order that the possession may be unlawful within sect. 14, it is not necessary that the killing must be criminal within sect. 12 or sect. 13. Here I submit it was

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unlawful since the only person lawfully entitled to the deer was Lord Lonsdale, whose property it became when killed. Counsel referred to

Davies v. Powell, Willes, 46;

Blades v. Higgs, 11 H. L. C. 621.

Little in reply.

RIDLEY, J.—This case raises a question of some difficulty, though the facts are simple. The appellant was convicted by the justices under sect. 14 of the Larceny Act 1861, they holding that he had not under the circumstances satisfied them that he had come lawfully into possession of the deer within the meaning of sect. 14. The facts which give rise to the difficulty in the case are as follows: The deer in question was proved to have been one of a herd of deer kept within the forest of Mr. Hasell which had escaped from the forest and was killed by the appellant outside the boundaries of the forest, upon land belonging to Lord Lonsdale. The appellant, not being the owner of the land on which it was killed, cannot set up any right that the deer belonged to him. The question is whether under the circumstances the justices ought to have found that the appellant had satisfied them that "he had lawfully come by such deer." That question depends upon the construction of certain sections of the Larceny Act 1861; but I will first of all state what I believe to be the law with regard to forests. I believe that any offences committed within forests as they were made by the early Norman Kings were treated as capital offences, or were punished severely if the punishment fell short of death. By a series of statutes passed from time to time the severity of the forest laws was mitigated. That being so with regard to offences in respect of animals *feræ naturæ* committed within a forest, those offences were confined to the limits of a forest. There were, however, certain boundaries wider than the forest which included what we should call the outskirts of the forest, and within those outskirts there were wider rights belonging to those who held the land. The law is, I believe, correctly stated in Coke's Institutes, book 4, ch. 73, where it is said that "when the King's game of the forest do range out of the forest (and purlieu if any be) they belong not to the King, but are at their natural liberty, *et occupanti conceduntur*." I think that *occupanti conceduntur* means that the person who found them might make himself owner of them. Assuming, however, that it does not mean that, but means that the occupier of the land may kill and take them, it seems to me to show that the rights of the forest ceased at the limits of the purlieu—that those rights were local, and did not extend further. A person who killed one of the animals outside the forest did not break the laws of the forest; he may have broken the civil law by taking something which did not belong to him, but he was not liable to criminal proceedings. Within the purlieu there were certain other rights which the owner possessed which are stated in Manwood's Forest Laws and in Comyn's Digest, tit. Chase I. It comes to this, that within the forest the owner's right was absolute; that within the purlieu if he caught the animals he might kill them, but he was not entitled to hunt them; and that outside the purlieu he had no rights at all as owner of the forest. That was the law, I believe, as it anciently

existed. That law has been gradually altered by statutes, the last of which is the Larceny Act 1861, which we have now to construe. I will first mention sect. 10 of the Act, which deals with the stealing of domestic animals, and makes that an offence punishable with penal servitude. Then sect. 11 provides that "whosoever shall wilfully kill any animal with intent to steal the carcase . . . shall be guilty of felony," and be liable to the same punishment as under sect. 10 if the offence of stealing the animal would have amounted to a felony. That has no application to sect. 12, which immediately follows, although it might be said that it does apply to sect. 13, which makes it a felony to kill deer in the inclosed part of a forest. It is unnecessary, however, to decide that point, for the proceedings in this case are not taken under sect. 12 or sect. 13. Then the statute goes on to deal with deer, and we have to consider the question whether sects. 12, 13, 14, 15, and 16 are to be read together as a code to be construed with regard to the previous law upon the subject, or whether these are new provisions which are to be construed without regard to the previous law, and to receive a wider meaning than they would otherwise receive. According to the one interpretation it would be unlawful to do that which the appellant did in this case—to kill outside the limits of a forest a deer which was usually kept within a forest. According to the other interpretation it would not be unlawful, because the deer was not killed within the limits of a forest. Now, which is the correct interpretation? Is it to be supposed that this Act intended to make criminal an act which previously would not have been so regarded? I would hesitate long before accepting such a proposition. It seems to me that it is not probable that it was intended that persons who killed deer escaped from a forest should be treated as if they had done it within the forest. Some stress has been thrown on the word "unlawfully." It seems to me that some light has been thrown on the meaning of that word as used in the Act by the difference between the sections which make it universally an offence to kill domestic animals and sect. 12 which does not make it universally an offence wilfully to kill deer. Up to the time of the passing of this Act it was, as I have said, not unlawful, in the sense of being criminal, to kill deer outside certain boundaries. The word "unlawfully" seems to me to indicate that there may be circumstances under which it might be lawful to kill deer within a forest. That being so, may not the word "unlawfully" be sufficiently and properly explained in that way? The word refers to the killing of a deer in a place where it is not lawful to kill it. Then the words "any deer kept or being in an uninclosed part of any forest, chase, or purlieu" have to be interpreted. It has been argued that all of these words must be explained, and that, as the word "being" is used, a wider meaning must be given to the word "kept" so as to include deer which are usually kept in the forest but have escaped. These words can, however, be read in this sense—that is, that the statute is to protect the boundaries of a district analogous to an ancient forest, and not the rights of any particular person; that it protects both the animals which are usually kept there and those which happen to stray there. If that is a possible construction of the words, it seems to me that this section may have

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a narrower interpretation than that for which the respondent contends. Now, having regard to the previous law on the subject, I think that that is a proper interpretation of sect. 14, and that the narrower construction is the better one. Then comes sect. 13, which relates to deer in an inclosed forest, which we need not consider. Then comes sect. 14, the one now in question, which provides that if any deer shall be found in the possession of any person or on his premises with his knowledge and he does not "satisfy the justice that he came lawfully by such deer" he may be convicted and fined. For the respondent it was argued that the appellant was not lawfully in possession of the deer, because it belonged to Lord Lonsdale under the rule of law that the owner of land has the right to animals *feræ naturæ* which are on the land, and that no person has a right to kill them and claim them as his without the permission of the owner of the land. Is the word "lawfully" used in that sense in this section? It seems to me that it is not. I think that, having regard to sect. 12, it is used in the same sense as "unlawfully" in sect. 12. Therefore, if the person found in possession of the deer can show that he had killed it outside the limits of a forest protected by sect. 12, I think that he shows that he came by it "lawfully" within the meaning of sect. 14. The following sections (sects. 15 and 16) seems to be supplemental sections. They deal with attempts to kill deer and with persons who set snares or enter into a forest with intent to hunt deer. During the argument some stress was laid upon the use of the words "if any person shall enter into any forest" in sect. 16. Under that section no person can be convicted unless he has done something within the forest, chase, or purlieu, whether inclosed or not. I think that furnishes an argument in favour of our view rather than of the contrary view, and shows that all these sections are intended to protect animals at the particular place which is limited by the boundaries of the forest, chase, or purlieu. For these reasons I have come to the conclusion that the justices were wrong, and that they ought to have found that the appellant was lawfully in possession of the deer.

BIGHAM, J.—I am of the same opinion. The respondent supports the conviction first by saying that sect. 14 is of general application, and is not to be read with exclusive reference to the offences created by sects. 12 and 13. In my opinion that is not a sound contention. Having regard to the position of sect. 14 in the Act, coming as it does after the two sections which make it an offence to kill deer and before the two sections which do not relate to the offence of killing, I have no doubt that sect. 14 intends, when it says that a person shall be convicted unless he shall satisfy the justices that he came lawfully by the deer, that the person charged shall not be convicted if he satisfies the justices that an offence has not been committed under sect. 12 or sect. 13. I think that any other construction would lead to absurd consequences, for it would make any person who happened to be in possession of any part of a deer liable to have an information laid against him under sect. 14. I think that sect. 14 is only meant to apply to a person who is in possession of any part of a deer and cannot show that an offence has not been committed in respect thereof under sect. 12 or sect. 13. Then it is contended

that even if sect. 14 is to be construed as having that narrow application, still it appears from the facts of this case that the appellant was guilty of the offence dealt with by sect. 12 because the deer which he killed was "kept" in the forest. This deer was one which, in a sense, was at one time kept or was in the uninclosed part of a forest, and would therefore appear to be a deer which while it was there came within sect. 12. Now, sect. 12 provides that "whosoever shall unlawfully and wilfully . . . kill any deer kept or being in the uninclosed part of any forest" may be convicted and fined. The first question is whether the appellant did "unlawfully" kill this deer. What does "unlawfully" there mean? For the respondent it is said that "unlawfully" there means in such a way as to violate the private rights of an individual, and that the appellant in killing this deer did violate the private rights of Lord Lonsdale. I will assume that he did do so; but in my opinion that does not make his act unlawful within the meaning of sect. 12. Probably it has at all times been contrary to the criminal law to "course, hunt, snare, or carry away, or kill or wound" any deer in a forest. From time to time statutes have defined the punishment for that offence. Those statutes have from time to time been repealed and replaced by other statutes, and the last of those statutes is the Larceny Act 1861. Sect. 12 does not create the offence, but refers to it as an existing offence, and, I think, as an existing common law offence. What, then, does sect. 12 mean? It means that if any person violates the criminal law by doing this act, he shall be liable to the prescribed punishment. I interpret the adverb "unlawfully" as used in sect. 12 to mean, not in contravention of the rights of a private individual, but in contravention of the criminal law of the land. I think that the appellant did not commit any unlawful act in that sense. He killed an animal *feræ naturæ* at a time when to do so was not to commit any crime. He was possibly violating the rights of Lord Lonsdale, but he was not doing anything more, and therefore was not, in my opinion, acting "unlawfully" within the meaning of sect. 12. The next question is whether the deer, at the time it was killed, was "kept or being" in the forest within the meaning of sect. 12. It certainly was not in any part of the forest, for it had escaped and was in the manor of Bampton. It was said, however, that although it was not in the forest, it was "kept" in the forest. Now, in my opinion, sect. 12 refers only to acts done in the forest itself, and does not refer to anything done outside of the limits of the forest, chase, or purlieu. I think that sect. 12 means that the act must be done in respect of an animal which is either kept there by the owner of the forest or happens to be there. I can put no other construction upon the words "kept or being." I am of opinion therefore—first, that the act done by the appellant was not under the circumstances done "unlawfully" within the meaning of sect. 12; and, secondly, that his act was not an offence within this statute, because it was not done in a forest, chase, or purlieu, and also because this deer was not at the time "kept or being" in a forest. The conviction was therefore wrong. I may add that in my opinion the decision in *Reg. v. King (sup.)* involves the notion

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that this offence cannot be committed except within the limits of a forest, because it was held in that case that the conviction was bad for omitting to state that the deer was in the uninclosed part of some forest, chase, or purlien.

Appeal allowed.

Solicitors for the appellant, *Edwards and Sons*, for *Scott and Allen*, Penrith.

Solicitors for the respondent, *Bleaymire and Shepherd*, Penrith.

Monday, Aug. 12, 1901.

(Before LAWRENCE, J. without a Jury.)

HOARE AND CO. LIMITED v. MAYOR, &C., OF THE METROPOLITAN BOROUGH OF LEWISHAM. (a)

Metropolitan corporation—Agreement as to sign post on highway—Not under seal—Statute of Frauds—Obstruction to highway—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 144.

The proprietor of a public-house with a "draw-up" in front of it which also belonged to him offered by letter to the corporation of the borough to permit such draw-up to be thrown into the public road on condition that his signpost was allowed to continue at a convenient spot on the widened highway, and that certain front gardens belonging to other frontagers were also thrown into the road. The corporation did not reply to this letter, but subsequently it did throw the said gardens and the draw-up into the public road. The proprietor of the public-house thereupon erected his signpost in the highway some 45ft. from the site of the draw-up. The corporation threatened to have it removed.

Held, that the proprietor was entitled to restrain such removal, as the facts constituted an agreement between him and the corporation in the terms of his letter, and that such agreement was part performed by the action of the corporation and was not an illegal agreement as sanctioning the erection of an obstruction in the highway, but was within the powers conferred on the corporation by sect. 144 of the Metropolis Management Act 1855.

In this case the plaintiffs, a firm of brewers, claimed against the defendants, the mayor and corporation of Lewisham, an injunction to restrain the defendants, their servants, agents, and workmen, from removing a signpost erected by the plaintiffs in High-street, Lewisham, in front of a public-house belonging to the plaintiffs, or, in the alternative, a declaration that the plaintiffs were entitled on the removal of such signpost by the defendants, to erect and maintain such signpost on some convenient spot in front of the said public-house on the site of what had formerly been a draw-up appendant to it.

Avory, K.C., E. Morten, and H. M. Sturges for the plaintiffs.

Mattinson, K.C. and A. H. Poyser for the defendants.

The facts and arguments sufficiently appear from the following written judgment:

LAWRENCE, J.—In this case the plaintiffs are owners of certain houses—viz., a public-house called the Marquis of Salisbury (formerly the

Lion and Lamb) and two shops fronting the High-street at Lewisham—and they bring their action against the mayor and corporation of Lewisham, sued as the metropolitan borough of Lewisham. The defendants are the successors of the Lewisham Board of Works, and the streets and highways are vested in them. Before 1899 the whole of the frontage owned by the plaintiffs was occupied by the Lion and Lamb public-house; but in that year the plaintiffs rebuilt the house, and only about half the frontage was occupied by the rebuilt public-house, the remainder of the frontage being taken up by two shops which were built on part of the land on which the Lion and Lamb had stood. In front of the Lion and Lamb was a piece of ground called a "draw-up," on which was a trough used for watering horses calling at the Lion and Lamb, and a signpost stood near to the footpath which ran close to the public-house. This draw-up was open to the street, and was divided from the road by a channel, otherwise it was possible for anyone to use it. When the public-house was rebuilt a suggestion of a public improvement was made by Guy, the architect employed by the plaintiffs, in a letter dated the 7th Feb. 1899 to Carline, who was surveyor to the defendants. I had better read the letter which forms part of the case: "Feb. 7, 1899.—Dear Sir,—Lion and Lamb site, Lewisham.—I forward you plan showing how above is to be developed—namely, two shops and the public-house at the corner of the private road (widened to some 20ft.)—and I would suggest that a public improvement would be made here. My client will do away with the horse-trough and remove the signpost to the corner, and the present draw-up would be given over to the parish and thrown into the roadway, and if the inclosure in front of Child's ham shop was removed the traffic could then go both ways. At present at this spot it is much congested, and will be more so when the Jubilee Memorial is erected. The pathway lowered to the draw-up in front of the public-house (reduced to 40ft.), Messrs. Hoare and Co. would reserve the right for any vehicle to stand thereon. I may add that with the new house there would be no catering for the class of customers formerly encouraged. I should be pleased to meet you on site if you wish it." The suggestion was that the draw-up should be thrown into the public highway, and that further improvement be made by taking in land belonging to other people which stood in front of their houses, and that was adopted afterwards. Letters were repeatedly written by Guy on the subject throughout 1899, to which no answers were sent, and in June of that year, the defendants having taken the draw-up into the public street, the plaintiffs, being unable to get any answer to their repeated applications, placed the signpost at the corner of the street on the edge of the footpath. Further correspondence ensued, which ended in a refusal from the highway authorities to allow the signpost to remain upon the footpath except on the terms that it should be so constructed as to form a sewer ventilator and to be removable at any time by the authority. To this latter stipulation the plaintiffs objected, and in Dec. 1900 the writ in this action was issued. In the meantime the defendants had completed the suggestion of the architect by making the draw-up a part of the High-street

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and by widening the same street by taking into it certain pieces of land which were planted and fenced by the owners of the adjoining properties. The first question that arises for consideration is whether the draw-up was dedicated to the public as highway or whether it continued the private property of the plaintiffs. There was evidence that on two occasions the public authority had placed stone on it, and that on one of those occasions the steam-roller had gone over it. On the other hand, there was a considerable body of evidence which showed that repairs to the draw-up had been repeatedly done by the tenants of the Lion and Lamb and that the trough was repaired by the same tenants. I find, as a fact, that taking the position of the draw-up in question and the manner in which it was used, it never formed part of the highway and was never dedicated to the use of the public. This being so, it formed no part of the highway until the offer was made by the plaintiffs' architect so to dedicate it on the terms that the plaintiffs were to have the right to have a signpost near the public-house either on the footpath or in the high road. I think that the offer made by the plaintiffs was accepted by the defendants and that they have partly performed their agreement by taking advantage of that part beneficial to themselves. The defendants' answer to the plaintiffs' claim is (1) that the terms of the said agreement were *ultra vires* because not under seal; (2) that the erection of the signpost is an obstruction to the highway which the board has no power to authorise; and (3) the Statute of Frauds. As to the last point, it appears to me that the performance by the defendants of their part of the agreement is a sufficient answer. As to the contract not being under seal, it appears to be well established that a corporation may so acquiesce in an informal contract without actually ratifying it as to be bound by it: (*Brice on Ultra Vires*, 3rd edit., p. 553; *Crook v. Corporation of Seaford*, 25 L. T. Rep. 1; L. Rep. 6 Ch. App. 551; *Leake on Contracts*, 3rd edit., p. 515; *Laird v. Birkenhead Railway*, 1 L. T. Rep. 159; 29 L. J. 218, Ch.; *London and Birmingham Railway v. Winter*, Cr. & Ph. 57). The principle of the cases cited is, I think, recognised by Cotton, L.J. in *Hunt v. Wimbledon Local Board* (40 L. T. Rep. 115; 4 C. P. Div. at p. 62) and by Romer, L.J. in *Mayor of Oxford v. Crow* (69 L. T. Rep. 228; (1893) 3 Ch. 535). *Cotching v. Bassett* (32 Beav. 101) is an authority for the proposition that communication to a surveyor of an intention to build and acquiescence by his employer in the building is sufficient to raise this equity. I am therefore of opinion that performance of these terms was not *ultra vires* on the first ground taken by the defendants, and that if no other objection could be sustained the defendants could be restrained from breaking the agreement although it was not made under their common seal. With regard to the second point, that performance is impossible because it involves the defendants' causing or permitting an obstruction in the highway, it appears to me that sect. 144 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) applies. The section is as follows: "The Metropolitan Board of Works" (now the defendants) "shall have power to make, widen, or improve any streets, roads, or ways for facilitating the passage of the traffic between different parts

of the metropolis, or to contribute or join with any persons in any such improvement as aforesaid, or to take by agreement or gift any lands, rights in land, or property for the purposes aforesaid (or otherwise) for the improvement of the metropolis, on such terms and conditions as they may think fit, and such board, where it appears to them that further powers are required for the purposes of any work for the improvement of the metropolis or the public benefit of the inhabitants thereof, may make application to Parliament for that purpose." I have no doubt that the defendants under this section were enabled to carry out the agreement—namely, to remove the signpost belonging to a private owner, with his consent, to a place 45ft. distant from its original site. So far from creating an obstruction, the result was, by the removal of the trough, to remove a serious obstruction upon the widened road. It follows that, in my opinion, the defendants cannot justify the removal of plaintiffs' signpost and that the plaintiffs are entitled to the injunction claimed. Even if sect. 144 of the Metropolis Management Act 1855 does not enable the defendants to maintain the signpost in its present position on the edge of the footpath, it would certainly enable them to maintain it on some portion of the draw-up. It cannot be contended that a private owner of land dedicating it to the public might not annex to his dedication the stipulation that the signpost should be removed to some convenient position upon the land so dedicated. This would entitle the plaintiffs to the declaration they claim in the alternative. But, for the reasons already given, I think they are entitled to the injunction, which I grant with costs.

Judgment accordingly.

Solicitors: for the plaintiffs, *Sandilands and Co.*; for the defendants, *W. W. Young and Son.*

HOUSE OF LORDS.

Thursday, July 18, 1901.

(Before the KING IN PARLIAMENT.)

REX v. EARL RUSSELL (a)

Criminal law—Bigamy—Offences Against the Person Act 1861 (24 & 25 Vict. c. 100), s. 57—Jurisdiction.

Sect. 57 of the Offences Against the Person Act 1861 (24 & 25 Vict. c. 100) makes bigamy felony "whether the second marriage shall have taken place in England or Ireland or elsewhere."

Held, that the courts in this country have jurisdiction to try a charge of bigamy against a British subject where the second marriage took place outside the King's dominions.

In Feb. 1890 Earl Russell married in England a Miss Scott. Differences arose between them, and in Nov. 1890 she filed a petition for a judicial separation on the ground of her husband's cruelty. The case was tried before Sir C. Butt and a special jury in Dec. 1891, when the jury found that the respondent had not been guilty of cruelty, and the petition was dismissed.

They continued to live apart, and in April 1894 the countess filed a petition for the restitution of

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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conjugal rights. The earl by a counter-claim asked for a judicial separation on the ground that the countess had been guilty of cruelty in persisting, since the first trial, in allegations of a very serious nature against him, knowing them to be false, and he also alleged that the suit for the restitution of conjugal rights was not brought *bonâ fide*.

The case was tried before Pollock, B. and a special jury in April 1895, and, in answer to questions, the jury found that the countess had been guilty of cruelty, and was not acting *bonâ fide*. Pollock, B. thereupon dismissed the suit of the wife, and pronounced a judicial separation in favour of the husband.

The countess appealed, and the Court of Appeal varied the order of Pollock, B., holding that the wife's conduct was sufficient to justify the court in refusing a decree for the restitution of conjugal rights, but did not amount to legal cruelty sufficient to support the husband's claim for a judicial separation: (*Russell v. Russell*, 73 L. T. Rep. 295; (1895) P. 315). The earl appealed to the House of Lords, and the decision of the Court of Appeal was affirmed: (77 L. T. Rep. 249; (1897) A. C. 395).

On the 14th April 1900 Earl Russell obtained a divorce from his wife in the State of Nevada, in the United States of America, and on the following day he went through the form of marriage in Nevada with a Mrs. Somerville, a widow. It was admitted that the divorce proceedings in Nevada were not effectual to dissolve the English marriage.

In June 1900 the countess presented a petition for a divorce on the ground of bigamous adultery. The suit was not defended, and a decree *nisi* was made on the 24th March 1901.

After his return to England Earl Russell was arrested on a charge of bigamy. A true bill was found by the grand jury at the Central Criminal Court, and the Recorder thereupon informed the House of Lords that a true bill for felony had been found against a peer of the realm. The indictment was removed by *certiorari*, and the Lord Chancellor (the Earl of Halsbury) was duly appointed Lord High Steward to preside at the trial before the House of Lords.

The judges were summoned, and Sir Francis Jeune, President of the Probate Division, and Mathew, Wills, Lawrance, Wright, Kennedy, Bigham, Darling, Cozens-Hardy, Farwell, and Buckley, J.J. attended.

The Attorney-General (Sir R. Finlay, K.C.), the Solicitor-General (Sir E. Carson, K.C.), H. Sutton, B. D. Muir, Bodkin, and G. R. Askwith appeared for the prosecution.

Robson, K.C. and H. Avory, K.C. (C. Matthews, Llewellyn Davies, and Pilcher with them), for the prisoner, took the preliminary objection that there was no jurisdiction in this country to try a prisoner on a charge of bigamy committed abroad. The charge is founded on sect. 57 of the Offences Against the Person Act 1861 (24 & 25 Vict. c. 100), which is as follows: "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and, being convicted thereof, shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding seven years

and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody in the same manner in all respects as if the offence had been actually committed in that county or place, provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." The ordinary construction of the section cannot give jurisdiction to try an offence committed in a foreign country. "Elsewhere" must mean "elsewhere in the King's dominions." In sect. 9 of the same Act, which deals with murder, the words are "within the Queen's dominions or without," which show what was intended. Similar words in a colonial statute have been so construed in *McLeod v. Attorney-General for New South Wales* (65 L. T. Rep. 321; (1891) A. C. 455) by the Judicial Committee. A similar implied limitation is to be found in other Acts. They referred to

Powell v. Apollo Candle Company, 53 L. T. Rep. 638; 10 App. Cas. 282;
Santos v. Illidge, 29 L. J. 348, C. P.;
Reg. v. Debruiel, 11 Cox C. C. 207;
United States v. Holmes, 18 U. S. Rep. 412;
Reg. v. Topping, 7 Cox C. C. 103.

See also

1 Hale's Pleas of the Crown, 692, 693;
1 Jac. 1, c. 11, s. 1;
9 Geo. 4, c. 34, s. 22.

At the conclusion of the argument the Lord High Steward gave judgment on the question of jurisdiction.

THE LORD HIGH STEWARD (Halsbury, L.C.).—My Lords: We have the advantage of having His Majesty's judges here. I have been myself of opinion for some time that the matter which has been discussed at such length is really too plain for argument. The statute is plain in its ordinary signification, and the only ground upon which the learned counsel can suggest that we should not give it its ordinary signification is, apparently, because of the existence of other words in other statutes enacted under other circumstances in relation to other crimes. I thought it right to ask His Majesty's judges whether there is anything in the argument suggested which should call for a reply from the Attorney-General; and they are of opinion that there is not, and that it is not necessary to hear the Attorney-General.

Thereupon Lord Russell, under the advice of his counsel, pleaded "Guilty," and was sentenced to three months' imprisonment as an offender of the first division.

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Solicitor for the prosecution, *The Solicitor to the Treasury*.

Solicitors for the prisoner, *Vandercom and Co.*

May 14, 17, 20, June 11, 13, and Aug. 5, 1901.

(Before the LORD CHANCELLOR (Halsbury), LORDS MACNAGHTEN, SHAND, BRAMPTON, ROBERTSON, and LINDLEY.)

QUINN v. LEATHAM. (a)

ON APPEAL FROM THE COURT OF APPEAL IN IRELAND.

Trade union—Inducing customers and servants not to deal—Malice—Right of action.

It is a violation of legal right to interfere with contractual relations recognised by law, if there be no justification for the interference.

The appellant, an officer of a trade union, in furtherance of the objects of the union, wrongfully and maliciously induced customers of the respondent, who was not a member of the union, to cease to deal with him, and servants of his to leave his employment.

Held (affirming the judgment of the court below), that an action would lie for damages sustained in consequence of such conduct.

Allen v. Flood (77 L. T. Rep. 717; (1898) A. C. 1) explained and distinguished.

Lumley v. Gye (2 E. & B. 216) and Temperton v. Russell (69 L. T. Rep. 78; (1893) 1 Q. B. 715) approved and followed.

THIS was an appeal from a judgment of the Court of Appeal in Ireland (Lord Ashbourne, L.O., Porter, M.B., Walker and Holmes, L.J.J.), reported Ir. Rep. (1899) Q. B. 667, affirming a judgment of the Queen's Bench Division (Sir P. O'Brien, C.J., Andrew and O'Brien, J.J.), Palles, C.B. dissenting.

The respondent was a butcher carrying on business at Lisburn, in the county of Antrim, and the appellant was the treasurer of a registered trade union society known as "The Belfast Journeymen Butchers and Assistants' Association."

In 1895 a dispute arose between the respondent and the society on the question of the employment by the respondent of men who were not members of the society.

The respondent refused to discharge his non-union men at the bidding of the society, and the society consequently brought pressure to bear upon customers of the respondent, and in particular upon a person of the name of Munce living at Belfast, who had had large dealings with the respondent for a long time, to induce them to cease to deal with him, in several cases, including Munce, with success. They also induced some of the respondent's servants to leave him.

It was proved that the appellant Quinn had taken an active part in the proceedings against the respondent.

The facts are very fully set out in the judgment of Lord Brampton.

The respondent brought this action against the appellant and other members and officers of the society to recover damages for the loss sustained by him in consequence of their conduct.

The case was tried before FitzGibbon, L.J. and

a special jury at the Belfast Summer Assizes in 1896, when the jury found a verdict for the plaintiff with 250*l.* damages.

The respondents moved to set aside the verdict on the ground of misdirection, or for a nonsuit, but the Queen's Bench Division (Palles, C.B. dissenting) refused the rule, except that they reduced the damages to 200*l.*, and their judgment was affirmed by the Court of Appeal.

W. Martin McGrath (of the Irish Bar), and *Vesey Know* appeared for the appellant, and argued that what was done was nothing more than legitimate trade competition within the rules laid down in *Mogul Steamship Company v. McGregor, Gow, and Co.* (66 L. T. Rep. 1; (1892) A. C. 25) and *Allen v. Flood* (77 L. T. Rep. 717; (1898) A. C. 1), which was decided in the House of Lords after the trial of the present case. Further, this was a "trade dispute" within the meaning of the Conspiracy and Protection of Property Act 1875.

Haldane, K.C. and *F. Watt*, for the respondent, maintained that the *Mogul Steamship* case and *Allen v. Flood* were distinguishable on the facts, and the case was governed by the decision in *Temperton v. Russell* (69 L. T. Rep. 78; (1893) 1 Q. B. 715). The Act of 1875 does not affect civil proceedings, but only deals with criminal proceedings.

The arguments, and the authorities relied on, are fully set out in the judgments of their Lordships.

McGrath was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 5.—Their Lordships gave judgment as follows:—

THE LORD CHANCELLOR (Halsbury).—My Lords: In this case the plaintiff has, by a properly-framed statement of claim, complained of the defendants and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff; that the defendants did this in pursuance of a conspiracy formed among them; and that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment; and that all this was done with malice in order to injure the plaintiff; and that it did injure the plaintiff. If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilised community. Nor, indeed, do I understand that any one has doubted, before the decision in *Allen v. Flood* (77 L. T. Rep. 717; (1898) A. C. 1) in this House, that such facts would have established a cause of action against the defendants. Now, before discussing the case of *Allen v. Flood* and what was decided therein, there are two observations of a general character which I wish to make; and one is to repeat what I have very often said before—that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but are governed and qualified by the particular facts of the case in which such expressions are to be

(a) Reported by O. E. MALDEN, Esq., Barrister-at-Law.

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found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. I think that the application of these two propositions renders the decision of this case perfectly plain, notwithstanding the decision in the case of *Allen v. Flood*. Now, the hypothesis of fact upon which *Allen v. Flood* was decided by a majority in this House was that the defendants there neither uttered nor carried into effect any threat at all. They simply warned the plaintiff's employer of what the men themselves without their persuasion or influence had themselves determined to do, and it was certainly proved that no resolution of the trade union had been arrived at, and that the trade union official had no authority himself to call out the men, which, it was argued in that case, was the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy or even of combination. What was alleged to have been done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favour of his fellow members. It is true that I personally did not believe that it was the true view of the facts, but as I have said we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision. In my view what has been said already is enough to decide this case without going further into the facts of *Allen v. Flood*, but I cannot forbear accepting with cordiality the statement of the case prepared by two of your Lordships—Lord Brampton and Lord Lindley—with great care and precision. Now, in this case it cannot be denied that, if the verdict stands, there was a conspiracy and threats carried into execution so that loss of business and interference with the plaintiff's legal rights are abundantly proved, and I do not understand that the very learned judge who dissented doubted any one of the propositions; but his view was grounded on the belief that *Allen v. Flood* had altered the law in these respects and made that lawful which would have clearly been actionable before the decision of that case. For the reasons which I have given I cannot agree with that conclusion. I do not deny that if some of the observations made in that case have to be pushed to their logical conclusion it would be very difficult to resist Palles, C.B.'s inflexible logic; but, with all the respect which any view held by that learned judge is entitled to command, I cannot concur. This case is distinguished in its last form from the essentially important facts in *Allen v. Flood*. Rightly or wrongly the theory upon which judgment was pronounced in that case is one whereby the present is shown to be one which the majority of your Lordships would have held to be a case of actionable injury inflicted without any excuse whatever. There was a subordinate question raised which I must not pass over. It is suggested that FitzGibbon, L.J. did not put all the questions which were necessary to raise all the points which the learned counsel desired to argue. Now I think the charge of the Lord Justice absolutely accurate, and when, in deference to

the wishes of the counsel for the defendant, he consented to put such questions as were then desired, it would be intolerable that it should be made afterwards the subject of complaint that he did not at the same time put other questions which he was not asked to put at all. I move that this appeal be dismissed with costs.

Lord MACNAGHTEN (read by Lord Brampton).—My Lords: Notwithstanding the strong language of O'Brien, J. and the weighty argument of Palles, C.B., I cannot help thinking that the case of *Allen v. Flood* (*ubi sup.*) has very little to do with the question now under consideration. In my opinion the decision in *Allen v. Flood* laid down no new law. It simply brushed aside certain dicta which were, in the opinion of the majority, contrary to principle, and unsupported by authority. Those dicta are first to be found in the judgment delivered by Lord Esher (then Brett, L.J.) on behalf of himself and Lord Selborne, L.C. in *Bowen v. Hall* (44 L. T. Rep. 75; 6 Q. B. Div. 333). They were repeated by Lord Esher, M.R. and Lopes, L.J. in *Temperton v. Russell* (69 L. T. Rep. 78; (1893) 1 Q. B. 715); but they were not, I think, necessary for the decision in either case. They did form the ground of the decision in *Allen v. Flood* in its earlier stages. But the only result of the final decision in that case was that the law was restored to the condition in which it was before Lord Esher's views in *Bowen v. Hall* and *Temperton v. Russell* were accepted by the Court of Appeal. In fact I think that the headnote to *Allen v. Flood* might well have run in these words, which were used by Parke, B. in giving the judgment of an exceptionally strong court nearly half a century ago in *Stevenson v. Newnham* (13 C. B. 285): "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." That, in my opinion, is the sum and substance of *Allen v. Flood*, if you eliminate all matters of merely passing interest, the charge of the learned judge, the findings of the jury (unintelligible, I think, without a careful examination of the evidence), and the discussion of the evidence itself in the two aspects in which it was presented for the consideration of this House, and for the consideration of the judges by whom the House was assisted. The case which is really brought under review on this appeal is *Temperton v. Russell* (*ubi sup.*). I cannot distinguish that case from the present case. The facts are identical in substance, and the grounds of decision must be the same. Now, the decision in *Temperton v. Russell* was not overruled in *Allen v. Flood*, nor is the authority of *Temperton v. Russell*, in my opinion, shaken in the least by the decision in *Allen v. Flood*. Disembarrassed of the expressions which Lord Esher, M.R. unfortunately used in giving judgment, the decision in *Temperton v. Russell* seems to me to stand on sure ground. So far from being impugned in *Allen v. Flood*, it had, I think, the approval of Lord Watson, whose judgment seems to me to represent the joint views of the majority far better than any other judgment delivered in the case. Lord Watson says that he did not think it necessary to notice at length *Temperton v. Russell* because it was to his mind "very doubtful whether in that case there was any question before the court with regard to the effect of the *animus* of the actor in making that unlawful

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which would otherwise have been lawful." Then he goes on to say: "The only findings of the jury which the court had to consider were: (1) That the defendants had maliciously induced certain persons to break their contracts with the defendants; and (2) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which was disposed of in *Lumley v. Gye* (2 E. & B. 216). According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy, a clear ground of liability according to *Lumley v. Gye* if, as the court held, there was evidence to prove it." It must be admitted, I think, that the second reference to *Lumley v. Gye* in the passage which I have just quoted is a slip, a rare, if not an unexampled, occurrence in a judgment of Lord Watson's. I cannot see that *Lumley v. Gye* has any bearing on the question of conspiracy. But I do not think that the slip (if it be a slip) impairs the effect of what Lord Watson said. Obviously he thought that there was authority for the proposition that a conspiracy to injure may give rise to civil liability. There is authority for that proposition; but even if there were none to be found, Lord Watson's view that the proposition was supported by authority is, I think, of considerable weight. Precisely the same questions arise in this case as arose in *Temperton v. Russell*. The answers, I think, must depend upon precisely the same considerations. Was *Lumley v. Gye* rightly decided? I think that it was. *Lumley v. Gye* was much considered in *Allen v. Flood*. But as it was not directly in question, some of your Lordships thought it better to suspend your judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of right to interfere with contractual relations recognised by law, if there be no justification for the interference. The only other question is this: Does a conspiracy to injure, if there be damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it is founded in good sense. *Gregory v. Brunswick* (6 M. & G. 205) is one authority, and there are others. There are valuable observations on the subject in Erle, J.'s charges to the jury in *Reg. v. Duffield* (5 Cox C. C. 404) and *Reg. v. Rowlands* (5 Cox C. C. 436). Those were cases of trade union outrages, but the observations to which I refer were not confined to exploded doctrines in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Fitzgerald, J. in *Reg. v. Parnell* (14 Cox C. C. 508). That a conspiracy to injure, an oppressive combination, differs widely from an invasion of civil rights by a single individual

cannot be doubted. I agree with the remarks of Bowen, L.J. and Lord Bramwell and Lord Hannen in *Mogul Steamship Company v. McGregor, Gow, and Co.* (61 L. T. Rep. 820; 23 Q. B. Div. 598; 66 L. T. Rep. 1; (1892) A. C. 25). A man may resist without much difficulty the wrongful act of an individual. In repelling it he would probably have at least the moral support of his friends and neighbours; but it is a very different thing, as Fitzgerald, J. observes, when one man has to defend himself against many combined to do him wrong. I have only to add that I agree generally with the judgments delivered in the courts below, and particularly with the judgment of Andrews, J. in the Queen's Bench, and the judgment of Holmes, L.J. in the Court of Appeal. I do not think that the acts done by the defendants were done "in contemplation or furtherance of a trade dispute between employers and workmen." So far as I can see there was no trade dispute at all. Leatham had no dispute with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay all their fines and entrance money. What he did object to was a cruel punishment which it was proposed to inflict on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leatham, and so enable them to wreak their vengeance upon Leatham's servants who were not members of the union. I also think that the provision in the Conspiracy and Protection of Property Act 1875, which says that in certain cases an agreement or combination is not to be "indictable as a conspiracy," has nothing to do with civil remedies.

LORD SHAND (read by Lord Davey).—My Lords: After the able and full opinions of the learned judges of the Court of Appeal in Ireland, holding that the verdict and judgment for the plaintiff ought to stand, the grounds of my opinion that this judgment ought to be affirmed, and the appeal dismissed, may be shortly stated. I refrain from any detailed reference to the numerous cases cited in the argument. These have been considered and discussed by the judges of the Court of Appeal, and I concur in the reasoning of the majority of their Lordships, and they have been already dealt with in my judgment in the case of *Allen v. Flood*. In that case I expressed my opinion that while a combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that a combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed. The learned Lord Justice before whom the case was tried told the jury with reference to the words "wrongfully and maliciously" in the first question that the questions to be answered by them were only matters of fact to be determined on the evidence, and in particular involved the question whether the intention of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests. The verdict

affirms that this was the fact, for after the direction of the learned judge no other interpretation can be given to the finding that the acts were done by the defendants "wrongfully and maliciously." This being clearly so, the question now raised is whether in consequence of the decision of this House in *Allen v. Flood*, and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another, and not to advance the parties' own trade interests, and injury has resulted, no action will lie; or, to put the question in a popular form, whether the decision in *Allen v. Flood* has made boycotting lawful? Apart from the decision in that case the judgment of the learned judges in Ireland would have been unanimous in affirming the principle to which FitzGibbon, L.J. gave effect. The general law cannot, I think, be more happily stated than in the passage from the judgment of Bowen, L.J. in the *Mogul* case (61 L. T. Rep. 820; 23 Q. B. Div. 598), which was quoted by Lord Halsbury, L.C., with an expression of his strong approval, in *Allen v. Flood*. The Lord Chancellor there said: "I can desire no more apt exposition of the law than that which is contained in Bowen, L.J.'s admirably reasoned judgment in the *Mogul* case in the Court of Appeal," which he then quotes, as follows: "Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of the violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton v. McGavley*, 1 Peake N. P. 270); the obstruction of actors on the stage by preconcerted hissing (*Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 M. & G. 205); the disturbance of wildfowl in decoys by the firing of guns (*Carrington v. Taylor*, 11 East, 571, and *Keeble v. Hickeringill*, 11 East, 573, n; 11 Mod. 74, 130); the impeding or threatening servants or workmen (*Garret v. Taylor*, Cro. Jac. 567); the inducing persons under personal contracts to break their contracts (*Bowen v. Hall*, 44 L. T. Rep. 75; 6 Q. B. Div. 333; and *Lumley v. Gye*, 2 E. and B. 216), are all instances of such forbidden Acts." The Lord Chancellor also spoke with approval, as I should certainly do, of the views to a similar effect stated by Erle, J. in his work on trade unions. It may be that in certain cases the object of inflicting injury and success in that object require combination or conspiracy with others in order to be effectual. That was not so in all the cases enumerated by Bowen, L.J., but no question on that point arises in the circumstances of this particular case, for, according to the verdict of the jury, the defendants by combined action wrongfully and maliciously induced a number of persons to refrain from dealing with the plaintiff. That is sufficient for the decision of the case, although in my opinion it is further proved that they succeeded in inducing a servant and a customer of the plaintiff to break existing contracts with him. On the whole, it seems to me clear that the defendants were guilty of unlawful acts unless the judgment in the case of *Allen v. Flood* has introduced a change which has rendered such acts lawful. As to the vital distinction between *Allen v. Flood* and the present case, it may be stated in a single sentence.

In *Allen v. Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which he was held entitled to do, although it was injurious to his competitors; whereas in the present case, while it is clear that there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests." It is unnecessary to quote from the judgments of the majority of the learned judges in *Allen v. Flood* to show their opinions on the importance of this essential point. Lord Herschell, for example, said: "The object which the defendant and those whom he represented had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end"; and the other Lords in the majority expressed themselves to a similar effect. For myself, what I said was this: "If anything is clear on the evidence it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those whom he represented in all that he did, that this was his motive of action, and not a desire, to use the words of the learned judge, 'to do mischief to the plaintiffs in their lawful calling.' The case was one of competition in labour, which in my opinion is in all respects analogous to competition in trade, and the same principles must apply to it." The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen, in what he said and did, was only exercising the right of himself and his fellow-workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong. It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him; and that the case of *Allen v. Flood* as a case of legitimate competition in the labour market is essentially different, and gives no ground for the defendants' argument. I concur in holding that there is not sufficient ground for disturbing the verdict on the question of damages, and in holding that the special provision of sect. 3 of the Conspiracy and Protection of Property Act 1875 has no application to the circumstances of this case.

LORD BRAMPTON.—My Lords: This case now awaiting final judgment is one which, looked at simply as affecting the parties to it, is of no serious pecuniary concern, but it involves nevertheless questions of widespread importance to every trader, and to every employer and servant engaged in trade. The action was originally brought in the High Court in Ireland by Henry Leatham, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons—John Craig (now dead), John Davey, Henry Dornan, and Robert Shaw, as defendants,

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to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years before July 1895, Leatham had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly 20*l.* or 30*l.* worth of the best meat; and he had in his employment as assistants several men at weekly wages. In Feb. 1893, a trade union society was registered under the Trade Union Acts 1871 and 1876, by the name of "The Belfast Journeymen Butchers and Assistants' Association." Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dornan and Shaw, joined subsequently as mere ordinary members. Leatham was not a member, nor were any of his assistants. The members of the society amongst themselves soon adopted an unregistered rule that they would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July 1895, this had been productive of any conflict between Leatham's men and the union. Early in that month, however, Leatham, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. Leatham had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years; he was desirous of keeping him and all the others employed by him in his service, but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury. "I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked them out, and they said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes." The chairman spoke truly; for, on the 6th Sept., the secretary of the society wrote to Leatham, asking "whether he had made up his mind to continue to employ non-union labour," adding, "If you continue as at present our society will be obliged to adopt extreme measures in your case." He wrote also to Mr. Munce on the 13th Sept. stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leatham and Sons, as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on the

14th Sept. a very sensible reply, "It is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to come at me, seeing it appears to be the Messrs. Leatham that you wish to interfere with." A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on the 17th Sept. he wrote to the secretary the reply of his father, "that he could not interfere to bring pressure to bear on Mr. Leatham to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man." The 18th Sept. brought a definite announcement from the secretary to Mr. Munce, that having failed to make a satisfactory arrangement with Mr. Leatham, they had no other alternative but to instruct his (Munce's) *employees* "to cease work immediately Leatham's beef arrives." Thereupon Mr. Munce was constrained to send to Leatham on the 20th Sept. a telegram: "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work." On and from that day Munce took no more meat from Leatham, to his substantial loss. Another mode adopted by several of the defendants with a view to prevent persons from dealing with Leatham was the publication throughout the district of Lisburn of "black lists," containing and holding up to odium not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Amongst others, a man named McBride, a customer of Leatham, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to induce two other men named Davis and Hastings. With the object of further inconveniencing Leatham in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leatham; it is true that they gave due notice of their intention to do so, and as regards them, therefore, no separate cause of action could be maintained. But after they had left their service they were paid by the society during the time that they were out of work weekly sums of money as compensation for the wages which they would have earned with Leatham. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so broke his contract with his employers, and there was evidence that he was induced to do so through the influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leatham's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leatham because the rest were out, and promised to pay him what he had from Leatham; that he left and was paid by Rice for the society and was then in Dornan's service. The case came on for trial at the Belfast Assizes in July 1896, before FitzGibbon, L.J. and a special jury. The pleadings charged in the first four counts as separate causes of action—(1) the procuring Munce to break contracts he had made with Leatham;

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(2) the publication by the defendants of "black lists"; (3) the intimidation of Munce and other persons to break their contracts; and (4) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these counts alleged that the acts complained of were done "wrongfully and maliciously, and with intent to injure the plaintiff, and to occasion him and have occasioned him actual loss, injury, and damage." The fifth and last count charged also as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed. At the conclusion of the evidence, Mr. O'Shaughnessy, Q.C., for the defendants, submitted that they were entitled to a nonsuit upon the grounds that there was no evidence of a contract between Munce and Leathem, nor of any pecuniary damage to the plaintiff by reason of the acts of the defendants, and the acts of the defendants were legitimate. The learned Lord Justice refused to nonsuit. He left, in compliance with the wishes of the defendants' counsel, the three following questions to the jury: (1) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? (2) Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so? (3) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and, if so, did the publication so injure him? The jury answered each of these questions in the affirmative, and assessed the damages against all the defendants at 200*l.*, and with regard to the third question they found against the defendants Dornan, Davey, and Shaw, with an additional 50*l.* as damages against them only. Judgment was given in accordance with that verdict. The defendants appealed, but the appeal was dismissed except that the damages were disallowed in respect of the third question. FitzGibbon, L.J., rightly I think, refused to nonsuit. For there was clearly evidence for the consideration of the jury upon one or more of (I think upon all) the causes of action. I need not discuss that point further, for it was practically disposed of during the argument before this House. No evidence was called for the defendants. From a careful perusal of the learned Lord Justice's own notes and memoranda, I am satisfied that every indulgence that could have been reasonably given to the learned counsel in presenting his case to the jury was allowed him, and I am satisfied that he must be taken to have acquiesced in the form in which the questions submitted for the consideration of the jury were left to them, even though it might otherwise have been open to criticism. After commenting upon the evidence relied upon by the plaintiff as proof of actionable misconduct, the judge told the jury that they had to consider whether the conduct and actions of the defen-

dants went beyond the limits which would not be actionable—namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts as proved were intended and calculated to injure the plaintiff in his trade through a combination, and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests; that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, by reasonable and legitimate means were perfectly lawful and were not actionable, so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, he told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention, which had inflicted actual money loss upon the plaintiff in his trade. And having so told the jury, he proposed to put to them as the question which they had to try upon the evidence, whether the acts of the defendants were or were not in that sense actionable? I have thought it right to follow as nearly as possible the language of the Lord Justice, for that charge was delivered before *Allen v. Flood* was decided in this House, and in substance I think that it was correct, having regard to the particular case. In some respects it seems to me a little too favourable to the defendants. The defendants' counsel made four objections to the summing up. The first two—viz., that the judge had given no definition of damage, and that he had told the jury that the liability of the defendants depended on a question of law—were conclusively answered in the summing up. The third objection was that the question relating to the black list should be separately left to the jury. It was then so left, and as to that the judge directed them that there was not sufficient evidence to connect Quinn and Craig with the black lists. By this, I take it, he meant not as an independent cause of action, there being, in fact, no evidence of their personal participation in the publication of these lists. But that left them still affected by them as overt acts of conspiracy, for each of which every one of the conspirators was liable, and the evidence touching the black lists is beyond question admissible under the conspiracy count. The fourth objection was that there was no evidence of any binding contract having been broken through the action of the defendants, but the judge then declined to withdraw the question of contract from the jury, and I think rightly. And, at a later stage, after the whole matter had been disposed of under the conspiracy count, he rightly refrained from putting the question at all, because it had become unnecessary. The single general question at first proposed by the judge was finally divided into three separate questions—(1) Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff to refuse to deal with him? (2) Did

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the defendants or any two or more of them maliciously conspire to induce the customers or servants named in the evidence, or any of them, not to deal with the plaintiff, or not to continue in his employment; and were such persons so induced not to do so? (3) Did the defendants Davy, Dorman, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and if so, did the publication injure him? The jury answered each of these questions in the affirmative. Rightly understood, I think that the judgment in *Allen v. Flood* is inapplicable. But in order to properly appreciate it, it is essential to ascertain what were the material facts assumed to exist by their Lordships who assented to that judgment, and what were the principles of law applied by them to those facts. This necessity will be more apparent when it is realised that unanimity of opinion as to the facts certainly did not prevail, and that the judges who were called on to render assistance to the House were given one simple question only—viz., "Assuming the evidence given by the plaintiff's witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" The evidence of the plaintiff's witnesses handed to the judges most certainly did not altogether coincide with some very material facts assumed by their Lordships. This would account for the variance in the views expressed as to the legal rights and alleged wrongful acts of the parties. It would be an endless task to endeavour to reconcile all these differences of fact and opinion. I will therefore not make the attempt. Some of this confusion arose, no doubt, from the course taken, rightly or wrongly, at the trial. Then all questions of conspiracy, intimidation, coercion, or breach of contract were withdrawn from the jury, the only matters of fact found by them being that Allen maliciously induced the Glengall Company to discharge Flood and Taylor from their employment, and not to engage them again, and that each plaintiff had suffered 20% damages. It was assumed by their Lordships that the Glengall Company were under no contractual obligation to retain the plaintiffs, Flood and Taylor, in their service for any duration of time, but might dismiss them from their employment at any moment, and that the boilermakers were working under the same conditions; that Allen, in making the communication which induced the company to dismiss the plaintiff, was only doing that which he had a legal right to do, and their Lordships held therefore, that the plaintiffs had no legal cause of action against either the company or the defendant, and that the mere fact, as found by the jury, that the defendant was actuated by a malicious motive could not convert a rightful into a wrongful act. This proposition that the exercise of an absolute legal right cannot be treated as wrongful and actionable merely because a malicious motive prompted such exercise was established as clear law in the *Bradford Corporation v. Pickles* (73 L. T. Rep. 353; (1895) A. C. 587), and it is now too late to dispute it even if one were disposed to do so, which I am not. It must not, however, be supposed that a malicious intention can in no case be material to the maintenance of an action. It is commonly used to defeat the defence of privilege, to do or to say that which, without such privilege, would

be wrongful and actionable. Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person who honestly believed that he had reasonable and probable cause, though he had it not, in fact, to put the criminal law in motion against another; but if a malicious motive operating on the mind of such prosecutor be added, that which would have been a justifiable act, if done without malice, becomes with malice wrongful and actionable. What would constitute such malice it is not material for the purposes of this case to define. In the present case the alleged cause of action is very different from that in *Allen v. Flood*. The real and substantial cause of action was an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business, and by so doing to invade his undoubted right—in the words of Alderson, B. in *Hilton v. Eckersley* (6 E. & B. 47)—"in all matters not contrary to law to regulate his own mode of carrying on his business according to his own discretion and choice." To this I would add the emphatic expression of Lord Halsbury, L.C. in the *Mogul* case (*ubi sup.*): "All are free to trade upon what terms they will," and of Bramwell, B. in *Reg. v. Druiitt* (10 Cox C. C. 592), who in a passage referred to by Lord Halsbury, L.C. in the same case said: "The liberty of a man's mind and will to say how he should bestow himself and his means, his talents, and his industry, is as much a subject of the law's protection as is that of his body." Again, Sir William Erle thus expresses himself: "Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour, or his own capital, according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." I am not aware that the rights thus stated have ever been seriously questioned. I rest my judgment on the principle expressed in the extracts which I have read. I seek for no more. The remedy for the invasion of a legal right was thus stated by Lord Watson in *Allen v. Flood*: "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed." I cannot suppose that any intelligent person reading the evidence adduced on the trial of the present case would fail to come to the conclusion that the acts complained of amounted to a serious invasion of the plaintiff's trade rights, and I am at a loss to comprehend on what ground the defendants seek to justify or excuse their action towards him. As members of a trade union they had no more legal right to commit what would otherwise be unlawful wrongs than if the association to which they were attached had never come into existence. They had no more right to coerce others pursuing the same calling as themselves to join their society, or to adopt their views or rules, than those who differed from them and belonged to other trade associations would have a right to coerce them. The Legislature in conferring on trade unions such privileges as were contained in the Acts of 1871 and 1876 most certainly has not conferred on any association or any member of it a license to

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obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way which he thinks fit, provided only that it is lawful; and although a combination of members of a trade union for certain purposes is no longer unlawful and criminal as a conspiracy, merely because the objects of that combination are in restraint of trade, no protection is given to any combination or conspiracy which before the Act of 1871 would have been criminal for other reasons. One cannot read the 7th section of the Conspiracy Act of 1875 without seeing that it had no intention to tolerate such proceedings as in this case were complained of, but rather to protect those upon whom coercive measures might be practised. But I will not linger upon a consideration of what might be done in competition, for competition is not even suggested as a justification of the acts now complained of—acts of wanton aggression, the outcome of a malicious but successful conspiracy, to harm the plaintiff in his trade. It cannot be—it has not even been suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirements, nor in support of any lawful right of the association, or any member of it, nor to obtain or maintain fair hours of labour or fair wages, nor to promote a fair understanding between employers and employed or workman and workman. It would indeed be a strange mode of promoting such a good understanding to coerce a tradesman's customers to leave him because he would not at the bidding of the association dismiss workmen who desired to continue in his service, and whom he wished to retain, to make way for others whom he did not want; nor for the settlement of any dispute, for none had existence. I will next deal with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, of embarking upon a history of the law relating to the subject. That would be useless for the present purpose, and I will endeavour briefly to state how I view the matter practically as far as it concerns the present case. A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful or harmful towards some other person. It may be punished criminally by indictment, or civilly by an action if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy are in my opinion the same, though to sustain an action special damage must be proved. I will quote, as a very instructive definition, the words of a great lawyer, Willes, J. in *Mulcahy v. The Queen* (L. Rep. 3 H. L. 306) in delivering the unanimous opinion of himself and others, which was adopted by this House—"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more, to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra*

actum, capable of being enforced if lawful; and punishable if for a criminal object, or for the use of criminal means. The number and compact give weight and cause danger." It is true that these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present. I have occupied more of your Lordship's time than I had intended, but the case is of great importance and I feel that such unlawful conduct as has been pursued towards Mr. Leatham demands serious attention. I think that the law is with him, and that the damages awarded were in the circumstances very moderate. It is at all times a painful thing for any individual to be the object of the hatred, spite, and ill-will of anyone who seeks to do him harm. But that is as nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous conspirators acting under an illegal compact together and separately, as often as opportunity occurs, regardless of law, and actuated by malvolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organised and ruinous oppression. I think that the judgment in the courts below ought to be affirmed and this appeal dismissed with costs.

Lord ROBERTSON concurred.

Lord LINDLEY.—My Lords: The case of *Allen v. Flood* has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs. The only question which the House of Lords had to decide in that case was whether what Allen had done entitled the plaintiffs to maintain their act against him. What the jury found that he had done was that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal, but the opinion of the majority was that Allen had no power himself to call the workmen out, and all that he did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. There being no question of conspiracy, intimidation, coercion, or breach of contract for the consideration of the House, and the House having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie, that he had infringed no right of the plaintiffs, that he had done nothing which he had not a legal right to do, and that the fact that he had acted maliciously, and with intent to injure the plaintiffs, did not entitle the plaintiffs to maintain the action. This decision, as I understand it, establishes two propositions, one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first. The first and important

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proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new nor laid down for the first time in *Allen v. Flood*; it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition, however, care must be taken to bear in mind, first, that in *Allen v. Flood* criminal responsibility had not to be considered. It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful"—i.e., to acts involving no breach of duty, or, in other words, no wrong to anyone. I shall refer to this matter later on. The second proposition is that what Allen did infringed no right of the plaintiffs, even though he acted maliciously and with a view to injure them. I have already stated what he did and all that he did in the opinion of the majority of the noble Lords. If their view of the facts was correct, their conclusion that Allen infringed no right of the plaintiff is perfectly intelligible and, indeed, unavoidable. Truly, to inform a person that others, not under the control of the informant, will annoy or injure him unless he acts in a particular way cannot of itself be actionable whatever the motive or intention of the informant may have been. I will pass now to the facts of this case and consider (1) what the plaintiff's rights were; (2) what the defendants' conduct was; (3) whether that conduct infringed the plaintiff's right. For the sake of clearness it will be convenient to consider these questions, in the first place, apart from the statute which legalises strikes, and in the next place, with reference to that statute. 1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided that he did not violate some special law prohibiting him from so doing, and provided that he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty without justification. But a person's liberty or right to deal with others is nugatory unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would obviously be practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damaged, the whole aspect of the case is changed; the

wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by Bowen, L.J. in his admirable judgment in the *Mogul Steamship Company's case* (61 L. T. Rep. 820; 23 Q. B. Div. 598) may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen v. Flood* to be opposed to it. If the above reasoning is correct, *Lumley v. Gye* (2 E. & B. 216) was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service; nor, indeed, to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton v. Russell* (69 L. T. Rep. 78; (1893) 1 Q. B. 715) ought to have been decided and may be upheld on this principle. That case was much criticised in *Allen v. Flood*, and not without reason; for, according to the judgment of Lord Esher, M.B., the defendant's liability depended on motive or intention alone whether anything wrong was done or not. This went too far, as was pointed out in *Allen v. Flood*. But in *Temperton v. Russell* there was conspiracy and a wrongful act—viz., unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right. 2. I pass on to consider what the defendants did. They were the officers of a trade union, and the jury have found that the defendants wrongfully and maliciously induced the customers of the plaintiff to refuse to deal with him and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union, but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen v. Flood*. In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers; nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse their conduct. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so

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themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case. 3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights; they were dictating to the plaintiff and his customers and servants what they were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed liberty of acting as they had a perfect right to do. What is the legal justification or excuse for such conduct? None is alleged and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff; not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of *damnum absque injuria*, but of *damnum cum injuria*. Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in *Mogul Steamship Company v. McGregor* (66 L. T. Rep. 1; (1892) A. C. 25) and *Allen v. Flood* (77 L. T. Rep. 717; (1898) A. C. 1), and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen v. Flood* in favour of the appellants. Their sheet-anchor is *Allen v. Flood*, which is far from covering this case, and can only be made to cover it by greatly extending its operation. It was contended at the Bar that, if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. One man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and if he had done so I conceive that he would have committed a wrong towards the plaintiff, for which the plaintiff could have maintained an action. I am aware that in *Allen v. Flood* Lord Herschell expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike or threatening to make them strike by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen v. Flood* there was nothing more, but here there was very much more. What may begin as peaceable persuasion may easily become, and in trade disputes generally

does become, peremptory ordering with threats, open or covert, of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working is a very different thing, and is *prima facie* unlawful. Again, not to work oneself is lawful so long as one keeps off the poor rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him, very difficult to resist, and, to say the least, requiring justification. None was offered in this case. It is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so when many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy, both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country. Amongst the American cases I would refer especially to *Vegelahn v. Guntner* (167 Mass. 92), where coercion by other means than violence or threats of it was held unlawful. In this country it is now settled by the decision of this House in the case of the *Mogul Steamship Company* that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but at the same time merely exercise their own rights and infringe no rights of other people. *Allen v. Flood* emphasises the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Society v. Glasgow Fishers' Association* (35 Sc. L. Rep. 645), which was referred to in the course of the argument. In that case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs showed no cause of action, although the butchers, object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert. The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed; no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as of his, and was wrongful both to them and also to him, as I have already endeavoured to show. Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, action-

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able by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible provided that nobody's rights are infringed. The law is the same for all persons, whatever their callings; it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to look out as well as the rights of those who strike. But coercion by threats open or disguised not only of bodily harm, but of serious annoyance and damage, is, *prima facie*, at all events, a wrong inflicted on the persons coerced, and in considering whether coercion has been applied or not numbers cannot be disregarded. I conclude this part of the case by saying that in my opinion the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service and coercion to break contracts of other kinds, and coercion not to enter into contracts. I pass now to consider the effect of the statute 38 & 39 Vict. c. 86. This Act clearly recognises the legality of strikes and lock-outs up to a certain point. It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or anyone else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts of degrees; picketing is a distinct annoyance, and if damage results is an actionable nuisance at common law; but if confined merely to obtaining or communicating information it is rendered lawful by the Act. (sect. 7). Is a combination to annoy a person's customers so as to compel them to leave him unless he obeys the combination permitted by the Act or not? It is not forbidden by sect. 7; is it permitted by sect. 3? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in *Lyons v. Wilkins* (74 L. T. Rep. 358; (1896) 1 Ch. 811), in the case of Schoenthal, which arose there, and is referred to in the judgment of Walker, L.J. in this case. This particular point had not to be reconsidered when *Lyons v. Wilkins* came before the Court of Appeal after the decision in *Allen v. Flood* (79 L. T. Rep. 709; (1899) 1 Ch. 255). But Byrne, J. modified the injunction granted on the first occasion by confining it to watching and besetting (78 L. T. Rep. 618). He might safely have gone further and have restrained the use of other unlawful means; but the strike was then over, and his modification was not objected to, and cannot be regarded as an authority in favour of the appellant's contention. It must be conceded that if what the defendants here did had been done by one person it would not have been punishable as a crime. I cannot myself see that there was in this case any trade dispute between

employers and workmen within the meaning of sect. 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them have any dispute can invoke the benefit of this section even on an indictment for a conspiracy. But assuming that there was a trade dispute within the meaning of sect. 3, and that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked, and is well known. An illegal agreement, whether carried out or not, is the essential element in a criminal case; the damage done by several persons acting in concert and not the criminal conspiracy is the important element in the action for damages: (see the notes to 1 Wms. Saund. 229b and 230). In my opinion it is quite clear that sect. 3 has no application to civil actions; it is confined entirely to criminal proceedings. Nor can I agree with those who say that the civil liability depends on the criminality, and that if such conduct as is complained of has ceased to be criminal it has therefore ceased to be actionable. On this point I will content myself by saying that I agree with Andrews, J. and those who concurred with him. It does not follow, and it is not true, that annoyances which are not indictable are not actionable. The law relating to nuisances, to say nothing of the law relating to combinations, shows that many annoyances are actionable which are not indictable, and the principles of justice on which this is held to be so appear to me to apply to such cases as these. I will detain your Lordships no longer. *Allen v. Flood* is in many respects a very valuable decision, but it may be easily misunderstood and carried too far. Your Lordships are asked to extend it, and to destroy that individual liberty which our laws so anxiously guard. The appellants seek by means of *Allen v. Flood*, and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trade unions in one of its most objectionable forms is lawful and gives no cause of action to its victims, although they may be pecuniarily ruined thereby. So to hold would, in my opinion, be contrary to well-settled principles of English law, and would be to do that which is not yet authorised by any statute or legal decision. In my opinion this appeal ought to be dismissed with costs.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Eyre, Dowling, and Co.*, for *Joseph Donnelly*, Belfast.

Solicitor for the respondent, *Francis H. White*, for *G. B. Wilkins*, Lisburn, Ireland.

CHAN. DIV.]

SMITH v. NORTHLEACH RURAL DISTRICT COUNCIL.

[CHAN. DIV.]

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Nov. 8, 1901.

(Before FARWELL, J.)

SMITH v. NORTHLEACH RURAL DISTRICT COUNCIL. (a)

Public authorities—Action in respect of act done in execution of Act of Parliament—Payment by defendants into court—Acceptance by plaintiff in satisfaction—Discontinuance—Costs as between solicitor and client—Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61), s. 1 (b) (c).

In an action for an injunction to restrain the abstraction of water from a river and the execution of works relating thereto on land of the plaintiff, three cases of abstraction were set up. As to one of these the defendants paid 10l. into court, which was accepted by the plaintiff in satisfaction of all the causes of action, and she thereupon gave notice of discontinuance.

On a summons asking how the costs should be borne, the defendants contended that as to those incurred since the payment into court, the plaintiffs ought to pay them as between solicitor and client under sect. 1 (c) of the Public Authorities Protection Act 1893.

Held, that the whole framework of the section proceeded on the ground that the action went to judgment; that, as in case of discontinuance there could be no judgment, the section did not apply, and the defendants were not entitled, therefore, to solicitor and client costs.

This action was brought for the purpose of obtaining an injunction to restrain the abstraction of water from a river, and from executing or doing works relating thereto on certain lands of the plaintiff, and for damages and costs.

A statement of claim was delivered, and then certain amendments were added, amongst which was one as follows:

A part of the said wrongful abstraction at the Seven Springs consists of the wrongful continuance of an abstraction of water at a point just below the Seven Springs, formerly authorised by a revocable licence granted by a predecessor of the plaintiff for an annual payment of 1l., which licence has been duly revoked by the plaintiff.

To that the defendants answered:

That such abstraction did not continue, if committed at all, after the month of March 1899, and, while denying all liability for such alleged abstraction, they bring into court the sum of 10l. and say that the same is sufficient to satisfy this part of the plaintiff's claim.

Subsequently they paid the money into court, and the plaintiff then sent this notice:

Take notice that the plaintiff accepts the sum of 10l. paid by you into court in full satisfaction of the causes of action in the statement of claim mentioned, and she also gave notice of discontinuance.

This was a summons taken out to ascertain how the costs should be borne.

Butcher, K.C. and Ashworth James for the plaintiff.—The question is how the costs of the action ought to be borne. We submit that we ought to have the general costs, except so far as they have been increased by the two causes of action which we have dropped:

McIlwraith v. Green, 52 L. T. Rep. 81; 14 Q. B. Div. 766.

*Jenkins, K.C. and W. Wills for the defendants.—Order XXVI., r. 1, under which the application is made, makes the matter entirely for the discretion of the court. Having regard to that rule and to *McIlwraith v. Green* (*ubi sup.*) we are entitled to the general costs. As to those incurred after payment into court, they must be ours, and as the action was afterwards proceeded with by the plaintiff, we are entitled to those costs as between solicitor and client. [*Butcher, K.C.*—There has been no judgment within sect. 1, sub-sect. (b) of the Public Authorities Protection Act.] We rely on sub-sect. (c) of that section. The local authority ought to be in no better position merely because the action is fought out. The meaning of the word "recovered" has been considered under the County Courts Acts.*

Pontifex v. Midland Railway Company, 37 L. T. Rep. 403; 8 Q. B. Div. 23;

Fleming v. Manchester, Sheffield, and Lincoln Railway Company, 39 L. T. Rep. 555; 4 Q. B. Div. 81;

Howorth v. Sutcliffe, 73 L. T. Rep. 277; (1895) 2 Q. B. 358.

These cases show that the word applies to cases which have not proceeded to judgment.

Butcher, K.C. in reply.

FARWELL, J. (after stating the facts, continued:)

*—The true meaning of discontinuance is to be found in the exposition of the law by Lord Esher in *McIlwraith v. Green* (*ubi sup.*) where he says: "The nature and effect of a discontinuance are now ascertained by Rules of the Supreme Court, Order XXVI., r. 1. . . . What the plaintiffs have done is equivalent to an acceptance of the payment into court in respect of the one breach and a discontinuance of the action in respect of the other breach." The question now arises as to the costs of the action. The plaintiff is entitled under the orders to the costs of this one issue in respect of which 10l. was paid into court, and she has to pay the cost of the other issues in respect of which she has discontinued. That is absolutely plain, having regard to the exposition by Lord Esher above-mentioned. That does not give rise to any difficulty. As Mr. Jenkins proposes, for the purpose of saving trouble and expense, to divide the costs into thirds and for the plaintiff to bear the costs of two of such thirds, I think that is an advantage to Mr. Butcher's clients, and the point may be left in that way. Then the other question which is raised is rather a curious one as it is said that the defendants are a public authority who are sued in respect of a matter done in the execution of their duty as such authority, and it is asked that the portion of the costs incurred since the tender and payment into court ought to be paid to the defendants as between solicitor and client under the Public Authorities Protection Act 1893. That depends on the construction of sect. 1 of that Act. The first provision is: "Where, after the commencement of this Act, any action, prosecution, or*

other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty, or authority, or in respect of any alleged neglect, or default in the execution of any such act, duty, or authority, the following provisions shall have effect: (b) Wherever in any such action a judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client." It has been held that a consent order is a judgment within that section (*Shaw v. Hertfordshire County Council*, 81 L. T. Rep. 208; (1899) 2 Q. B. 282), and it has been also held that there is jurisdiction to give no costs (*Bostock v. Ramsey Urban District Council*, 83 L. T. Rep. 358; (1900) 2 Q. B. 616), but that if costs are dealt with at all they must be as between solicitor and client (*North Metropolitan Tramways Company v. London County Council* (78 L. T. Rep. 711; (1898) 2 Ch. 145). But these cases do not apply here. Then it is said that sub-sect. (c) applies here, namely: "Where the proceeding is an action for damages tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs to be taxed as between solicitor and client as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action." Now, it appears to me that the whole framework of the section proceeds on the ground that the action goes to judgment, because, the court having already held that the whole discretion of the court is not taken away as it may grant no costs at all, it seems to me that the question of that discretion does not arise unless the case goes to trial. Again, the plaintiff does not recover anything; the action is simply discontinued; there was never any order or judgment given. Order XXVI, r. 1, says that the mere notice of discontinuance puts an end to the action, and it is necessary to pay the costs because they are carried in on the notice. I understand that that is the practice. From this I say that no order could be obtained. The words "does not recover more" means by the judgment of the court or consent order, having regard to the authority I have referred to. This section is a highly penal one, creating a rather curious preferential state of things in favour of public authorities. It ought not to be extended to cases which do not come within it. These authorities have very great powers of interfering with people's rights, and are supported by the moneys of the ratepayers. It is quite right that if they are attacked they should be allowed to defend themselves, and that the attacking party should run the risk of paying costs as between solicitor and client. But I see no reason for giving them that preference to any greater extent than is expressed in the words of the Act of Parliament. Inasmuch as the true view is that there must be a judgment on which the court can exercise its discretion and give costs or no costs in the case of discontinuance, the plaintiff can simply

go on with another action or not. Therefore I am unable to give solicitor and client costs in this case.

Solicitors: *Peacock and Goddard*, agents for *Mullings, Ellett, and Co.*, Cirencester; *Blyth, Dutton, Hartley, and Blyth*, agents for *T. Mace*, Chipping Norton, and *H. T. Bavenor*, Witney.

Monday, Aug. 5, 1901.

(Before BUCKLEY, J.)

BARNARD CASTLE URBAN DISTRICT COUNCIL
v. WILSON. (a)

Waterworks Clauses Acts—Water supply—Domestic purposes—Trade or business purposes—School swimming baths—Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93), s. 12.

A supply of water to a swimming bath in a boarding school for the use of the scholars is a supply for "domestic purposes" within the meaning of sect. 12 of the Waterworks Clauses Act 1863.

THE plaintiffs were the urban sanitary authority, authorised, under the Public Health Act 1875 and Acts incorporated therewith, to supply water to the district of Barnard Castle; and for the supply of water for domestic purposes only to premises within their district the plaintiffs, apart from special agreements, charged a water rate. For the supply of water for purposes other than domestic purposes the plaintiffs charged according to certain rules and regulations, which provided that the charge for water supplied for trade purposes should be 6d. per 1000 gallons.

The defendants were sued as representing the governors of the North-Eastern County School, which was within the plaintiffs' district.

The school was administered under a scheme settled by the Charity Commissioners. Its income was derived partly from endowments and partly from tuition fees. Any part of the income not applied to the purposes specified in the scheme was to be invested in the names of the official trustee of charitable funds in trust for the foundation in augmentation of its endowment. A swimming bath was provided on the school premises capable of holding about 35,000 gallons of water. The school accommodated 300 boarders and fifty day boys. Boarders were required to pay an additional fee of 3s. 6d. per term for the swimming bath, and an instructor of swimming was kept.

The plaintiffs claimed to charge for water supplied to the swimming bath as for water supplied for trade or business purposes.

The Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93), which is incorporated with the Public Health Act 1875, provides by sect. 12:

A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages where such horses or carriages are kept for sale or hire or by a common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose.

S. G. Lushington for the plaintiffs.—The defen-

(a) Reported by H. PROCTOR, Esq., Barrister-at-Law.

CHAN. DIV.]

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dants carry on the trade or business of educating boys:

Wauton v. Coppard, 79 L. T. Rep. 467; (1899) 1 Ch. 92;

Doe d. Bish v. Keeling, 1 M. & S. 95; 14 E. R. 405;

Rolls v. Miller, 50 L. T. Rep. 153, 155; *Ibid.*, 597; 27 Ch. Div. 71, 75.

The last case shows that even a school which is not carried on for profit may be a business. The swimming bath is part of the educational plant, and the water supplied to it is for the purposes of the school business. He referred to

Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 51, 56;

Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), ss. 53, 74;

Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93), s. 12 (*ubi sup.*);

Liskeard Union v. Liskeard Waterworks, 7 Q. B. Div. 505;

Busby v. Chesterfield Waterworks Company, E. B. & E. 176.

B. C. Glen for the defendants.—Sect. 12 of the Waterworks Clauses Act 1863 practically contains a definition of what are to be included in domestic purposes. It is submitted baths are not excluded. The word "business" in that section means something *ejusdem generis* with "trade or manufacture." The defendants are trustees for carrying on a public institution. *Liskeard Union v. Liskeard Waterworks (ubi sup.)* involves a decision that a supply of water to a public institution is not a supply for any trade, business, or manufacture. A fixed bath in a private house has been held to be a domestic purpose:

Weaver v. The Corporation of Cardiff, 48 L. T. Rep. 906.

The swimming bath in this school, which for this purpose must be regarded as a large family, is also a domestic purpose. He also referred to

Smith v. Anderson, 43 L. T. Rep. 329; 15 Ch. Div. 247;

Public Health Act 1875, s. 65.

Lushington in reply.—*Weaver v. The Corporation of Cardiff (ubi sup.)* only decided that the word "bath" in a special Act meant "public bath."

BUCKLEY, J.—The plaintiffs are the urban sanitary authority who, under the Public Health Act 1875, and the Acts incorporated therewith, are authorised to supply water to a district. The defendants are the governors of a school in the district. In 1896 they erected a swimming bath for the use of the boys, some 350 in number. The bath consumed some 35,000 gallons of water. The question is whether the supply to the swimming bath is one for "domestic purposes" within the Acts, or is a supply for the purpose of any "trade, manufacture, or business." It appears to me that the undertaking of this school is, within certain authorities and for certain purposes, a business. I find that Lord Ellenborough, C.J. in *Doe d. Bish v. Keeling (ubi sup.)* held that an assignment of a lease to a schoolmaster was a breach of a covenant "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises or any part thereof, any trade or business whatsoever, &c., without the licence of the lessor, &c." In the recent case of *Rolls v.*

Miller (ubi sup.), the Court of Appeal held that a charitable institution, known as the Home for Working Girls, where the inmates were provided with board and lodging, whether any payment was taken or not, was a business, and came within the restrictions of a covenant that a lessee would not use, exercise, or carry on upon the premises any trade or business of any description whatsoever. This case is not varied by the fact that the school is not carried on for profit, and that the receipts go in augmentation of its endowment. For certain purposes I think that this is a business. The question is whether, within sect. 12 of the Waterworks Clauses Act 1863, contrasting the expressions "a supply of water for domestic purposes" with "a supply for any trade, manufacture, or business," the supply to this swimming bath is for a domestic purpose or not. The only other sections in the Acts to which I need refer are sects. 56 and 65 of the Public Health Act 1875. The effect of sect. 56 is that where a local authority supply water they may charge a water rate, with power to enter into agreements for supplying water on such terms as may be agreed on between them and the persons receiving the supply. Sect. 65 is the only section dealing with baths—i.e., "any local authority may, if they think fit, supply water from any waterworks purchased or constructed by them to any public baths or washhouses, or for trading or manufacturing purposes, on such terms and conditions as may be agreed on between the local authority and the persons desirous of being so supplied." I have to deal with a series of statutes in which there is no provision as to baths except public baths. Counsel for the plaintiffs did not contest the proposition that a supply of water to a bath in a private house is a supply for domestic purposes: (see *Weaver v. Corporation of Cardiff*, 48 L. T. Rep. 906). If a private resident was minded to construct, and did construct for his own use, a swimming bath in his garden, or contiguous to his house, the supply to that bath would be a supply for a domestic purpose. It is said this school is a business, and a supply to the swimming bath is a supply for that business. The business, if it be a business, is that of receiving, feeding, teaching, and housing boys during the school term. It seems to me, if the plaintiffs' proposition is true, that a supply of water to the boys for washing their hands or cooking purposes would be a supply for the purposes of that business. It seems to me a very extravagant proposition. It is argued that I ought to draw a distinction between water supplied for domestic purposes and water supplied to the swimming bath. I fail to find that the swimming bath is a business as distinguished from the general business. Suppose the school had a gymnasium; could it be said that the governors carried on a business of gymnastic teaching? The true answer to the contention on the part of the plaintiffs is to be found in this: In sect. 12 of the Waterworks Clauses Act 1863, this word "business" is to be read in contrast with "domestic purposes." Then if you find a domestic purpose, even if keeping a school is a business, a supply for that purpose is a supply for domestic purposes. The nearest case is *Liskeard Union v. Liskeard Waterworks (ubi sup.)*, where it was argued that water supplied to a workhouse was not supplied for domestic purposes within the meaning of the Act

K.B. DIV.] PEARKS, GUNSTON, & TEE LIM. v. KNIGHT; SAME v. VAN TROMP. [K.B. DIV.]

in question there, because the maintenance of paupers in England is a public purpose. Lord Coleridge says: "No doubt this is true, but in the prosecution of that which is a public purpose there may be domestic uses, and this is one." And further on he says: "Every large family is partly made up of persons quite unconnected by ties of blood or marriage, and the number of those so connected may bear a very small proportion to the whole number of persons collected together, as, for instance, in the case of a school, where a number of persons of different families are collected from different places, but under one head and one roof, and are for all practical purposes one family." That is the real way in which to treat this case. All these boys constitute one establishment, and a supply of water to them is as much a supply for domestic purposes as a supply to the masters. The plaintiffs fail, and I dismiss the action with costs. I declare that the governors are entitled to a supply of water to the swimming bath as for domestic purposes.

Solicitors: for the plaintiffs, *Doyle, Devonshire, and Woodhouse*, for *J. Ingram Dawson*, Barnard Castle; for the defendants, *Huntington and Leaf*, for *A. T. Piper*, Barnard Castle.

KING'S BENCH DIVISION.

Friday, Aug. 9, 1901.

(Before WILLS and KENNEDY, JJ.)

PEARKS, GUNSTON, AND TEE LIMITED (apps.) v. KNIGHT (resp.).

SAME v. VAN TROMP (resp.). (a)

Adulteration of food—Addition of natural constituent—Butter—Excess of water—Milk added to butter to increase weight—Offence—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6.

To a purchaser, who demanded butter, the appellants sold butter which contained an excessive quantity of water. The excess of water was not the result of the manufacture of butter from milk or cream, but was caused by the addition to the butter already manufactured extraneous milk which had been incorporated with the butter by some process after its manufacture. Butter is made from milk or cream or both, and water is a natural constituent of it, and is always in it to a varying extent. The added milk was not required for the production of butter, but was incorporated with it for the purpose of increasing its weight by the extra water thereby introduced:

Held, that, though water was a natural constituent of butter, the butter sold by the appellants was not of the nature, substance, and quality of the article demanded by the purchaser, and that the appellants had therefore committed an offence under sect. 6 of the Sale of Food and Drugs Act 1875.

PEARKS, GUNSTON, AND TEE LIMITED (apps.) v. KNIGHT (resp.).

CASE stated by the stipendiary magistrate for the Staffordshire Potteries District.

At a court of summary jurisdiction, held at Longton on the 8th May 1901, an information was

preferred by Knight, the respondent, against the appellants, under sect. 6 of the Sale of Food and Drugs Act 1875, charging that the appellants unlawfully did sell to the prejudice of the purchaser a certain article of food—namely a quantity of butter, which was not of the nature, substance, and quality of the article demanded by the purchaser, the same being adulterated with water contrary to the provisions of the statute.

The magistrate convicted the appellants of the offence, and ordered them to pay a sum of 20*l.* and 23*l.* 8*s.* 6*d.* costs.

The following facts were proved or admitted:—

The appellants were grocers and provision merchants, and the respondent was an inspector under the Sale of Food and Drugs Acts.

On the 20th March 1901 the respondent caused to be purchased at the appellants' shop at Fenton, in the county of Stafford, one half-pound of butter for the purpose of submitting the same to analysis.

The price of the half-pound of butter was 5*d.*

A portion of the butter was submitted for analysis to the public analyst, who certified that the part or sample of butter contained 22·53 per cent. of water, and that this was at least 6 per cent. too much water.

Water is a natural constituent of butter, and is always present in butter to a considerable though varying extent. Butter is made sometimes from milk, sometimes from cream, sometimes from milk and cream. Milk contains about 88 per cent., cream about 50 per cent. of water.

There is no statutory standard for the composition of butter as regards the proportion of water it may contain. The Board of Agriculture have made no regulations as to this under sect. 4 of the Sale of Food and Drugs Act 1899. The standard taken by the analyst certifying in the present instance was 16 per cent.

The 6 per cent. excess of water which the sample of the appellants' butter was certified to contain was not the result of the manufacture of butter from milk, or cream, or both, but was caused by the addition to butter already manufactured from milk, or cream, or both, of extraneous milk, which milk had been incorporated with the butter by some process subsequent to the manufacture of the butter.

The added milk was not required for the production of butter, but was incorporated with the butter for the purpose of increasing its weight by means of the extra water thereby introduced.

It is not unusual for a butter manufacturer to blend two or three different kinds of butter.

No evidence was called by the appellants, but it was contended on their behalf that an article could not be adulterated by the addition of a constituent from which it was derived, and therefore that the butter in question, having been made exclusively from milk, or cream, or both, was in fact not adulterated butter, whatever the percentage of water might be, and there being no legal standard as to the quantity of water in butter, the fact that the butter contained 22·53 per cent. of water was under the circumstances no evidence of adulteration, and that no offence was committed, under sect. 6 of the Sale of Food and Drugs Act 1875, by not eliminating a natural constituent of the article.

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The magistrate was of opinion that of the 22·53 per cent. of water found in the butter, 6 per cent. was excessive and was caused by the addition of the milk as previously stated, and he held that the process of adding the milk to the butter being for the purpose of the addition of water, constituted an offence under sect. 6 of the Sale of Food and Drugs Act 1875, in that an article was sold not of the nature, substance, and quality demanded by the purchaser, the same being adulterated with water.

The question for the opinion of the court was whether, upon the above statement of facts, the magistrate came to a correct determination and decision in point of law.

PEARKE, GUNSTON, AND THE LIMITED (apps.)
v. VAN TROMP (resp.).

Case stated by the stipendiary magistrate for South Staffordshire.

At a court of summary jurisdiction, held at Brierley Hill, in the county of Stafford, on the 3rd May 1901, an information was preferred by the respondent, Van Tromp, an inspector under the Sale of Food and Drugs Act, against the appellants under the same section charging them with having, on the 1st April 1901, sold to the prejudice of the purchaser at Brierley Hill butter which was not of the nature, substance, and quality of the article demanded by the purchaser, the same being adulterated with at least 5 per cent. too much water.

The magistrate convicted the appellants, and imposed a penalty of 20*l.* and 15*l.* 6*s.* 6*d.* costs.

The appellants, who were the same as the appellants in the previous case, carried on their business (amongst other places) at Brierley Hill. One half-pound of butter was purchased in the appellants' shop for analysis. The butter was labelled "Pure dairy butter," and was wrapped in a paper on which were the words "Pure butter."

The analyst certified that the butter contained 21·75 per cent. of water, and that this was at least 5 per cent. too much. Water is a natural constituent of butter, and, though the quantity varies, it should never exceed 16 per cent.

It is a common practice in the trade to blend different kinds of butter, and the process of blending adopted by the appellants is to mix different kinds of butter together, and during this process to add to it full cream milk. The butter in question had been blended by the above process—that is to say, it was composed of different kinds of butter mixed together, genuine full cream milk being added to it during the process.

The excessive amount of water found in the butter was derived entirely from the milk which was added during this process. The price of full cream milk is three-farthings a pound and butter about tenpence.

It was contended on behalf of the appellants that, until regulations were made by the Board of Agriculture under sect. 4 of the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), any article made exclusively from milk, or cream, or both was in fact butter; that, there being no statutory standard as to the quantity of water in butter, the fact of the butter containing 21·75 per cent. of water was, under the circumstances, no evidence of adulteration; that no offence was committed under sect. 6 of the Sale of Food and Drugs Act 1875 by not eliminating a natural constituent of the

article, and that the facts disclosed no evidence of adulteration or any offence under sect. 6 of that Act.

The magistrate was of opinion that the water found in the butter was excessive, and as it was caused by adding milk to an already manufactured article, the mixture could not properly be called butter, but was butter adulterated by the addition of water in the form of milk, and he was of opinion that the milk was added fraudulently and with intent to increase the bulk of the mixture.

He was further of opinion that the fact that the Board of Agriculture had not exercised the powers conferred upon it by sect. 4 of the Sale of Food and Drugs Act 1899 did not warrant the appellants in mixing milk with the butter, and so producing an abnormal amount of water in the butter.

The question for the opinion of the court was whether, upon the facts stated, the magistrate was right in law in convicting the appellants of the offence charged in the information under sect. 6 of the Sale of Food and Drugs Act 1875.

Joseph Walton, K.C. (Bonsey with him) in the first case. The question is whether the butter supplied was of the nature, substance, and quality of the article demanded. In considering the application of the section, different considerations apply to the different classes of cases: for example, in the case of milk, which is a natural product and which contains a large quantity of water, it would be no offence under the section to sell milk, however large the quantity of water it contained, provided that no water was added. The case of butter is different; it is a manufactured article, made by bringing together the different ingredients of the milk or cream. It is the product of milk or cream, and by the definition in sect. 3 of the Margarine Act 1887 (50 & 51 Vict. c. 29), it must be made exclusively from milk or cream. In this case that was so, as the butter did not contain anything but milk or cream. What was added was milk and not water, and what was done was merely an additional process in the making of butter by which more milk was incorporated into the butter, and the process of manufacture adopted had merely the effect of adding more water to the butter than if a different process had been adopted. Different methods of making the butter may result in adding different quantities of water to the butter, and in the process here adopted more milk was used, but nothing else was used, and this resulted in a butter containing more than the ordinary quantity of water. That is not an offence under the section. If a dealer has butter in which there is little water, and if he puts the butter through this process by adding milk, thereby increasing the quantity of water in the butter, it could not be said that an offence under this section was committed; and if so, the appellants have committed no offence here. No statutory standard has been fixed under sect. 4 of the Sale of Food and Drugs Act 1899, and no regulations have been made, and therefore so long as the butter is made from milk, or cream, or both, and from nothing else, no offence is committed.

Avory, K.C. (Bonsey with him) in the second case.

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Danckwerts, K.C. and B. C. Brough, for the respondents, were not called upon to argue.

WILLS, J.—I am clearly of opinion that these convictions must be supported, and I think that when a little consideration is given to the question which is raised there is not room for any serious doubt about it. The section prohibits the selling, to the prejudice of the purchaser, any article of food which is not of the nature, substance, and quality of the article demanded. The purchaser in this case demands butter. What does he get? He gets that which has been butter, because we are told that it is butter that is started with, but which by some ingenious process, the nature of which is a trade secret, or at all events is not told to us, milk is taken in in considerable quantities, and care is taken that the milk shall be introduced into the butter in a state in which it is not butter. If the milk were subjected to the ordinary processes by which butter is made, and the natural amount of butter were taken out of it, well and good. The ordinary way of making butter is perfectly well known, and in the making of it people know where to stop. It is not a question of delicate percentages, and it is not a question of whether it contains 20 per cent. or 25 per cent. of water. It seems that the very object of the process is that the added cream or milk, as the case may be, shall not be turned into butter, but that some of the watery parts of it in considerable quantity, which in the natural process of making butter out of it would be eliminated, shall be left in the resulting compound product. Of course, the process itself must cost money. That would not be done unless it were done for the purpose of making a spurious profit out of it, and of making that profit out of it by reason of the purchaser supposing that he has got the genuine article, in lieu of which he has got the genuine article saturated with certain materials (whatever they may be) which are produced by stopping short in the process of making the added cream or milk into butter. It does not, however, matter for what purpose this is done, and we need not trouble ourselves for the purposes of these convictions with the motives or purposes for which it is done. The magistrate very properly added, and I think that nobody can doubt that he has arrived at a right conclusion on the question of fact, that it was fraudulently and dishonestly done; but if it were done ever so honestly it is immaterial, because the offence which is created by the first part of sect. 6 is complete, whatever the motive is. In my opinion, therefore, there is not a shadow of a doubt about these not being right convictions, and the appeals must be dismissed with costs.

KENNEDY, J.—I am entirely of the same opinion, and I must say it seems to me to be a remarkably clear case.

Convictions affirmed.

Solicitors for the appellants, *Neve, Beck, and Kirby.*

Solicitors for the respondents, *Thomas White and Sons, for C. F. Hand, Stafford.*

Aug. 5 and 10, 1901.

(Before WILLS, J.)

CORPORATION OF TRURO v. ROWE. (a)

Corporation — Fisheries — Short lease taken by corporation — Validity — Mortmain — Right of oyster fishery — Depositing oysters on foreshore as incident to right of fishery — Mortmain and Charitable Uses Act 1888 (51 & 52 Vict. c. 42), s. 1 — Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), s. 107.

A corporation were by a local Act constituted undertakers for the regulation of the oyster fishery in their river, and they subsequently took a lease for fourteen years of certain parts of the foreshore to which the Act applied. The defendant had a right of oyster fishery in the harbour, and from time immemorial he and other fishermen were in the habit of depositing oysters, which had been taken from the sea, on a particular spot of the foreshore which had been roughly staked out. This depositing of the oysters was necessary to free them from contamination and to render them fit for use, and the acts of the defendant did not constitute any occupation of the spot by him, but were merely incidental to the fishing for oysters, and practically such storage was necessary for the oyster fishery.

In an action by the corporation as such lessees for alleged trespass in so depositing the oysters on the foreshore:

Held (as to the right of the corporation to sue), that neither the Mortmain Act, nor sect. 107 of the Municipal Corporations Act 1882 prevented the corporation as such from acquiring a short leasehold, and as the acquisition of the leasehold afforded a reasonable facility for carrying out the purposes of their local Act, its acceptance was not ultra vires and they could sue under it:

Held, also, that the right of depositing the oysters on the foreshore was a right which could be legally incidental to the right of fishery, and that therefore, as such right had been established in fact, the defendant had committed no trespass in so depositing them.

FURTHER CONSIDERATION by WILLS, J. in an action tried before him with a jury at Truro.

The plaintiffs were the mayor, aldermen, and burgesses of the city of Truro, and the action was brought by them against the defendant for damages for alleged acts of trespass on a part of the foreshore at Truro of which the plaintiffs were the lessees, and for an injunction to restrain the defendant from committing the acts of trespass alleged.

By a charter of 31 Elizabeth the borough of Truro was to be a free borough of itself, and was to be a body corporate and politic by the name of the Mayor and Burgesses of the Borough of Truro, and it was provided that they by the name of the Mayor and Burgesses of the Borough of Truro,

May and shall be for ever at all future times persons fit and capable in law to hold, purchase, receive, and possess lands, tenements, liberties, privileges, jurisdictions, franchises, and hereditaments of what kind or nature soever they be, to them and their successors in fee and perpetuity, and also goods and chattels and other things whatsoever of what nature or kind soever they may be,

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

and to give, grant, demise, and assign lands, tenements, and hereditaments, and all and singular other acts and deeds to do and execute by the same name.

By an indenture, dated the 4th June 1897, certain parts of the shore of the estuary of the Fal or Truro river, and of the creeks thereof as far as the sea flows and reflows between high and low water-marks at highest and lowest tides, which formerly belonged to the Duchy of Cornwall, were demised by the owner, Colonel Tremayne, to the mayor, aldermen, and citizens of the city of Truro for a term of fourteen years from the 29th Sept. 1896 at a yearly rent of 15l.

The defendant had the right of fishing for oysters in the harbour of Truro, and in the exercise of this right of fishery the defendant and other fishermen had from time immemorial been in the habit of depositing the oysters when dredged from the sea upon a particular spot or part of the foreshore covered by the sea except at lowest tides.

The oysters as dredged up or gathered from the oyster beds in the harbour were contaminated with copper from the washings of the copper mines in the vicinity, and it was necessary to deposit them for some considerable time in this particular place on the foreshore in order to get rid of the copper.

Other fishermen exercised the same rights, each having a particular spot for depositing his oysters.

The allocation of these particular spaces was settled amongst the fishermen themselves, and the defendant's space was roughly staked or marked out by withies stuck in the bed of the river.

The defendant and other fishermen had exercised these rights of depositing the oysters on the foreshore as far back as living memory extended.

The plaintiffs, claiming as lessees of the foreshore under the lease of the 4th June 1897, brought the present action against the defendant, alleging that the acts of the defendant in depositing the oysters on the foreshore as above described, were acts of trespass committed on the foreshore.

The jury at the trial found, in answer to the learned judge, (1) that the acts done by the defendant did not constitute an occupation of the soil; (2) that such acts were merely incidental to the fishing for oysters, and (3) that the oyster fishery could not be practically carried on without a storage.

Upon these findings the case was reserved for further consideration.

The Sea Fisheries Act 1868 (31 & 32 Vict. c. 45), in part 3 deals with oyster fisheries, and sect. 29 gives power to the Board of Trade to make orders for oyster fisheries, and sect. 37 provides that such orders made by the Board of Trade shall not have any operation until confirmed by Act of Parliament.

Under these powers an order was made by the Board of Trade "for the regulation by the Corporation of the Borough of Truro of an oyster and mussel fishery in part of the Truro river, in the county of Cornwall"; and this order was confirmed by an Act of Parliament, The Oyster and Mussel Fisheries Order Confirmation Act 1876 (39 & 40 Vict. c. xci.).

Under this Act the corporation were made undertakers of the order, and the description and

limits of the fishery comprised in the order were defined, and the corporation were given powers to make, with the approval of the Board of Trade, bye-laws and regulations for regulating the fishery generally in terms not inconsistent with the order.

The Mortmain and Charitable Uses Act 1888 (51 & 52 Vict. c. 42), provides:

Sect. 1. (1) Land shall not be assured to or for the benefit of, or acquired by or on behalf of any corporation in mortmain, otherwise than under the authority of a licence from Her Majesty the Queen, or of a statute for the time being in force, and if any land is so assured otherwise than as aforesaid the land shall be forfeited to Her Majesty from the date of the assurance, and Her Majesty may enter on and hold the land accordingly.

The Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), provides:

Sect. 105. A municipal corporation may contract for the purchase of and hold any land not exceeding in the whole five acres, either in or out of the borough, and thereon, or on any land belonging to or held in trust for the corporation, may build a townhall, council-house, justices' room, with or without a police-station and cells, or lock-ups, or a quarter and petty sessions house, or an assize court-house, with or without judges' lodgings, or a polling-station, or any other building necessary or proper for any purpose of the borough.

Sect. 107. (1) Where a municipal corporation has not power to purchase or acquire land, or to hold land in mortmain, the council may, with the approval of the treasury, purchase or acquire any land in such manner and on such terms and conditions as the treasury approve, and the same may be conveyed to and held by the corporation accordingly. (2) The provisions of the Lands Clauses Consolidation Acts 1845, 1860, and 1869, relating to the purchase of land by agreement and to agreements for sale . . . shall extend to all purchases of land under this section.

Duke, K.C. and J. A. Hawke for the plaintiffs.—The plaintiffs are entitled to the damages and injunction claimed. With regard to the question of mortmain, sect. 1 of the Mortmain and Charitable Uses Act 1888 prevents land from being acquired by a corporation in mortmain, and it operates as a forfeiture to the Crown of land so acquired. The effect of this merely is that a corporation may, without licence from the Crown, acquire land, and as regards the title of the corporation it is good, notwithstanding any illegality, if those who have power to enter do not do so:

Brice on Ultra Vires, 3rd edit., pp. 63-4;

Great Eastern Railway Company v. Turner, 27 L. T. Rep. 697; L. Rep. 8 Ch. 149;

Ayers v. South Australian Banking Company, L. Rep. 3 P. C. 548, per Mellish, L.J. at pp. 558-9.

Then by the charter the corporation have power to acquire and hold lands—which would include this leasehold—and subsequently, by sect. 12 of the local Act of 1876, they have power to make bye-laws for the regulation of these oyster fisheries, and sects. 29 to 56 of the Sea Fisheries Act 1868, establish a code for their management and protection. Under the powers given by these sections the Board of Trade have made an order which has been confirmed by Parliament (39 & 40 Vict. c. xci.). What the defendant has done in this case is, that he has staked and marked out a piece of the foreshore; that he has laid oysters there and kept the public off, and that

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he has taken away the oysters for sale. He says and claims that he has an oyster bed there, and these acts are all acts which assert a right of occupation in him, which may afterwards be turned into ownership by the Statute of Limitations. Our contention is that the defendant has got, not an oyster bed there, but a public right of fishery. If this were an oyster bed it would be protected by sect. 26 of the Larceny Act 1861 and sect. 51 of the Sea Fisheries Act 1868. The defendant was occupying a part of this foreshore with these chattels; that amounted to an actual dispossession of the owner and was a user which tended to give a property or right in the soil:

Lord Advocate v. Lord Blantyre, 4 App. Cas. 770, at p. 791.

These acts of the defendant were therefore a trespass unless they can be justified, and the defendant cannot do an act which is a dispossession of the owner, even if he has a right of fishery:

Blundell v. Catterall, 5 B. & A. 268.

The right claimed by the defendant is not in any way incidental to his right of fishery. He may have a right of fishery, but that does not carry with it the right of storing or depositing the oysters on this place:

Earl of Ilchester v. Rashleigh, 5 Times L. Rep. 739;

Ward v. Oreswell, Willes, 265;

Gray v. Bond, 2 B. & B. 667;

Aiton v. Stephen, 1 App. Cas. 456.

Foots, K.C. and *Bodilly* for the defendant.—Dealing first with the nature of the acts done by the defendant on this part of the foreshore, the acts done did not in any sense amount to any claim to the occupation of the land. The defendant merely put in stakes or withies for the purpose of showing as between himself and the other fishermen where his oysters were. It is contended that the right of fishery does not give the right of storage for the oysters, but this was not a right of storage of the oysters on this spot, but merely a depositing of the oysters until they were purified; and the acts done by the defendant, which are alleged to be a trespass, were acts incidental to and part of the right of fishery; they were acts without which the defendant's right of fishery would be almost useless. The evidence has shown that this right has existed beyond living memory, and that would give the defendant a right to do the acts complained of. Also the right exists at common law as being incident to the right of fishery. Sect. 41 of the Sea Fisheries Act 1868 merely gives the right to make rules for the regulation of the fishery, but it does not give the corporation any such right as is claimed by them in this case. The two sections relied upon (sect. 26 of the Larceny Act 1861 and sect. 51 of the Sea Fisheries Act 1868) as showing that there is a right to protect oyster beds, assume the whole question, as they assume that these were oyster beds, which they were not. These sections only apply to oyster beds which are the property of some private person, and therefore to use them for the purpose of showing that the acts here complained of are a trespass, is vicious reasoning. See

Reg. v. Downing, 23 L. T. Rep. 398.

With regard to the other point as to the right of the corporation of Truro to take this lease. A

corporation as such has no power in itself to hold land unless that power is given by charter. The power here given by the charter is a power to hold lands in fee simple only; there is no power to hold lands under a lease. Then the Municipal Corporations Act 1882 deals with the question of corporate land in sects. 105 and 107. Sect. 105 gives a corporation power to purchase land as therein prescribed; and sect. 107, which applies here, gives power to acquire land with the consent of the Treasury. This corporation has no power to take any land on lease at all, and the question of mortmain does not apply. It is not a question of mortmain; it depends on the power given by the charter—which is a power in this case to hold lands in fee—and then comes sect. 107 of the Act of 1882, which says that the corporation may acquire land upon such terms as the Treasury may agree to. The plaintiffs had therefore no power to take this lease at all.

Curr. adv. vult.

Aug. 10.—WILLS, J. read the following judgment:—The plaintiffs complain of various acts done by the defendant which they allege are acts of trespass committed on parts of the foreshore of the port of Truro, of which the plaintiffs claim to be the lessees by virtue of a lease for fourteen years granted in the year 1897. The acts complained of are the depositing of oysters which have been dredged up from the oyster beds in other parts of the harbour, and which are placed by the defendant in a particular spot and kept there until they are ready and wanted for sale in the market. The defendant is in the habit of keeping to a particular spot, which is very roughly indicated by withies stuck in the soil or bed under the sea. It is not quite clear whether they are placed on the foreshore or below the line of foreshore; but I have the strongest impression that it was mentioned in the course of the case that they are below low water mark. Other fishermen do the like, and the practice has been the same as far back as living memory goes. It is not contended that the defendant has any legal right to the spot in question, only that he has the right to use some part or other of the foreshore in this way, to this extent and for this purpose, as an incident to the right of fishing for oysters. The right is claimed both as a common law right, and as existing by immemorial custom. The allocation of particular spaces to particular individuals is an act of comity among the fishermen themselves, and up to the present time it does not appear that any difficulty has arisen out of it. It is alleged by the plaintiffs that the time is at hand when by the improvement of the fishery and the increase in the number of the fishermen difficulties will arise which will render the possession of the foreshore by them very desirable, if not necessary, for the regulation of the fishery. The plaintiffs also complain of these acts as amounting to an occupation of the soil which will in time give a title to the occupant. The ground may be cleared at once to a certain extent. The jury have found that the acts in question were not acts of occupation but were incident to and practically necessary for the oyster fishing. The circumstances are peculiar. The oysters as gathered from some of the beds are contaminated with copper from the washings of the copper mines, and they require a prolonged stay in the particular locality in question to get rid of the

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copper. Oysters gathered from other beds are sometimes fit for immediate use and sometimes require to be laid down; and it is needless to say that the oysters are not kept unsold longer than is necessary. The only importance of the facts relating to the use of the fishery is as explaining the necessity for a place of deposit, without which the fishery would be of little value, and I think the jury for that and other reasons were justified in finding that the Truro oyster fishing requires such a place of deposit. The finding that the acts were not acts of occupation gets rid of the contention that the defendant is acquiring a title under the Statute of Limitations, and reduces the questions for my consideration to two—namely: Have the plaintiffs made out such a title as will enable them to maintain an action of trespass; and, secondly, Can a right of deposit on the foreshore legally exist as an incident to the right of fishing for oysters? The plaintiffs do not appear, upon the evidence, to have done any single act of possession or ownership since the lease was granted. There is no evidence, for instance, that they have taken money for ballast or exercised any other act of ownership. They have therefore to rely upon the right of possession which flows from ownership and upon the presumption of actual possession which follows upon such legal right. It becomes necessary, therefore, to consider the objections which have been taken to their title. They are two; first, under the Statutes of Mortmain; and, secondly, under the Municipal Corporations Act 1882. The Statutes of Mortmain appear to me to have nothing to do with a short lease for fourteen years. It does not seem to be open to the class of objections which gave rise to the Statutes of Mortmain, and I find that both Shelford's Statutes of Mortmain (1836), p. 9, and Tudor's Charitable Trusts, 3rd edit. (1889), p. 382, treat this as clear law and they give a number of authorities for the proposition. These objections, therefore, may be shortly dealt with and put on one side, and I may add that as the Statutes of Mortmain do not apply, the licence to hold lands in fee which it is plain from the charter of Elizabeth existed in the old charters, and which had no application to leaseholds, is equally beside the question. The licence to hold goods and chattels, which term is used, where it is used, in contra-distinction to lands, cannot, I think, have any application to leases of land. As to the objection under the Municipal Corporations Act, sect. 105 of the Act of 1882 confers powers on corporations to purchase or hold a limited quantity of land for certain purposes without consent of any authority, and sect. 107 provides that with the consent of the Treasury (for which the Local Government Board is now substituted by the Local Government Act 1888 (51 & 52 Vict. c. 41), sect. 72) where the corporation has not power to purchase or acquire land or to hold land in mortmain, they may purchase or acquire any land on such terms as the Treasury may approve; but I think it is clear from the reference to mortmain that the Act is speaking of the acquisition of lands in fee or for such long terms as the Statutes of Mortmain do attach to, and I do not think that the implied prohibition to go outside those sections has ever been applied in practice to prohibit the taking of land by a municipal corporation on short leases, or been supposed to extend to such leases.

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I can see, therefore, no objection to the lease on that ground. But a municipal corporation, as such has nothing to do with foreshore or foreshore rights, and the limits of expenditure are prescribed by sect. 140, and sched. 5, and I think they do forbid the payment by a municipal corporation as such out of the borough fund of such a rent as this, and that, therefore, if the lease is *intra vires* it must be supported under some other powers. This brings me to the question of whether, under the Sea Fisheries Act 1868 and the order made in pursuance of that Act by the Board of Trade and confirmed by the local Act of 1876 (39 & 40 Vict. c. xci.) any such power is conferred. There is neither in the Act of 1868 nor in the local Act any express power conferred on the grantees, who in the present case are the plaintiffs, to take and hold foreshore. On the other hand, I start with the proposition that there is no statutory or other disability which prevents a corporation, merely because it is a corporation, from acquiring a short leasehold. It seems to me, therefore, that if the acquisition of the leasehold affords a reasonable facility to the corporation for the carrying out the purposes of their Act of 1876, they may do so. This view is much strengthened by sect. 47 of the Sea Fisheries Act of 1868. By sect. 46 no fishery order can be obtained where the Crown or the Duchy of Cornwall owns the foreshore, without the consent of such owner, so that the Crown or the duchy can make its own terms. By sect. 47, if the foreshore belongs to a private owner no consent is necessary, but for the protection of the owner it is enacted that the order shall incorporate the Lands Clauses Act 1845. This would of course give no power to buy any existing interest, freehold or leasehold, in the foreshore unless the special Act—that is, the order confirmed by Parliament, should confer it, and even then it would be a power to buy an existing interest, not to create a new leasehold. But it is the clearest possible intimation that it may be a useful thing for the grantees to have the foreshore, and the section applies to both classes of orders—those which create several fisheries and those, like the present order which only give power to regulate the fishery. I have come to the conclusion therefore, that the acceptance of the lease is not *ultra vires*, and that therefore, the right to possession draws the possession with it, and that so far as this objection is concerned the plaintiffs are not out of court. For one reason I am not sorry to come to this conclusion, inasmuch as it avoids a purely technical difficulty available in another action, and leaves open only the one real question important to the parties—namely, Is there any legal objection to the finding of the jury that the acts complained of are incidental to the right of enjoyment of oyster fishing? I think the question is very nearly answered when I say that it appears to me to be a perfectly right conclusion in fact. A great part of this oyster fishery would be useless without it. I believe the same is true in varying degrees of advantage or necessity in most oyster fisheries. In this case oyster laying is absolutely necessary to sweeten some of the oysters, and the source of pollution certainly existed long before legal memory if one is at liberty to resort to history and tradition. I do not think, however, that it would make any difference were that not so. The practice is traced back as far as living memory can go, and

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that is evidence of immemorial usage. Oyster laying often has to be resorted to for the purpose of feeding and fattening before the oysters are ready for consumption, and although oysters may be and I believe often are sold as dredged, yet they quite as often have to be deposited and left for a time before being fit for the market. In an interesting article on oysters in the 9th edition of the *Encyclopædia Britannica*, the temporary laying of oysters for such purposes as I have mentioned is treated as a regular "concomitant"—to use the writer's phrase—of an oyster fishery, and I cannot see how any valid objection can be raised to a practice so widespread and so ancient. The chief objection that has been made is that it amounts to an occupation of the soil. I think this is disposed of by the finding of the jury. It was clearly a question of fact for them, and in my opinion their finding is right. The mere sticking in of a stake to indicate a spot is too trivial to talk about, even if it be on the foreshore, which I think is not the case. It is quite true that the oyster laying may interfere with the uninterrupted user of the foreshore by the owner, but a like interference with territorial rights takes place in many instances which present no legal difficulty. The rights of inhabitants to recreate themselves on a village green have been repeatedly established by evidence and upheld by the courts, and yet they may absolutely destroy all chance on the part of the owner of making any, or any but the slightest, beneficial use of land which is undoubtedly his. The custom here alleged is not open to the objection that it is in substance a claim to a profit à prendre, nor in my judgment to any other legal objection to its validity. Apart from custom the owner of the foreshore owns and enjoys the foreshore subject to the common rights of all members of the public which are such as to reduce the value of the foreshore in nine cases out of ten to something of very small pecuniary value. The owner cannot build on it because the public have rights of passage over it everywhere *per mare et per terram*. In all but some exceptional cases he cannot graze it, because no herbage will grow upon it. Where herbage will grow upon it, as in the fens, I do not think oysters will be found to be composite factors. At all events the enjoyment of foreshore is subject to the common rights of fishing, and if oysters constitute a part of the fish to be taken, the right of fishing must include the necessary and practical incidentals, and if they involve the consequences that in some places he cannot dig ballast or sand for sale, as he can generally, he suffers no inconvenience or loss which is not common to him and the owner, say, for example, of the village green, who cannot dig pits or do other acts of ownership which would interfere with the rights of recreation of the inhabitants. I am of opinion, therefore, that whether the rights claimed be regarded as parts of the common law rights of oyster fishing, or as claimable by immemorial custom, they can stand in law, and as they have been established in fact, the acts complained of by the plaintiffs are justified. Suggestions were made that the rights in question, if upheld, might lead to trouble between the fishermen, whose numbers, it is said, are increasing, so that the old comities observed between themselves will no longer meet the necessities of the case. I do not think that such con-

siderations affect the existence or non-existence of the rights. Inconvenience of this kind must be always liable to arise when the class of persons enjoying concurrent rights over a limited area comes to include more than can conveniently enjoy the rights simultaneously. The remedy lies usually in some form of legislation. In the present case it seems to be amply met by the powers of regulation given to the plaintiffs by the order of the Board of Trade confirmed by the Act of 1876. My judgment must therefore be for the defendant with costs.

Judgment for the defendant.

Solicitor for the plaintiffs, *John A. Bartrum*, for *Robert Dobell*, Truro.

Solicitor for the defendant, *Sydney James*, for *J. Messer Bennetts*, Truro.

Wednesday, Nov. 6, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

BOWDEN (app.) v. TOLL (resp.). (a)

Vaccination — Proceedings under sect. 29 — No further notice—Proceedings under sect. 31 — Application to child between six and eighteen months old—Vaccination Act 1867 (30 & 31 Vict. c. 84), ss. 29, 31—Vaccination Act 1898 (61 & 62 Vict. c. 49), s. 1 (3).

After proper notice given to the appellant, a summons was taken out under sect. 29 of the Act of 1867, but this summons was dismissed.

Without any further notice a summons was issued under sect. 31.

No notice had been served by the public vaccinator under sect. 1 (3) of the Act of 1898, but he had visited the appellant's house to vaccinate the child, which was between six and eighteen months old.

Held, that an order under sect. 31 was rightly made.

CASE STATED.

The appellant was charged on the 13th May 1901, under sect. 31 of the Vaccination Act 1867, that the respondent, being the vaccination officer duly appointed, having reason to believe that the appellant's child, being more than six months old, had not been successfully vaccinated, and that the respondent had given notice to the appellant, the parent, to procure its vaccination; that such notice had been disregarded, contrary to the Vaccination Acts 1867 to 1898.

On the hearing it was proved and admitted that notice had been given to the appellant to procure the child to be vaccinated, and that the child was still living, and was under the age of fourteen, being between the age of six and eighteen months, and had not been vaccinated or had had the smallpox.

The respondent admitted this notice was anterior to the issue of a summons under sect. 29, and that no subsequent notice had been given, and that no notice of intention to visit the home under sect. 1 (3) of the Vaccination Act 1898 had been given since the child's birth, though such visit had been paid.

It was alleged by the appellant and not disputed by the respondent that at petty sessions

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on the 18th Feb. 1901 proceedings had been taken by the respondent against the appellant in respect of the same child, under sect. 29 of the Act of 1867, and that the summons had been dismissed, and it was contended that it was not competent for the justices to deal with a complaint under sect. 31 when they had previously dismissed a complaint under sect. 29 in respect of the same child on the same facts.

It was further contended by the appellant that whether or not they were competent to deal with the matter, the fact of the non-compliance with the requirements of sect. 1 (3) of the Act of 1898, in respect of the notice of the public vaccinator's visit, precluded any order being made under sect. 31 of the Act of 1867 in regard to a child born since the passing of the Vaccination Act 1898; that proceedings in regard to children resident from birth in the district should be taken under sect. 29 and not under sect. 31 of the Vaccination Act 1867, unless the child is of eighteen months and upwards.

The justices were of opinion that the remedies given by sects. 29 and 31 of the Act of 1867 were independent of each other, and that the dismissal of a summons under the former was no bar to proceedings under the latter, although no further notices were given between the summonses; that the fulfilment of the provisions of sect. 1 (3) of the Act of 1898 was not a condition precedent to proceedings under sect. 31; and that sect. 31 was not only applicable to children of the age of eighteen months and upwards.

They therefore made an order directing that the child should be vaccinated within twenty-eight days.

By the Vaccination Act 1867 (30 & 31 Vict. c. 84), s. 29:

Every parent or person having the custody of a child who shall neglect to take such child or to cause it to be taken to be vaccinated, or after vaccination to be inspected, according to the provisions of this Act, and shall not render a reasonable excuse for his neglect, shall be guilty of an offence, and liable to be proceeded against summarily, and upon conviction to pay a penalty not exceeding twenty shillings.

And by sect. 31:

If any registrar or any officer appointed by the guardians to enforce the provisions of this Act shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of the child to procure its being vaccinated, and that this notice has been disregarded, the justice may summons such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find after such examination as he shall deem necessary that the child has not been vaccinated nor has already had the smallpox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time.

By the Vaccination Act 1898 (61 & 62 Vict. c. 49), s. 1:

(1) The period within which the parent or other person having the custody of a child shall cause the child to be vaccinated shall be six months from the birth of the child, instead of the period of three months mentioned in section sixteen of the Vaccination Act of 1867, and so much of that section as requires the child to be

taken to a public vaccinator to be vaccinated shall be repealed. (2) The public vaccinator of the district shall, if the parent or other person having the custody of a child so requires, visit the home of the child for the purpose of vaccinating the child. (3) If a child is not vaccinated within four months after its birth the public vaccinator of the district, after at least twenty-four hours' notice to the parent, shall visit the home of the child, and shall offer to vaccinate the child with glycerinated calf lymph or such other lymph as may be issued by the Local Government Board.

Schultess Young for the appellant.—Under sect. 31 of the Vaccination Act 1867 it is a condition precedent that notice should be given before proceedings are taken. It is clear that the notice is the starting point, for it was laid down in *Knight v. Halliwell* (30 L. T. Rep. 359; L. Rep. 9 Q.B. 412) that where an information was laid for disregarding a notice under sect. 31, at a time exceeding twelve months from the disregard of a former notice, the parent could not be convicted without a fresh notice being given. He also referred to

Holloway v. Coster, 76 L. T. Rep. 57; 18 Cox C. C. 487; (1897) 1 Q. B. 347.

Here nothing was done, and no further notice was given between the proceedings under sect. 29 and sect. 31. The notice by the registrar was the 14th June 1900, the notice by the vaccination officer the 6th Dec. 1900; on the 18th Feb. 1901 the summons under sect. 29 was heard, and on the 13th May 1901 the present summons under sect. 31 was disposed of. The notice of December was a gratuitous notice such as was dealt with by the case of *Langridge v. Hobbs* (84 L. T. Rep. 319; (1901) 1 K.B. 497). [Lord ALVERSTONE, C.J.—That case only shows that a notice given under par. 6 (d) of the 4th schedule to the Vaccination Order 1898 does not affect the period of limitation of proceedings under the Vaccination Acts, and that such notice would not cure a lapse of time.] Here the public vaccinator did not give the twenty-four hours' notice required by the Vaccination Act 1898. He referred to

Francis v. Smith, 58 J. P. 429.

R. D. Muir, for the respondent, was not called upon to argue.

Lord ALVERSTONE, C.J.—There are three points raised in this case. The first is that the notice given is not a good notice, but I cannot see why it is not a good one. It is dated Dec. 1900, and is given by the vaccination officer, and points out to the appellant that he is in default, and requires him to have the child vaccinated within a given time, or otherwise proceedings will be taken. I think that is a good notice within sect. 31. The second point is whether the magistrates could entertain these proceedings under sect. 31, when there have been already proceedings, under sect. 29, which have been unsuccessful. But when you look at the sections I do not think there is any difficulty. Under sect. 29 the parent has to take the child to be vaccinated. And, if he has a reasonable excuse, then he is not guilty of the offence and no penalty is incurred. Under sect. 31, however, where the child for any reason has not been vaccinated, the magistrate can order it to be vaccinated within a certain time. I cannot see why any proceeding under sect. 29 should prevent the making of an order under sect. 31. The third point is that the visit of the vaccination officer to

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the house was not preceded by a notice in conformity with sect. 1 (3) of the Vaccination Act 1898. That might be an answer under sect. 29, but the statute of 1867 does not prevent the magistrate ordering the child to be vaccinated under sect. 31, because there may have been a slip of the vaccination officer in conforming with sect. 1 of the Vaccination Act 1898. It was also argued that the proceedings were bad, because the child was between six and eighteen months old, but there is nothing in either of the statutes to show that sect. 31 does not apply in such a case.

DARLING and CHANNELL, JJ. concurred.

Appeal dismissed.

Solicitors: *H. T. Nicholson; A. E. Passingham, Hitchin.*

Wednesday, Nov. 6, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

LESTER (app.) v. QUESTED (resp.). (a)

Gaming and wagering—Betting slips—Horse races—Wagering on a game of chance—Vagrancy Act 1824 (5 Geo. 4, c. 83)—Vagrant Act Amendment Act 1873 (36 & 37 Vict. c. 38), s. 3.

A bookmaker betting on horse races in a public place, and receiving slips of paper recording the bets and the money, does not commit an offence, within the Vagrancy Act 1824 as amended by the Vagrant Act Amendment Act 1873, of betting by way of wagering with tokens at a game of chance.

CASE stated upon an information charging the appellant under the Vagrancy Act 1824 as amended by 36 & 37 Vict. c. 38, s. 3, with unlawfully betting by way of wagering in a certain place with tokens—to wit, certain pieces of paper—at a game of chance.

The appellant was a bookmaker living at Sheerness, and on the 17th day of May 1901 was seen by the respondent on the Recreation Ground at Sheerness. While the appellant was there several persons approached him and were seen to hand him certain pieces of paper and sums of money. Only one person approached him at a time and appellant did not remain standing but walked about within certain limits. Respondent then arrested the appellant and took him to the police-station, and on searching him found slips of paper with different names of racehorses thereon and various amounts of money set opposite their respective names and a sum of money, 10l. 13s. 3½d., on him.

The appellant admitted that several persons separately approached him and that he received such slips of paper from such persons.

It was contended on behalf of the appellant that what appellant had done was not an offence under the statute upon which the information was preferred; that the pieces of paper handed to the appellant by the persons were not tokens, and therefore not instruments of gaming within the meaning of the statute; that the transactions were not a game of chance within the statute; that it was essential for a conviction to prove that the betting was at some game or pretended game of chance; that horse-racing was not a game of

chance and that there was no evidence before the court to prove that it was a game of chance.

In support of such contention the following cases were referred to by the appellant: *Tollett v. Thomas* (24 L. T. Rep. 508; L. Rep. 6 Q. B. 514), *Hirst v. Molesbury* (23 L. T. 559), *Ridgeway v. Farndale* (67 L. T. Rep. 318; 17 Cox C. C. 561 (1892) 2 Q. B. 309); while, on the other hand, *Tollett v. Thomas* (sup.) and *Ridgeway v. Farndale* (sup.), *Bew v. Harstow* (39 L. T. Rep. 233; 3 Q. B. Div. 454), *Jenks v. Turpin* (50 L. T. Rep. 808; 15 Cox C. C. 486; 13 Q. B. Div. 505), *Dyson v. Mason* (60 L. T. Rep. 265; 16 Cox C. C. 575; 22 Q. B. Div. 851), *Reg. v. Stoddart* (83 L. T. Rep. 538; (1901) 1 Q. B. 177) were referred to by the respondent.

Having regard to the whole of the case the magistrate upheld the contention of the respondent that the pieces of paper were tokens and instruments of gaming within the meaning of the statute, and that the wagering was at a game of chance within the statute, and held that the facts and circumstances above stated proved an offence within the meaning of the Acts, and he therefore convicted the appellant.

By the Vagrant Act Amendment Act 1873 (36 & 37 Vict. c. 38), s. 3:

Every person playing or betting by the way of wagering or gaming in street, road, or highway, or other open or public place, or in any open place to which the public have or are permitted to have access at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming at any game or pretended game of chance, shall be deemed a rogue and vagabond within the true intent and meaning of the recited Act, and as such may be convicted and punished under the provisions of that Act, or in the discretion of the justice or justices trying the case in lieu of such punishment, by a penalty for the first offence not exceeding forty shillings, and for the second or subsequent offence not exceeding five pounds.

Lincoln Beed for the appellant.

Robertson (Sutton with him) for the respondent.

LORD ALVERSTONE, C.J.—I am sorry that we cannot take the view of the learned magistrate. I think that the authorities show that mere betting on a horse race is not within the statute. There must be a game of chance, and some token whereby the game of chance is being carried on.

DARLING and CHANNELL, JJ. concurred.

Appeal allowed.

Solicitors: *Crossman, Pritchard, and Co.; The Solicitor to the Treasury.*

Thursday, Nov. 7, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

W. H. SMITH AND SON (apps.) v. KYLE (resp.). (a)

Shop Hours Acts—"Shop"—Stall for sale of newspapers—Temporary structure—Necessity of exhibiting notice on stall—Shop Hours Act 1892 (55 & 56 Vict. c. 62), s. 4.

A young person was employed by newsagents at their stall at R. railway station. His duties were that for some four hours each morning he was employed at a village two miles distant

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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where he delivered papers in the district, and then set up a stall consisting of a board laid on trestles, and sold newspapers there, and the remainder of his time he was employed at the stall at the R. railway station, at which stall there was duly exhibited the notice required by sect. 4 of the Shop Hours Act 1892, but no such notice was exhibited at the temporary stall.

Held, that the structure consisting of the board laid on trestles was not a "shop" within the meaning of sect. 4 of the Shop Hours Act 1892, and that therefore a notice under that section was not required to be exhibited therein; and, further, that the young person was not "employed" at this temporary structure, but was employed at the stall at the railway station.

CASE stated by justices of the peace for the county of Surrey.

At a petty sessions held at Reigate on the 13th April 1901 an information was preferred by the respondent against the appellants, W. H. Smith and Son, charging that the appellants on the 23rd March 1901, at Merstham, in the county of Surrey, then being the employers of a certain young person, one Albert Boorer, in a stall there, did fail to keep exhibited therein the notice required by sect. 4 of the Shop Hours Act 1892 and sect. 1 of the Shop Hours Act 1895.

This information was heard and determined by the justices, who convicted the appellants of the offence and imposed a fine of 1s. and costs.

The following facts were proved or admitted:—

On the 23rd March 1901 Boorer, who was under eighteen years of age, was in the employment for hire of the appellants, who are newspaper agents. From 6.30 a.m. to 10.15 a.m. he was employed for them at Merstham, and for the remainder of his time at Redhill railway station.

Merstham is a village having a railway station two miles from Redhill. Boorer's duties while at Merstham were first to deliver papers in the district, and then to set up a stall at the railway station and sell newspapers there. This stall consisted of a board laid on trestles. No such notice as is mentioned in sect. 4 of the Shop Hours Act 1892 was exhibited at the stall at Merstham, but there was such a notice duly exhibited at the appellants' stall at Redhill station.

On the part of the appellants it was contended that Boorer was not employed in and about a shop at Merstham, but was employed at Redhill, where he had an opportunity of seeing the notice; that the stall at Merstham was not a "shop" within the meaning of the Shop Hours Act 1892 as defined by sect. 9 of the Act of 1892; and that, even if it were a shop, it was not a shop in and about which Boorer was employed.

On the part of the respondent it was contended that the stall at Merstham was a "shop" within the meaning of the last-mentioned Act; that if an employer had two shops even in the same town he was required by the Acts to exhibit a notice at each of them; that the stall at Merstham was none the less a shop because Boorer was not employed there for the whole of his time (the definition in the Act of 1892 not requiring that he should be in order to bring the stall within the Act).

The justices were of opinion that the stall at Merstham constituted a shop within the meaning

of the Shop Hours Acts 1892 to 1895, as defined by sect. 9 of the Act of 1892, and they accordingly convicted the appellants.

The question of law for the opinion of the court was whether on the facts before mentioned the justices were warranted in holding that the stall at Merstham was a shop within the meaning of the Shop Hours Acts 1892 to 1895.

The Shop Hours Act 1892 (55 & 56 Vict. c. 62) provides:

Sect. 3. (1) No young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal times, in any one week.

Sect. 4. In every shop in which a young person is employed a notice shall be kept exhibited by the employer in a conspicuous place referring to the provisions of this Act and stating the number of hours in the week during which a young person may lawfully be employed in that shop.

Sect. 5. Where any young person is employed in or about a shop contrary to the provisions of this Act, the employer shall be liable to a fine not exceeding one pound for each person so employed.

Sect. 9. In this Act, unless the context otherwise requires—"Shop" means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed public-houses and refreshment houses of any kind. "Young person" means a person under the age of eighteen years.

Sect. 1 of the Shop Hours Act 1895 (58 & 59 Vict. c. 5) provides:

If any employer fails to keep exhibited the notice required by sect. 4 of the Shop Hours Act 1892 in manner required by that section, he shall be liable to a fine not exceeding forty shillings.

R. B. Acland for the appellants.—The question is whether this board on trestles is a "shop" within the meaning of the Act. Sect. 3 deals with the hours of employment, and sect. 4 provides that "in" every shop in which a young person is employed this notice must be exhibited, and sect. 9 gives the definition of "shop," which includes "stalls." The only change made by the Act of 1895 is that the penalty is increased to 40s. This board on trestles is not a "shop" within sect. 4, and it is not a "stall" within the definition of a shop in sect. 9. Sect. 4 deals with the shop "in" which a young person is employed, and even if this board could in any case be a stall, how could it be said that it was a stall "in" which this young person was employed? In the first place, this board was not a "stall" at all; and, secondly, even if it were, it is not a stall "in" which the young person was employed. The justices were therefore wrong in their finding.

A. Glen for the respondent.—To a great extent this was a question of fact for the justices, and they have found that this board on trestles was a shop; and, in so far as it was a question of law for them, they have also found that it was a shop. It is suggested that there is a difference in the wording of sects. 3 and 4, and that, while in sect. 3 the words are "in or about" a shop, the words in sect. 4 are "in" a shop. If it were physically impossible to put the notice in the particular place, there might be some force in the objection that this notice could not be exhibited on a stall of this kind; but here there is no such physical impossibility, as the notice could be placed on the stall. Where a stall occupies a space such as this, then the Act is complied with by putting the notice on the stall. It is not necessary that the

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stall should be a shop for the whole of the day; if it be a shop for any part of the day then the Act must be complied with by placing this notice on it, and the justices were right in so finding. He referred to

Savoy Hotel Company v. London County Council,
82 L. T. Rep. 56; (1900) 1 Q. B. 665.

LORD ALVERSTONE, C.J.—I am of opinion that this particular conviction cannot stand. I am not going to say anything that would lead to the supposition that for some purposes of the Act some structure such as this may not be a shop. For example, if a young person were employed by his employer for more than seventy-four hours in any one week at such a structure as the one now in question, then I think, in so far as it may be right to express any opinion upon the matter without having heard any argument on that point, that the structure would be a stall or shop within the prohibition in sect. 3 and for the particular purpose of that section. In this case, however, we have to consider sect. 4, and we have to consider it with reference to the words in the definition clause—"unless the context otherwise requires," the word "shop" shall have a certain meaning. I think for the purposes of this particular case and under sect. 4 the structure must be in some degree in the nature of a permanent structure. In this case the boy was really being employed at Redhill, going for some three or four hours to Merstham station. During part of that time he was employed in delivering papers in the district, and then he set up this stall, which consisted of a board laid on two trestles, at the railway station and sold newspapers there. In my opinion it would be putting a ridiculous construction on the Act to hold that this board on trestles was a "stall" and therefore a "shop" in respect of which the employer would be bound to exhibit a notice under sect. 4. I think the construction of the Act would clearly exclude such a structure as this from sect. 4. Further, it was not consistent with the facts to hold that the boy was employed at this stall at all. He was not really employed at the stall, but at the shop at Redhill. There being no mischief likely to be caused in the case, I think the conviction ought to be quashed.

DARLING and CHANNELL, JJ. concurred.

Conviction quashed.

Solicitors for the appellants, *Bircham and Co.*
Solicitor for the respondent, *Sir R. H. Wyatt*,
Clerk of the Peace of Surrey.

Nov. 7 and 8, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

SEALEY (app.) v. TANDY (resp.). (a)

Licensing—Licensed house—Person requested to leave—Right of licensee to eject from licensed premises after refusal to leave—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 18.

The occupier and licensee of an ordinary licensed public-house—not being an inn—has a right to request any person to leave his licensed premises, and to eject him therefrom upon his refusal to

(a) Reported by W. W. OBR, Esq., Barrister-at-Law.

leave, although at the time such person is requested to leave he is neither drunken, violent, quarrelsome, nor disorderly.

CASE stated by the metropolitan police magistrate sitting at Southwark Police-court, upon dismissing a charge of assault preferred by the appellant against the respondent.

The case was stated in pursuance of an order of the High Court directing the magistrate to state a case.

Upon the hearing of the charge the following matters were proved in evidence before the magistrate:—

The appellant, Arthur W. Sealey, was the occupier and licensee of certain premises known as the New Concord public-house, situate in Bermondsey, in the county of London.

The premises were licensed by the justices for the retail sale of all intoxicating liquors, but were not an inn for the reception of travellers.

On the 25th Feb. 1900 the respondent, who was not a traveller, entered the licensed premises of the appellant about three o'clock in the afternoon.

The appellant had on several former occasions ejected the respondent from his premises for using offensive language thereon and behaving in a disorderly manner.

The following was a note of the evidence taken before the magistrate on the hearing of the charge:—

The appellant, the licensee of the public-house, stated:

I have forbidden prisoner the house. At 3 p.m. on the 25th inst. he came in half drunk and threatened to fight me. I asked him to leave. He struck at me. I went to eject him, and he fell and kicked me on the side of the face very violently. He had thrown himself down and pretended to be in a fit. I went to eject him because of his bad behaviour on previous occasions. He struck at me before I put hands on him. I will not say he was drunk, but he was unfit to be served because of his previous conduct more than anything.

A witness for the appellant stated:

Prisoner came in full of abuse. He began at me. He used very foul language, and the appellant went to eject him and prisoner fell. I cannot say whether before or after he had been pushed. He kicked at Mr. Sealey (the appellant). There was a bit of a skirmish, and prisoner fell and prosecutor was kicked.

A police constable stated:

I was called at 3 p.m. to take prisoner into custody for assault. Prosecutor had a slight red mark. Prisoner went quietly. At the station prisoner said, "Prosecutor is a liar." The prisoner was not drunk.

The kick received by the appellant was the assault complained of, but the evidence of the appellant and his witness did not appear to the magistrate to be in accord as to when the kick was received and as to how the respondent came to be on the ground at the time. The magistrate was of opinion on the evidence of the appellant and his witness regarding the attempt made to eject the respondent that the appellant had acted with undue haste in proceeding to eject the respondent immediately upon the respondent's refusal to leave the house and without waiting until the respondent had behaved in a violent or disorderly manner, and that the appellant's witness, though repeatedly pressed by the magistrate upon the point, was unable to recollect a

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single expression of the foul language alleged to have been used by the respondent, and the magistrate found as a fact that at the time the respondent entered the appellant's premises he was neither drunken, nor violent, nor quarrelsome, nor disorderly, and he was satisfied that the appellant sought to eject the respondent solely on account of the respondent's conduct in the house upon former occasions, and that the kick had been given in the course of a struggle so initiated by the appellant and while the respondent was resisting forcible expulsion.

On these findings the magistrate dismissed the charge, holding that on the circumstances disclosed in the case the appellant's right to forcibly eject the respondent was dependent upon and controlled by sect. 18 of the Licensing Act 1872, and that on the authority of *Dallimore v. Sutton* (62 J. P. 423) the appellant had no right to forcibly eject the respondent on his refusing to leave when required unless at the time of such requirement the respondent was either drunken, violent, quarrelsome, or disorderly within the meaning of the section, and that the respondent was therefore entitled to resist the appellant when seeking to forcibly eject him.

The question for the opinion of the court was whether the magistrate was right in law in so holding, or whether the appellant was entitled to require the respondent to leave the licensed premises and to eject the respondent from the premises after the respondent had refused to leave the same although the respondent was not at the time of such requirement either drunken, violent, quarrelsome, or disorderly.

Sect. 18 of the Licensing Act 1872 (35 & 36 Vict. c. 94) provides:

Any licensed person may refuse to admit to and may turn out of the premises in respect of which his licence is granted any person who is drunken, violent, quarrelsome, or disorderly, and any person whose presence on his premises would subject him to a penalty under this Act. Any such person who upon being requested in pursuance of this section by such licensed person, or his agent or servant, or any constable, to quit such premises, refuses or fails so to do, shall be liable to a penalty not exceeding five pounds, and all constables are required on the demand of such licensed person, agent, or servant, to expel or assist in expelling every such person from such premises, and may use such force as may be required for that purpose.

Danckwerts, K.C. and *Bruce Williamson* for the appellant.—The magistrate was wrong in holding that before a person could be lawfully removed from licensed premises he must at the time have been guilty of the behaviour of the kind mentioned in sect. 18. This is a wrong view of the law. A request to leave is necessary, and therein the case differs from the case of ejecting a person from a private house, but upon such request the person is bound to leave, and, if he does not do so, he may be ejected. Licensed premises are in the same position in this respect as an ordinary shop opened for the sale of certain commodities. In each case there is an implied invitation to the public to enter, and, if a person so enters, before he can be removed he must be requested to leave; but if upon being requested to leave the licensed premises or the shop he refuses to do so, then he may be ejected, and no assault is committed provided no more force is used than is neces-

sary to remove him. The magistrate based his decision upon *Dallimore v. Sutton* (62 J. P. 423), decided by Wills and Kennedy, JJ. in 1898; but he took a wrong view of that decision. Wills, J. there distinctly points out that a licensee might have a common law right to turn anyone off his premises, but that he could only do so under sect. 18 of the Licensing Act 1872, under which the charge was laid, when the person was either drunken, violent, quarrelsome, or disorderly. That decision amounts to no more than this, that a person cannot be convicted under that section for refusing to leave when requested unless he comes within the class of persons mentioned in the section. It is no authority for the proposition that the licensee cannot turn a person off his licensed premises after requesting him to leave. The matter was considered in Ireland in *Reg. v. Justices of Armagh* (1897) 2 Ir. Rep. 57, and Holmes, J. (at pp. 67-8) points out the distinction between an inn and an alehouse in respect of the obligation of the licensed person to supply customers, and he says that the modern publican is not subject to an obligation analogous to that of an innkeeper. In this connection it is necessary to remember that the magistrate has found, first, that this house was not an inn; and, secondly, that the respondent was not a traveller. Even in the case of an inn the obligation to supply or accommodate a guest in the inn is limited to travellers, and ceases if the guest ceases to be a traveller:

Lamond v. Richard, 76 L. T. Rep. 141; (1897) 1 Q. B. 541.

And *a fortiori* it must be limited in the case of an ordinary licensed house. That case clearly shows that even in the case of an inn a person who is not a traveller, or who has ceased to be a traveller, can be requested to leave, and can be ejected on his refusal to leave; and it simply reduces this case to the case of a person entering any ordinary shop. If the licensee is entitled to eject a person—as he was in this case—and if while the landlord has hold of him to put him out the person lays hold of the landlord, he is guilty of assault:

Howell v. Jackson, 6 C. & P. 723.

The case of *Reg. v. Rymer*, (35 L. T. Rep. 774; 2 Q. B. Div. 136) is exactly in point in the same direction as showing that the licensee is under no obligation either to serve or to allow a person to remain on his licensed premises longer than he thinks right to do so.

The respondent did not appear.

LORD ALVERSTONE, O.J.—This is a case stated by a metropolitan police magistrate who had dismissed a summons for assault, because he considered that the proceedings out of which the assault arose were occasioned by the appellant, who is the occupier and licensee of a public-house, requesting the respondent to leave the house, and that therefore, whatever followed, the magistrate could not entertain the charge for assault. The magistrate seems to have thought that the only rights of a licensed person in such a case depended on the 18th section of the Licensing Act of 1872, and that unless the person was drunken, violent, quarrelsome, or disorderly at the time, he had no right to request him to leave. We think that the learned magistrate has overlooked two important elements of the case to which our attention

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was called in the argument by counsel for the appellant—namely, that, in the first place, this house was not an inn, but was only an ordinary licensed house; and, secondly, that the person who was turned out, or attempted to be turned out, was not a traveller. We think the distinction has been recognised in many cases, not only in the case of *Reg. v. Justices of Armagh (ubi sup.)*, but in the case of *Reg. v. Rymer (ubi sup.)*, and in one or two of the other cases cited to us for the appellant. In our opinion the distinction is well founded, and we consider that the occupier of a licensed house has a right to request a person to leave his house if he does not wish him to remain upon his premises. We also think it right to say, and in this case it is quite clear the magistrate himself thought, that there was nothing unjustifiable in one sense in the conduct of the appellant, because the magistrate has found that the man who was requested to leave was one of a gang of men who had been disorderly and had given trouble in the appellant's house. But we do not base our judgment upon that point. We think that the point taken by counsel for the appellant was right, that, except in the case of an inn and a traveller, the licensee and occupier of a public-house has a right to request a person to leave. Therefore this case must go back to the magistrate, in order, if necessary, that the question of assault should be tried. The objection the magistrate took does not prevail, and this appeal must be allowed.

DARLING, J.—I am of the same opinion. It seems to me there is and always has been a very great difference between the old form of inn and the modern public-house, or what was simply an alehouse. In one of the passages read by counsel for the appellant from the judgment of Holmes, J. in the case of *Reg. v. Justices of Armagh (ubi sup.)*, it was stated that the English inn was coeval with English literature, and I have no doubt that, when the learned judge said that, he was thinking probably of the inn as described in Chaucer, and perhaps as described by Dr. Johnson in Boswell's Johnson. The reading of that recalled to my recollection the passage in which Dr. Johnson said that one of the characteristics of an inn is that you are made welcome, and that the more noise you make, the more trouble you give, and the more good things you call for, the more welcome you are. And, having made that statement, he proceeded to repeat, as Boswell says, with great emotion a well-known verse from Shenstone. The particular person in this case did not make himself welcome, because he went beyond what was described as the more noise you make, the more trouble you give, and the more good things you call for, the more welcome you are. He seems to have been a person who belonged to a disorderly gang, who would not be a good customer as the publican very well knew, and the appellant acted therefore upon the right, and I think the undoubted right, which he had to say: "I am quite ready to serve some customers, even noisy customers, and I serve them; but you are the kind of customer who not only makes a noise, but will do me no good, and I will not serve you. I have the choice like other shopkeepers, and I will not serve you." It seems to me that the appellant, in acting as he did, acted really to the public advantage, because the other persons who

frequented the house might very well have complained if the publican were to allow a person who to his knowledge was a member of a disorderly gang to frequent his public-house. If he allowed one of a gang to frequent it, he must allow them all; at least there is no reason why he should allow one more than another, and by allowing such a gang to frequent his house he would undoubtedly endanger his licence. It seems to me, therefore, that he was acting not only within his rights, but in the public interest, when he told this person that he would not serve him, and would not allow him to remain there, and that the person to whom he said that ought instantly to have left.

CHANNELL, J.—I agree.

Appeal allowed. Case remitted to the magistrate.

Solicitors for the appellant, *Maitlands, Peckham, and Co.*

Friday, Nov. 8, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. BROS. (a)

Justices—Application for summons—Prima facie evidence of offence—Discretion of magistrate.

On an application for a summons, if the magistrate, after hearing the applicant's statement, is of opinion that if the summons were issued and the offence were proved he would nevertheless under the circumstances dismiss the summons at the hearing, he may in the exercise of his discretion refuse to issue the summons.

RULE nisi for a mandamus to a metropolitan magistrate and one H. Nosseck to show cause why the magistrate should not hear and determine according to law the matter of a certain application for a summons against H. Nosseck for unlawfully exercising the trade or calling of a baker by causing to be sold or exposed for sale bread at 7.40 o'clock in the morning of Sunday, the 28th July, 1901.

From the affidavit of the magistrate the facts seem to have been as follows:—

The prosecution was a Sunday observance prosecution, instituted under 3 Geo. 4, c. cvi., s. 16, by one Thomas Vinters, a baker, of 462, High-street, Tottenham, outside the jurisdiction of the magistrate's court, against Nosseck, a baker carrying on his business at 113, Backchurch-lane, within such jurisdiction.

The magistrate was informed that Nosseck was a person of the Jewish religion, and that he kept his shop closed on Saturday, during the Jewish Sabbath. There was a very large Jewish community within the jurisdiction of the magistrate, and that if Nosseck's shop and similar shops in the locality were closed on Sundays, as in the Act provided, this Jewish community would be put to considerable hardship in the matter of fresh baked bread.

The learned magistrate refused to issue a summons. In doing so he took into consideration that the prosecution was practically one for the observance of the Lord's Day and was instituted under a local Act. If it had been instituted under the public Act upon the Lord's Day Act

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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(29 Car. 2, c. 7) it would have been necessary, under the Sunday Observance Prosecution Act 1871 (34 & 35 Vict. c. 87), to have obtained the consent in writing of the chief officer of police, or of two justices of the peace, or of a stipendiary magistrate having jurisdiction in the place where the offence was committed to the prosecution. If an application for such consent had been made to the magistrate as stipendiary magistrate he should under the circumstances have refused it. Exercising now a similar discretion he refused to issue the summons.

Henriques showed cause.—In the first place the magistrate has heard and determined the matter. He has done all he is bound by law to do. The application was made *ex parte* and he heard the applicant fully. [Lord ALVERSTONE, C.J.—Undoubtedly the magistrate gave a full hearing; the real question is whether or not he had a discretion to refuse the summons after a *prima facie* case was made.] As to that the magistrate put his decision on two grounds, either of which, I submit, would be sufficient to sustain it. In the first place he held that the application was vexatious, and that if he did issue a summons he would on that ground dismiss it. I submit that where the magistrate has a discretion to dismiss a summons he has a discretion to refuse to issue it. In the second place he held that the information was really laid in regard to an offence against the observance of the Lord's Day, and that it would have been more properly laid under the Lord's Day Act (29 Car. 2, c. 7). If it had been so laid, then, under the Sunday Observance Prosecution Act 1871, the written consent of himself or of certain other authorities would have been necessary before the summons could be issued. If application had been made to him for such consent he would have refused it, and exercising the same discretion now he refused it. Sect. 16 of 3 Geo. 4, c. cvi., is practically identical with sect. 1 of the Lord's Day Act. Both these grounds are, I submit, relevant to the consideration of whether or not a summons should issue, and if so the magistrate has acted within his powers in refusing to issue this summons, and this court will not review his decision. Counsel cited:

Reg. v. Adamson, 33 L. T. Rep. 840; 1 Q. B. Div. 201;

Ex parte Lewis, 59 L. T. Rep. 338; 21 Q. B. Div. 191;

Reg. v. Ingham, 14 Q. B. 396;

Reg. v. Boteler, 8 L. T. Rep. 514; 33 L. J. 101, M. C.

J. J. Johnson for the prosecutor.—In the first place, even if this information were laid under the Lord's Day Act, the consent of the magistrate would not be necessary to the issue of the summons. Under the Sunday Observance Prosecution Act of 1871 the magistrate is only one of the authorities who may consent to a prosecution. And in dealing with this case the magistrate used "vexatious" not as applying to the mode of proceeding in this particular prosecution, but rather as applying to the policy of the Act. The Act in this case is not a Sunday Observance Act. [Lord ALVERSTONE, C.J.—The magistrate's complaint is that you are using it as if it were a Sunday Observance Act. What objection is there to his taking into consideration that the proceedings should more properly be taken under

another statute?] It is for the prosecutor to decide under what statute he will proceed. If he makes a *prima facie* case under any statute he may choose, I submit that, unless the magistrate does not believe the evidence, he has no discretion but to issue the summons. Here the magistrate has chosen to dissent from the policy of the statute. He says that to enforce the law would be a hardship to the community. That is what he means when he says the prosecution is vexatious. [CHANNELL, J.—But the magistrate, having issued the summons, might at the hearing dismiss it on these grounds. Why then should he not take them into consideration in determining whether he should issue any summons at all?] Simply because the law gives him no such right. On issuing the summons he is only acting ministerially. It is the right of the prosecutor to have his complaint heard.

Lord ALVERSTONE, C.J.—We are asked to issue a *mandamus* to order the learned magistrate to grant this summons. I do not think we can do so. The law has been correctly laid down in *Reg. v. Bird* (*sup.*), where it is said that a justice of the peace may, in the exercise of his discretion, refuse to issue a summons if to issue a summons would be vexatious and improper, even if there were evidence of the offence. I understand Mr. Bros in this case to say that under the circumstances the issue of a summons would be improper. The summons is sought to be taken out under sect. 16 of 3 Geo. 4, c. cvi., which is a local Act applicable to this district. Sect. 16 prohibits bakers from baking bread or exposing it for sale on Sunday except between certain hours. This section is not in the Sunday Observance Act 1871, but in an Act regulating the baking of bread. That Act was probably passed to relieve bakers from some of the restrictions contained in an earlier Act, and was not passed for the purpose of securing the observance of Sunday. No one looking at the earlier Act could say it was intended as a Sunday Observance Act, as was the Lord's Day Act. As to the latter Act, in 1871 an Act, called the Sunday Observance Prosecution Act, was passed, which, with the object of imposing a restriction on prosecutions under the Lord's Day Act, made necessary to such prosecutions "the consent in writing of the chief officer of police of the police district in which the offence is committed, or the consent in writing of two justices of the peace or a stipendiary magistrate having jurisdiction in the place where such offence is committed." Mr. Bros says that in his opinion this was really a prosecution for non-observance of Sunday, and should have proceeded under the Lord's Day Act. If an application had been made to him for leave to prosecute under that Act he would have refused it. The summons applied for was to punish a Jewish baker for selling his bread on Sunday. There was a large Jewish community in the district, and the baker proceeded against had kept his shop shut on Saturday. If he had issued the summons applied for, the learned magistrate says he would have dismissed it at the hearing. I cannot but think that it is quite a proper matter for a magistrate to take into consideration that there are other methods of proceeding better applicable to the nature of the offence alleged. It was not argued that the learned magistrate could not, upon hearing the summons, dismiss on the grounds stated by him.

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That being so, I also think he is entitled to take such grounds into consideration when exercising this discretion whether or not to issue a summons. The application for the summons was carefully considered. There is, therefore, no ground for interfering with the discretion the magistrate had exercised, and the rule for the *mandamus* must be discharged with costs.

DARLING, J.—I entirely agree.

CHANNELL, J.—I agree.

Rule nisi discharged.

Solicitors for the prosecutor, *Pattinson and Brewer*.

Solicitor for the defendant, *D. A. Bomain*.

Friday, Nov. 8, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GOODRICH v. TOWN CLERK OF GREAT GRIMSBY. (a)

Registration of voters—Mistake as to qualification—Declaration by voter—Amendment of list—Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 24.

A declaration made by a voter, under sect. 24 of the Registration Act 1878, correcting an error as to such voter's qualification in the list of voters empowers the revising barrister to amend such list.

Lord v. Fox (65 L. T. Rep. 617; (1892) 1 Q. B. 199) distinguished.

CASE stated by the revising barrister for Great Grimsby.

The name of one Robert Mitchell appeared in the overseers' list of occupiers, division 1, for a "dwelling-house" at 84, Watkin-street, in the borough of Great Grimsby. Objection was taken to it on the ground that Robert Mitchell had not occupied those premises for the full twelve months prior to the 15th July preceding.

A statutory declaration for correcting misdescription in list had been duly filed with the town clerk prior to the 5th Sept., in which it was declared by Robert Mitchell that the correct nature of his qualification and qualifying property was not "dwelling-house" at "84, Watkin-street," but "yard and stables," "back of 84, Watkin-street."

It was proved to the satisfaction of the revising barrister that Robert Mitchell had for the whole of the twelve months prior to the 15th July preceding occupied the yard and stables mentioned in the declaration adjoining the dwelling-house at 84, Watkin-street, which yard and stables were of the requisite value, and it was submitted on his behalf that the revising barrister should correct the list according to the suggested amendment in the declaration, and substitute "yard and stables" for the former qualification "dwelling-house." *Foskett v. Kaufman* (54 L. T. Rep. 64; 16 Q. B. Div. 279) and *Plant v. Potts* (63 L. T. Rep. 585; (1891) 1 Q. B. 256) were relied upon.

The revising barrister thought that in the circumstances of this particular case he could not hold that the declaration could be treated as the correction of a misdescription or that it dispensed with the necessity of a formal claim with

its incidents of timely notice to overseer, publication, and possible challenge. He accordingly held the declaration to be insufficient, refused to accept it as a correction of the former qualification, and expunged the name of Robert Mitchell from the list of occupation voters.

Notice of appeal was given by Henry Goodrich.

Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26).

SECT. 24. Any person who is entered on any list of voters for a Parliamentary borough or any Burgess list subject to revision under this Act for a municipal borough, and whose name or place of abode or the nature of whose qualification or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list may, whether he has received a notice of objection or not, if he thinks fit, make and subscribe a declaration in the form in that behalf in the schedule to this Act.

Percival Hughes for the appellant.—I submit that the revising barrister could amend. The declaration here is in the form given in the schedule to the statute, and the corrections made are almost exactly similar to those given in the form: (see Form M.) Besides, although the point has not been expressly decided, the judgments in *Foskett v. Kaufman* (sup.) and *Plant v. Potts* (sup.) show that the court there assumed that where a declaration has been made the revising barrister can amend the list. *Lord v. Fox* (65 L. T. Rep. 617; (1892) 1 Q. B. 199) should be brought to the attention of the court, since it is hostile to my contention, but I ask the court to notice that in that case the fact that there was a declaration was not pressed upon the attention of the learned judges.

The respondent did not appear.

LORD ALVERSTONE, C.J.—I think this appeal must be allowed. The facts are as follows: The qualification was stated erroneously as "dwelling-house" instead of "yard and stables." I think that the Court of Appeal have held that a declaration made under sect. 24 of the Registration Act 1878 gives the revising barrister power to make alterations in the qualification stated in the list which he could not otherwise make. The section provides that declarations when made shall be open free of charge to public inspection, and sect. 25 provides, further, that if any person falsely or fraudulently signs any such declaration he shall be guilty of a misdemeanour, and punishable by fine or imprisonment. In *Foskett v. Kaufman* (sup.), which is a case where no declaration had been made, Lord Esher, M.R. says (at p. 289): "If the voter acts under sect. 24 of 41 & 42 Vict. c. 26, then the reason for taking away this power of the revising barrister does not apply, because the declaration must be sent to the clerk of the peace or town clerk as the case may be by a certain date, and the objector has the power of seeing that declaration, and the opportunity of inquiring whether the new claim and the declaration in support of it are true or not, so that he is not taken by surprise at the hearing; and there is a very good reason why the limitation of the revising barrister's power should not take effect in that case." Hence, though the Court of Appeal may not have actually decided this particular point, it has con-

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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sidered it, and expressed its opinion that where there is a declaration the revising barrister may amend. Mr. Hughes very properly called our attention to *Lord v. Fox (sup.)*, where Lord Coleridge, C.J. thought that the revising barrister had no power to make an amendment which would alter the description of the voter's qualification. But it is important to observe that though a declaration had been made in that case the court was not asked to consider the effect of it.

DARLING, J.—I agree.

CHANNELL, J.—I also agree. We express no opinion as to whether or not the revising barrister could have made the amendment if there had been no declaration under sect. 24 of the Registration Act 1878, but the effect of that declaration is to enlarge the power of the revising barrister. The revising barrister is to follow the declaration. The person claiming the vote who has omitted to make a correct claim is allowed to correct such omission on the terms that he makes and swears to a declaration. This is the view of the law taken in *Foskett v. Kaufman (sup.)* and *Plant v. Potts (sup.)*. There was no declaration in these cases, and in *Lord v. Fox (sup.)*, where there was a declaration, nothing is said about the effect of it, and therefore that case does not stand in the way of our present decision.

Appeal allowed.

Solicitors for the appellant, *Routh, Stacey, and Castle*, for *Henry Thompson and Sons*, Grantham.

Nov. 20 and 21, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

CRABTREE (app.) v. FERN SPINNING COMPANY LIMITED (resps.). (a)

Factories—Young person—Boy cleaning machine—Person in charge starting machine—"Allowing" boy to be in machine—Injury to boy—Liability of employers—Factory and Workshop Act 1895 (58 & 59 Vict. c. 37), s. 9, sub-ss. 2, 3.

A young person who was employed in a factory by a person in charge of a self-acting machine, was ordered by the person in charge of the machine to clean a part of the machine, and for this purpose the boy was obliged to go into the space between the fixed and traversing portions of the machine. When the order was given the machine was properly stopped; but while the boy was still in this space the person in charge of the machine, thinking the boy was clear of the space, started the machine, whereby the boy received injuries from which he died.

Held, that, as the person in starting the machine was acting under the belief that the boy was clear of the space, the boy was not "allowed" by him to be in the prohibited space at the time of the accident, within the meaning of sub-ss. 2 and 3 of sect. 9 of the *Factory and Workshop Act 1895*, and that the employers, the occupiers of the factory, were not liable in consequence thereof to a fine under sect. 83 of the *Factory and Workshop Act 1878*, though such occupiers would have been liable for an "allowance" by their servant.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

CASE stated by justices of the peace acting for Oldham in the county of Lancaster.

An information was preferred by the appellant, an inspector of factories and workshops, against the respondents, the Fern Spinning Company Limited, under sub-sect. 2 of sect. 9 of the *Factory and Workshop Act 1895*.

The information set out that on the 10th May 1901 at Shaw, in the county of Lancaster, the respondents were the occupiers of a certain factory wherein a person was allowed, contrary to the *Factory and Workshop Acts 1878 to 1895*, to be in the space between the fixed and traversing portions of a self-acting machine, the said machine not being stopped with the traversing portion on the outward run, whereby the respondents were liable to a penalty not exceeding 3*l.*

The following facts were proved or admitted:—

The appellant was an inspector of factories for the Oldham district; and the respondents were the occupiers of a factory at Shaw, the same being a factory within the meaning of the *Factory Acts*.

William Ralph was in employment at the factory as a little piecer, and was a young person within the meaning of the *Factory Acts*. He was so employed by one John Driesen, who was then in the employ of the respondents and in charge of a self-acting machine, and on the day in question (the 10th May 1901) the boy was ordered by Driesen to clean the scavenger cloth hung under the rolling beam of the machine for the purpose of cleaning the top of the carriage as the carriage passes under the cloth. In order to do so the boy was obliged to be in the space between the fixed and traversing portions of the self-acting machine, and was, at the time of the accident, at a distance of sixteen yards or thereabouts from the starting handle of the machine where Driesen was stationed. At the time the order was given the machine was stopped with the traversing portion thereof on the outward run.

While the boy was still in the space between the fixed and the traversing portions of the self-acting machine, and while cotton threads were stretched over the space, Driesen thinking that Ralph was clear of the space started the machine. The boy was in consequence caught between the carriage, which is the traversing portion of the machine, on the outward run and the spring piece, which is a part of the fixed portion of the machine. Driesen, finding that something prevented the carriage from running in up to its full extent, stopped the carriage on its next outward run, and saw the boy Ralph fall down between the spring piece and the carriage. The boy had received injuries from which he shortly afterwards died.

The carriage of the self-acting machine passes about 4in. underneath and about 10in. beyond the roller beam. The space traversed by the carriage on each run is about 64in. from the front stop to the spring piece against which the boy was crushed. The carriage on the inward run traverses the 64in. in about two seconds. While on the outward run it moves comparatively slowly, traversing the same space in about ten to twelve seconds.

There were no regulations or instructions in the factory whereby persons employed in the space between the fixed and traversing portions of a

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self-acting machine should report themselves when they had left such space.

It was contended by the appellant that the respondents had allowed the boy Ralph to be in such space contrary to the provisions of sect. 9, sub-sect. 2, of the Factory and Workshop Act 1895, and he referred to the case of *Prior v. Slaitthwaite Spinning Company Limited* (78 L. T. Rep. 532; (1898) 1 Q. B. 881).

It was contended on behalf of the respondents that they had taken adequate precautions to prevent Ralph from being in such space.

The justices dismissed the information on the ground that the respondents were not responsible for Ralph being in such space as aforesaid, and they were of opinion that Driesen improperly started the machine and was responsible for doing so.

The question of law for the opinion of the court was whether the justices ought to have convicted the respondents on the facts herein stated, and the court was asked to remit the case to them with its opinion thereon.

The Factory and Workshop Act 1895 (58 & 59 Vict. c. 37) provides:

Sect. 9.—(2.) A person employed in a factory shall not be allowed to be in the space between the fixed and the traversing portions of a self-acting machine unless the machine is stopped with the traversing portion on the outward run, but for the purpose of this provision the space in front of a self-acting machine shall not be included in the space aforesaid. (3.) A factory in which a traversing carriage is allowed to run out in contravention of this section shall be deemed not to be kept in conformity with the principal Act, and any person allowed to be in the space aforesaid in contravention of this section shall be deemed to be employed contrary to the provisions of the principal Act.

The Factory and Workshop Act 1878 (41 & 42 Vict. c. 16) provides:

Sect. 83. Where a child, young person, or woman is employed in a factory or workshop contrary to the provisions of this Act, the occupier of the factory or workshop shall be liable to a fine not exceeding three, or if the offence was committed during the night, five pounds for each child, young person, or woman so employed.

Sect. 87 gives the occupier of a factory or workshop, who is charged with an offence against the Act, the right of having any other person, whom he charges as the actual offender, brought before the court, and if after the offence has been proved such occupier proves to the satisfaction of the court that he had used due diligence to enforce the execution of the Act, and that such other person had committed the offence without his knowledge, consent, or connivance, then such other person shall be summarily convicted, and the occupier shall be exempt from any fine.

H. Sutton (the *Attorney-General* with him) for the appellant.—The question is whether the boy was “allowed” to be in this space within the meaning of sub-sect. 2 of sect. 9 of the Act of 1895. The boy was wrongly in this place by the negligence of Driesen, and the justices thought that because Driesen was in fault therefore the respondents were not in fault. That was a wrong view of the section. Driesen by his negligence allowed the boy to be in this prohibited place, and he may have been liable, but that does not show that the respondents are not also liable. For any

contravention of this Act the occupier is responsible, though he may exempt himself from liability in certain cases, under sect. 87 of the Act of 1878, by bringing in the actual offender. “Shall not be allowed”, in sub-sect. 2 means shall be prevented from being in the space. If a person in the position of Driesen does not take proper precautions to prevent a person going into the prohibited place, then he “allows” him to be in that place, and the boy was allowed to remain after a time when this space had become a prohibited place. On the facts as stated there was sufficient evidence to show that Driesen allowed the boy to be in this space. Having allowed him to be there when it was proper for him to be there, he did not take proper means to prevent him from being there when it had ceased to be proper for him to be there. The justices were therefore wrong in not convicting the respondents.

R. B. Acland for the respondents.—The decision of the justices was right. If the contention for the appellant were to prevail it would amount to striking the word “allowed” out of the Act altogether, which would be a change of very far-reaching importance. If we look at sect. 83 of the Act of 1878 we see that there are two classes of offences created under it, namely, offences which consist in doing something which is absolutely prohibited, and offences which consist in permitting something which a person is not “allowed” to do, such as not allowing a young person times for meals, or in allowing them to remain in the rooms at improper times. The reason why the occupiers of the factory in the case of *Prior v. Slaitthwaite Spinning Company Limited* (78 L. T. Rep. 532; (1898) 1 Q. B. 881) were convicted was that the charge there was for the breach or disregard of a thing which was absolutely prohibited, and not—as here—for allowing something to be done. That case is therefore distinguishable from the present. “Shall not allow” does not mean and is not synonymous with “shall prevent.” To “allow” a thing the mind of the person must be brought to permit the act which the young person has done; and we find the same distinction in the Licensing Acts between an absolute prohibition against doing a thing and prohibition by not allowing the thing to be done. The mind of Driesen not having gone with the fact that the boy was within the prohibited area, it is impossible to say that he or any one “allowed” the boy to be there.

Sir Robert Finlay (A.-G.) in reply.—The statute says that the boy shall not be allowed to be in this space. If the boy is there owing to the negligence of the person in charge, then he is “allowed” to be there within the meaning of the section. The man in charge, by his negligence, allowed him to be there. The respondents’ contention comes to this, that where a statute says a thing is not to be allowed, then it is an answer to say that the person did not know. Driesen, by his own negligence, started the machine; he ought to have satisfied himself that the boy was not in this space. He may show that he has taken every reasonable precaution to prevent him from being in the space, but it is no answer for the respondents to say that he merely did not know and did not apply his mind to it. He ought to have applied his mind to it, and it makes his

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employers liable if, by his own negligence, the forbidden act takes place. To bring the case within the section it is enough if the young person be in the prohibited place at the prohibited time by the negligence of any person for whom the employers are liable. Any other construction would unduly narrow the operation of the section.

LORD ALVERSTONE, C.J.—The question for our consideration is whether or not we ought to overrule the magistrates who came to the conclusion that upon the evidence before them they could not entertain a summons against the occupiers of a factory for allowing a boy to be in a certain space, as regards which space there is a prohibition against the boy being allowed to be there. The case is, in my opinion, one of considerable difficulty, but upon the whole I have come to the conclusion that the magistrates were right, and that we ought not to send the case back to them. The words of the statute upon which the question depends are sub-sects 2 and 3 of sect. 9 of the Factory and Workshop Act 1895. I agree that it is material to understand the structure of the Act and to go back to the old Act for certain purposes, but for the purpose of understanding this particular matter I do not think it is necessary to refer to anything but the later section. By sub-sect. 2 "A person employed in a factory shall not be allowed to be in the space between the fixed and the traversing portions of a self-acting machine, unless the machine is stopped with the traversing portion on the outward run"—that is to say, a person can only go into this space when the machine is stopped in a given position, so that it will have to move further out and then come back again; and it is therefore contemplated that if an accident occurs there will be some little further time for him to get out of the machine. The words, which to my mind have certainly created considerable difficulty, are the words at the end of sub-sect. 3 "Any person allowed to be in the space aforesaid . . . shall be deemed to be employed contrary to the provisions of the principal Act." The only other material sections are two sections of the Factory and Workshop Act 1878—namely, sect. 83, under which the occupier can be summoned for a penalty in the event of a person being employed contrary to the statute, and sect. 87, which provides that, when the occupier is charged with the offence and he alleges that there is an actual offender who has caused or committed the offence, he may bring him before the court, and if he shows that the offence was committed without this knowledge, consent, or connivance, the other person may be dealt with; and there is also the provision that the inspector may of his own motion bring the actual offender before the court if he has reason to think that the occupier had nothing to do with the matter, and had taken proper steps to avoid the accident. In this particular case the magistrates have found that the boy was let in or went in when the machine was stopped upon the outward run, and the accident occurred by the man in charge of the machine, who was distant about 16 yards, starting the machine, thinking the boy had got clear of the space, or, in other words, was out of the machine. I wish to say, that it may not be thought that I am deciding any further than I decide in this case, that if there had been a negligent allowance by

any person, being a servant or *employé* of the occupier, in my opinion, *prima facie* there would have been an offence within the section. In other words, the section is not confined to any act that the occupier himself has allowed, but it also includes an allowance by a servant or agent of the occupier; otherwise I do not think that any proper effect would be given to the words that "a person allowed to be in the space . . . shall be deemed to be employed contrary to the provisions of the principal Act"; and if I had come to the conclusion that there was any evidence that Driesen had allowed this boy to be in this space after the machine had ceased to be stopped, I should have thought that the magistrates ought to have determined the case, and ought, if the defendants were going to be acquitted, to have dealt with the matter under sect. 87. But the case finds that Driesen, when he started the machine, thought that the boy was clear of the space; or, in other words, he did not allow, not negligently, and certainly not intentionally allow, the boy to be within the machine. Although these Factory Acts, which I think ought to be construed strictly in the interests of human life and limb, are Acts which undoubtedly do intend to deal with states of circumstances that may lead to danger, yet it seems to me that they do not by such provisions as are contained in this subsection purport to deal with cases of negligence which are inconsistent with a previous breach of the statute. Therefore I come to the conclusion that in this particular case the accident was occasioned by Driesen starting the machine under the belief that the boy was not in the space, and that, that being so, the boy was not, either by the respondents, or by any person for whom they were responsible, allowed to be within the space. I only say again that any evidence of allowance by any agent, whether negligent or not, or whether intentional or not, would, in my opinion, create a *prima facie* case which would have to be dealt with under sects. 83 and 87. In this case upon the findings I think that the magistrates were right, and that their decision ought to be affirmed.

DARLING, J.—I am of the same opinion. It seems to me that this case could only be logically put upon the ground upon which Mr. Sutton put it, and that the moment that that ground was given up, as the Attorney-General gave it up, the whole basis of the argument upon which the appellant could succeed, failed. Mr. Sutton said that these words "shall not allow" mean in the statute "shall prevent," and that they have been so construed, not only in this but in other instances, and that the appellant really came here in this case to have that view affirmed. He went this length, and he was bound to go this length, that if the master allowed the boy to get into the space when the machine was stopped, where he might legitimately allow him to get, and then the boy started the machine himself and got hurt, still the master would be liable under the statute, because he did not prevent the boy from doing it. That would be giving the statute a logical application, but I cannot bring myself to think, and the Attorney-General could not bring himself to think, that that was what the statute meant. In fact the Attorney-General expressly said that he did not contend that, and that the statute did not mean that. I think that if the

Legislature had meant anything of that kind they would have said so; they would have said "shall prevent." They did not use those words; but they used the words "shall not be allowed." It seems to me that a man cannot be said to allow that of which he is unaware, or that which he cannot prevent. In this case what did the respondents allow? They allowed the boy to go into the space behind this machine and to be there while the machine was stationary. They were perfectly justified in doing that. Then the respondents' servant, Driesen, negligently, as I assume, having forgotten that the boy was there, started the machine. The respondents only allowed one thing, the boy's being there while the machine was stationary, and in that they were justified by the statute. It is true that they did not prevent the boy's being in that space after the machine was started, but to this the statute does not apply. They did not prevent the negligence of their servant Driesen; but they did not, in my opinion, allow it. They did not sanction or permit it; they merely failed to foresee it, and doing so, forbid the boy to remain in the space. Driesen did not allow the boy to be in the space after the machine was started, because he did not remember that the boy was there. For these reasons it seems to me that it would be straining the words of the statute beyond what the Legislature could have intended, to hold that the words "shall not allow" mean "shall absolutely prevent," and unless we give them that meaning I do not see how we could decide in favour of the appellant in this case.

CHANNELL, J.—I agree. I base my decision entirely upon the finding in the case—namely, that Driesen thought that the boy was clear of the space. I do not think it is necessary to say whether or not in some places in these Factory Acts it may be right to read the words "shall not be allowed to be" as meaning "shall be prevented," or still more likely as meaning that "reasonable care shall be taken to prevent." That may be so. But applying the words of this particular sub-section to the facts that are found, it seems to me to be quite impossible to say that Driesen allowed the boy to be in the place where he believed he was not. The very foundation of the complaint is that he—possibly wrongly, thought that the boy had gone away when he had not. If he did in fact, however wrongly, think that the boy had gone away, it seems to me to be quite impossible in any reasonable meaning of the words to say that he allowed him to be there. Consequently, having regard to that finding in the case, I think there is no evidence upon which we could possibly say that the magistrates could have held that anybody allowed the boy to be there. I quite agree with what my Lord has said about the liability of the master for the act of his servant, if the servant had allowed the boy to be in this prohibited space. *Appeal dismissed.*

Solicitors: for the appellant, *The Solicitor to the Treasury*; for the respondents, *Chester, Broome, and Griffiths*, for *H. Booth and Sons*, Oldham.

CROWN CASES RESERVED.

Oct. 26 and Nov. 9, 1901.

(Before Lord ALVERSTONE, C.J., WILLS, GRANTHAM, KENNEDY, and RIDLEY, JJ.)

REX v. TIBBITS AND WINDUST. (a)

Pervverting due course of law and justice—Attempt to pervert due course of law and justice—Comment on pending trial—Contempt of court—Indictable offence—Conspiracy—Evidence—Test of criminality—Libel—Newspaper—Editor—Reporter—"Crime Investigator."

To publish statements which are calculated or tend to prejudice or influence the minds of those who constitute a tribunal which is to try an accused person, is to attempt to pervert the due course of law and justice, and is an indictable offence. It is also a contempt of court with which the court may deal summarily. The test of the criminality is not the result of the judicial proceedings, for a guilty person is entitled to an impartial trial.

A. and C. were charged with certain felonies and misdemeanours, were committed for trial to the B. Assizes, and convicted. T. was the editor of, and W. a reporter, employed under the name of "Crime Investigator" by the proprietors of, the W. D., a newspaper. During the hearing by the committing magistrates of the charges against A. and C., and from time to time before the B. Assizes, articles incriminating A. and C. appeared in the W. D. purporting to be reports written by the "Crime Investigator." These articles were circulated in B. There was evidence that W. had been present at the hearing by the magistrates, and had made notes of the proceedings, and that he had on a previous occasion described himself as the "Crime Investigator" of the W. D. T. and W. were indicted for an attempt to pervert the due course of law and justice, and conspiracy for this purpose.

Held, that T. and W. were properly convicted of an attempt to pervert the due course of law and justice, that there was evidence that they had published the articles, and that the fact that the articles could not have appeared in the W. D. without their concurrence was evidence on which the jury might find them guilty of conspiracy.

THIS was a case stated by Kennedy, J.

Charles John Tibbits and Charles Windust were indicted at the Bristol Summer Assizes on an indictment containing sixteen counts, in which they were charged with: (1) An unlawful attempt to obstruct and pervert the due course of law and justice; (2) the unlawful doing of an act calculated and tending to the same result; (3) the composing, printing, and publishing of matters with the same intents; and (4) a conspiracy to obstruct and pervert the due course of law and justice.

The charges embodied in the indictment were based upon the alleged composition, printing, and the publication in Bristol of portions of certain issues of a newspaper known as the *Weekly Dispatch*, at various dates between the 13th Jan. 1901 and the 4th March 1901 inclusive.

These portions consisted of statements as to

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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the case of one David Allport and one Louisa Eleanor Chappell, and appeared in the said newspaper whilst certain charges of felony and misdemeanour against both those two persons were being heard before Charles Coates, the magistrate, who ultimately committed them for trial, and before and during the subsequent trial of those two persons at the assizes before Day, J.

The hearing before the magistrates commenced on the 1st Jan. 1901 and continued at intervals till the 8th Feb. 1901.

The charge preferred against Allport and Chappell before the magistrates was in the first instance the charge of an offence against sect. 1 of the Prevention of Cruelty to Children Act 1894, in respect of A. B. Allport and W. C. Allport. On the 17th Jan. there was a further charge against them of the felony of attempting to murder a child named Arthur Bertie Allport.

At a subsequent hearing there was a further charge of conspiracy to murder the same child. On the 6th Feb. there was a further charge of conspiracy to commit the offence against sect. 1 of the Prevention of Cruelty to Children Act 1894 in respect of both the above-named children.

On the 8th Feb. Allport and Chappell were committed to take their trial at the next Bristol Assizes, which had been fixed to commence on the 20th Feb. Allport and Chappell were put upon their trial at the assizes before Day, J. on the indictment for the attempt to murder Arthur Bertie Allport.

The trial commenced on the 1st March and terminated on the 5th March. They were found guilty, and sentenced, Allport to fifteen years penal servitude and Chappell to five years penal servitude.

The *Weekly Dispatch* is the property of a company registered with limited liability. Charles John Tibbits was the editor of the newspaper, Charles Windust was employed upon the staff of the said newspaper and acted as a reporter, and was the special "Criminal Investigator" mentioned in the headings of the columns of the *Weekly Dispatch*, relating to the case in the issues of the 13th Jan. and the 20th Jan., as the author of the matter therein published.

Evidence was given at the trial that copies of the issue of the *Weekly Dispatch*, containing the publications which formed the subject of the indictment, were circulated in Bristol, and that the sale of the newspaper had considerably increased in January, February, and March 1901. Copies of the *Weekly Dispatch* of the 13th, 20th, and 27th Jan., the 3rd, 10th, 17th, and 24th Feb., and the 3rd March 1901 were set out in the indictment.

It was proved at the trial that at the hearing by the magistrates, by whom Allport and Chappell were eventually committed for trial, of the charges against Allport and Chappell, irrelevant but prejudicial statements were made with regard to those prisoners, and that these statements appeared in the report of the proceedings in the *Weekly Dispatch*.

Evidence was also given that Windust had been present at the South London Sessions in June 1897, and had there described himself to the police as the "Crime Investigator" of the *Weekly Dispatch*, and that he had been present and had taken notes of the proceedings when Allport and Chappell were before the magistrates, and that he

had been seen at the office of the *Weekly Dispatch* in London, and had there been served with the summons to appear before the magistrates to answer the charges which were the subject of the indictment. With regard to Tibbits there was evidence that he had admitted that he was the editor of the *Weekly Dispatch*, and had in that capacity communicated with the Director of Public Prosecutions.

On behalf of the defendants it was objected:

(1) That there was no evidence on any of the counts of criminal intent. That there was no evidence that any of the statements were untrue, or that the accused desired or intended to procure a false verdict or to alter the course of justice. (2) That on the counts which charged conspiracy there was no evidence of conspiracy by the defendants. (3) That, as to counts 5, 6, 11, and 12, if the printing and publishing did not constitute attempts to pervert and obstruct justice as charged in the corresponding counts for attempts (3 and 4, 9 and 10), the printing and publishing was not a criminal offence. (4) That if the matters charged in the 16th count charged any offence, the offence was the conspiracy already charged in the previous counts.

On behalf of Tibbits it was contended that the evidence that he was the editor of the *Weekly Dispatch* was not evidence on which the jury could find that he printed and published the incriminated articles. And with regard to Windust, it was contended that there was no evidence that he wrote the articles which appeared in the *Weekly Dispatch*.

Kennedy, J. overruled these objections, and the jury convicted both the defendants.

The question reserved by Kennedy, J. was whether all or any and which of the counts of the indictment alleged a criminal offence, and whether there was evidence adduced at the trial upon which the accused persons, or either and which of them, could properly be found guilty upon all or any and which of the said counts in the indictment?

The following abstract of the counts of the indictment is taken from the judgment of the court:—

Count 1 alleged that the accused unlawfully attempted, by the composition and publication of the statements contained in the issue of the 13th Jan., to influence and prejudice the mind of the magistrate before whom the charge against Allport and Chappell was pending, and so unlawfully attempted to obstruct and pervert the due course of law and justice.

Count 2, in regard to the same publication, alleged the same offence by a similar attempt to influence, by the same publication, the mind of the jurors who might be returned and empanelled for the trial of Allport and Chappell at the assizes.

Count 3 charged in regard to the same publication the doing knowingly and unlawfully of an act calculated and tending to obstruct and pervert the due course of law and justice when the case of Allport and Chappell was before the magistrates.

Count 4 was identical with count 3 except that it related to the trial of Allport and Chappell at the assizes.

Count 5 charged in regard to the same publication that the defendants, unlawfully desiring

and intending to injure and prejudice Allport and Chappell, and to deprive them of a fair and impartial hearing before the magistrates, unlawfully, wilfully, and maliciously printed and published, and procured to be printed and published, a scandalous and malicious writing.

Count 6 was identical with count 5 except that it related to the trial of Allport and Chappell at the assizes.

Counts 7 to 12 (inclusive) in substance repeated in regard to the issue of the *Weekly Dispatch* of the 3rd Feb. the same charges as were contained in counts 1 to 6 in regard to issue of the 13th Jan. There is an additional prefatory averment of the preferring on the 17th Feb. of a further charge against Allport and Chappell of attempting to murder Arthur Bertie Allport, and in counts 11 and 12 is added a charge as to the publication in the incriminated article of a scandalous representation of Allport in clerical garb.

Count 13 alleged an unlawful conspiracy between Tibbits and Windust on the 9th Jan. 1901, and on divers other days between that day and the 14th Jan. 1901, to obstruct and pervert the due course of law and justice in reference to the hearing before the magistrates.

Count 14 alleges the same unlawful conspiracy in reference to the trial of Allport and Chappell at the assizes.

Count 15, after prefatory averments relating to the further charges against Allport and Chappell, alleges the like conspiracy on the 9th Jan. 1901, and on divers days between the 9th Jan. 1901 and the 4th March 1901, setting out dates of publication, in reference both to the hearing before the magistrates and to the trial at the Assizes.

Count 16, in regard to the same dates of publication, alleges an unlawful conspiracy to compose, print, and publish articles which were calculated and tended, as they, the accused, knew, to prejudice the minds of the committing magistrates and the jurors at the trial, and so to pervert and obstruct the due course of law and justice.

J. Alderson Foote, K.C. (Evans Austin with him) for the defendants.—There was no evidence of conspiracy, for there was no evidence that Tibbits and Windust had had any communication before the report of the proceedings before the magistrates. There was no *actus contra actum*, no promise of mutual assistance. Windust, the reporter, sent a report of proceedings before magistrates, and the fact that the editor accepted it for publication, though it may be an act which might make him civilly liable, if the reporter was civilly liable, it is not evidence of conspiracy. It is not evidence of an agreement, and agreement is an essential element in the crime of conspiracy:

Mulcahy v. The Queen, L. Rep. 3 H. L. at p. 317.

Even if there was evidence of a conspiracy, it was not a conspiracy to pervert justice; there was no evidence of an intention to pervert justice. An intention to pervert justice must mean an intention to induce the jury to return a verdict different from that which they would otherwise have returned, or an intention to corrupt the jury. *Skipworth's case* (28 L. T. Rep. 227; L. Rep. 9 Q. B. at p. 235, where Blackburn, J. cites *Lechmere Charlton's case*, 2 My. & Cr. 316). The whole theory of conspiracy

depends upon the statute *De conspiratoribus* (33 Edw. 1, c. 2), and all conspiracy to be indictable must be conspiracy *in pari materia*. He cited

Wright on Conspiracy, p. 6;

Archbold's Criminal Pleading, tit. "Conspiracy," 22nd edit., p. 1212.

The element of falsity must, therefore, exist in order that the conspiracy may be indictable; it is not suggested that anything in the reports published by the defendants was untrue. He referred to the cases cited in Wright on Conspiracy, p. 30:

1796. *R. v. Mawbey*, 6 T. Rep. 619; 3 R. R. 282;

1802. *R. v. Stevenston*, 2 East, 362;

1804. *R. v. Locker*, 5 Esp. 106;

1807. *Claridge v. Hoare*, 14 Ves. 59;

1844. *Wade v. Broughton*, 3 Ves. & B. 172;

1818. *R. v. Kroehl*, 2 S. 343;

1819. *Roberts v. Roberts*, 3 B. & A. 367;

1820. *The Queen's case*, 2 Brod. & Bing. 284; 22 E. R. 662;

1824. *R. v. Thomas*, 1 C. & P. 472;

1826. *Bushell v. Barrett*, Ry. & M. 439;

1837. *Reg. v. Hamp*, 6 Cox C. C. 167.

(Per Lord Alverstone, C.J.: If a newspaper published an article on a person about to be tried for murder, stating matters evidence of which would not be admissible, would not that be indictable as an attempt to pervert justice?) It would be necessary to prove that the article was calculated to procure the conviction of a person who ought not to be convicted. That the publisher could be punished for contempt of court does not show that he could properly be indicted. The gist of the offence is an act calculated to pervert justice. If the intention is material, then at all events the reporter cannot be convicted, for he is only liable for the "necessary" and, at the most, the "probable" consequences of his acts:

R. v. Farrington, R. & B. 207;

R. v. Dixon, 3 M. & S. 11;

R. v. Harvey, 2 B. & C. 257.

Publication was not the necessary consequence of sending the report to the editor. The cases of the editor and the reporter are distinguishable. There was no evidence that the editor intended to do anything illegal. He referred to

Reg. v. Grant, 7 State Trials, N. S. 507;

R. v. Hicklin, 18 L. T. Rep. 395; L. Rep. 3 Q. B. 360; 11 Cox C. C. 19;

Hair v. Wilson, 9 B. & C. 643;

Reg. v. Hamp, 6 Cox C. C. 167;

R. v. Jolliffe, 4 T. R. 285; 2 R. R. 383;

Skipworth's case, 28 L. T. Rep. 227; L. Rep. 9 Q. B. 232;

Reg. v. Almon, Wilmot's Opinions, 243, cited in *Crawford's case*, 13 Q. B. at p. 627.

The reporter (Windust) could not be convicted on this indictment, for there was no evidence that he attempted to pervert the course of justice as charged in the first four counts; nor that he printed and published the alleged articles as set out in the remaining counts of the indictment.

Sir Edward Carson, S.-G. (H. Sutton, C. W. Mathews, and Guy Stephenson with him) for the Crown.—The jury found as a fact that in publishing the articles in question the defendants did attempt to pervert the course of justice. The jury also found that the articles were calculated to pervert the course of justice, and that the defendants were guilty of conspiracy. The question then is, can two persons conspire to pervert

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the course of justice without being guilty of a criminal offence? It is no answer to say that the offence is contempt of court. The indictment sets out the ingredients of the offence, and the jury are asked to say that the defendants are guilty of the offence shown to have been committed. The Crown might have adopted the summary proceeding of applying to a judge to commit the defendants, but that is no reason why an indictment should not lie. An indictment will lie for scandalising the court:

Re Read and Huggonson, 2 Atk. 471.

The argument for the defendants is that they committed no offence because the Allports were convicted, and that they would only have committed an offence if the Allports had been acquitted. Anything which affects the equipoise of the mind of the jury is an offence against the tribunal. That offence is indictable:

R. v. Jolliffe (sup.);

R. v. Fisher, 2 Campb. 563; 11 R. R. 799.

In *Fisher's* case the defendant was indicted for a libel—that is, a writing affecting the administration of justice. Any attempt to prejudice a criminal trial is a misdemeanour, and there is no case in which such a publication has been held to be permissible. Publication of proceedings before magistrates was only permitted after *R. v. Williams and Longley* (26 R. R. 624; 2 L. J. O. S. 30, K. B.). Contempt of court is indictable, and if the case is not clear the alleged offender should be indicted on an information by the Attorney-General: (per Lord Russell, C.J. in *Gray's* case, 82 L. T. Rep. 534; (1900) 2 Q. B. 41. No distinction can be drawn between the editor and the reporter. The jury were entitled to find that the editor put the report into the paper, and that the reporter made his report with the intention that it should be published. The report could not have appeared without the co-operation of the editor and the reporter, and that fact is evidence on which the jury could find both guilty of conspiracy. The intention of the defendants is immaterial, the question for the jury was whether the articles were calculated to pervert the course of justice, and the jury found that the articles were so calculated.

Foots, K.C. in reply.

Cur. adv. vult.

Nov. 9.—The judgment of the court was delivered by

LORD ALVERSTONE, C.J.—This was a case reserved by Kennedy, J. at the last Summer Assizes at Bristol. Indictments were preferred against two defendants, Charles John Tibbits and Charles Windust. The indictments contained sixteen counts, upon each of which the defendants were found guilty. The charge contained in the indictments related to the publication of certain matters in a newspaper called the *Weekly Dispatch*, between the 13th Jan. 1901 and the 4th March 1901 inclusive, and particularly to the issues of that newspaper dated the 13th Jan. and the 3rd Feb. 1901. Prior to the publication of the first article, two persons named Allport and Chappell had been charged before the magistrates with offences under the Prevention of Cruelty to Children Act 1894. Further charges of attempting to murder and of conspiracy to murder a child named Arthur Bertie Allport, and of a conspiracy

to commit the offence against sect. 1 of the Prevention of Cruelty to Children Act 1894 were preferred against them. On the 8th Feb. Allport and Chappell were committed to take their trial at the next Bristol Assizes, which had been fixed to commence on the 20th Feb. Their trial on the indictment for the attempt to murder commenced before Day, J. on the 1st March and terminated the 5th March. They were found guilty and sentenced, Allport to fifteen years' penal servitude and Chappell to five years' penal servitude. The publications in the *Weekly Dispatch* which formed the subject of the indictment against Tibbits and Windust were statements relating to the case of Allport and Chappell, contained in issues of the *Weekly Dispatch* during the hearing of the case against Allport and Chappell before the magistrate and before and during the trial of the prisoners at the assizes. For the purpose of our judgment upon the questions reserved for consideration by this court I will shortly state the distinctions between the several counts of the indictment. [The judgment then dealt with the counts of the indictment *seriatim*.] It is unnecessary to refer in detail to any of the incriminated articles, of which those of the 13th Jan. and the 3rd Feb. were the most important. It is sufficient to say that the publication went far beyond any fair and *bona fide* report of the proceedings before the magistrates. They contained, couched in florid and sensational form, a number of statements highly detrimental to Allport and Chappell. Much of these statements related to matters of which evidence would not have been admissible against them in any event, and purported to be the result of investigations made by the "special crime investigator" of the newspaper. Under these circumstances it was contended on behalf of the prosecution that there was evidence upon which the jury might properly convict both the defendants upon all the counts of the indictment. Upon the argument before us we had no doubt upon the main questions which had been discussed, but, having regard to the nature of the proceedings and the importance of the case, we thought it desirable that we should endeavour to lay down as clearly as possible the law applicable to such a case. Points were raised and argued on behalf of the defendant Windust as distinguished from the defendant Tibbits. It will be convenient to postpone the discussion of these points until we have dealt with the main questions of law raised on behalf of both prisoners. It was not attempted to be argued by Mr. Foots, who appeared as counsel for both defendants, that the publication of such articles was lawful and that the persons publishing could not be punished. On the contrary, he contended that the publication of such articles was a contempt of court, and could only properly be punished as such either by summary proceedings or indictment for contempt. He further argued that there was no evidence of any intention on the part of either of the defendants to pervert or interfere with the course of justice, and that any inference which might otherwise be drawn from the contents of the articles that they were calculated to pervert or interfere with the course of justice was negatived by the fact that the defendants Allport and Chappell had been subsequently convicted. That the publication of such articles did constitute a contempt of court and could be punished as such is well established.

[CR. CAS. RES.]

REX v. TIBBITS AND WINDUST.

[CR. CAS. RES.]

One of the sorts of contempt enumerated by Hardwicke, L.C. in the year 1742 (2 Atkyns, 471) is prejudicing mankind against persons before the case was heard, and he added the important words "There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters." The case of *Rees v. Jolliffe* (1791) 4 T. R. 285 shows that a criminal information lay for distributing in the assize town, before the trial at Nisi Prius, handbills reflecting on the conduct of a prosecutor, and in the course of his judgment in that case Lord Kenyon, at p. 289, made the following very relevant observations: "Now it is impossible for any man to doubt whether or not the publication of these papers be an offence. Even the charge on the prosecutor would of itself warrant us to grant the information; but this is a minor offence when compared with that of publishing the paper in question during the pendency of the cause at the assizes and in the town of trial. It is the pride of the constitution of this country that all causes should be decided by jurors who are chosen in a manner which excludes all possibility of bias and who are chosen by ballot in order to prevent any possibility of their being tampered with. But if an individual can break down any safeguards, which the constitution has so wisely and so cautiously erected, by poisoning the mind of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts. And therefore I cannot forbear saying that if the publication be brought home to the defendant he has been guilty of a crime of the greatest enormity." Again, in the case of *Rees v. Fisher* (1811) 2 Campb. 563 the printer, publisher, and editor were convicted for publishing a scandalous, defamatory, and malicious libel intending to injure one Richard Stephenson, charged with assault, and deprive him of the benefit of an impartial trial "and to injure and prejudice him in the minds of the liege subjects of our lord the King and to cause it to be believed that he was guilty of the said assault and thereby to prevent the due administration of justice and to deprive the said Richard Stephenson of the benefit of an impartial trial." It was urged on behalf of the defendants that this was an indictment for libel, and that therefore it was no authority for the indictment in the present case. But if the judgment of Lord Ellenborough is examined, it will be noted that the main ground of his judgment is that the publication would tend to pervert the public mind and disturb the course of justice, and therefore be illegal, and we cannot doubt that if the attempt so to do be made or means taken, the natural effect of which would be to create a widespread prejudice against persons about to take their trial, an offence has been committed whatever the means adopted, provided there be not some legal justification for the course pursued. The case of *Rees v. Williams* (1823) 2 L. J. 30, K. B.; 26 R. R. 624 is another distinct authority for the same view in which it was laid down that any attempt whatever to publicly prejudge a criminal case, whether by a detail of the evidence or by a comment, or by a theatrical exhibition, is an offence against public justice and a serious misdemeanour. The publication of proceedings publicly heard in a court of justice, if fair and

accurate, has now the protection of the Law of Libel Amendment Act 1888 (51 & 52 Vict. c. 64, s. 3). The law, as laid down in the older cases, to which we have referred, was summarised by Blackburn, J. in *Skipworth's case* (23 L. T. Rep. 227; L. Rep. 9 Q. B. at p. 232), even with reference to the objections that the more proper proceedings should be by proceedings for contempt of court, we would refer to the judgment of the court in *Reg. v. Gray* (82 L. T. Rep. 534; (1900) 2 Q. B. at p. 41), from which it clearly appears that in many cases it is preferable to proceed by information or indictment, rather than by motion for contempt. We have no doubt whatever that the publication of the articles in this case, at the time when and under the circumstances in which they were published, constituted a criminal offence by whomsoever they were published. We think that the facts which bring the incriminated articles within the category of misdemeanour abundantly appear upon the face of each count, and that under those circumstances it is perfectly immaterial whether the articles be described and charged as libels or contempt, or not. With reference to the argument with which we were pressed, that there was no evidence of any intention to pervert the course of justice, we are clearly of opinion, for the reasons given in the authorities to which we have referred, that this is one of the cases to which the intent may properly be inferred from the articles themselves, and the circumstances under which they were published. It would indeed be far-fetched to infer that the articles were likely to have any effect upon the mind of either magistrate or judge, but the essence of the offence is the conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempt of court, where the legal proceedings pending did not involve trial by jury, and where no one would imagine the mind of the magistrates or judges charged with the case would or could be induced thereby to swerve from the straight course. The offence is much worse where trial by jury is about to take place; but it certainly is not confined to such cases. We further think that if the articles are in the opinion of the jury calculated to interfere with the course of justice, or pervert the minds of the magistrate or of the jurors, the persons publishing are criminally responsible: (see *Reg. v. Grant*, 7 State Trials, N. S. 507). We are also of opinion that the fact that Allport and Chappell, the persons referred to, were subsequently convicted, can have no weight in the decision of the question raised before us. To give effect to such a consideration would involve the consequence that the fact of a conviction, though resulting either wholly or in part from the influence upon the minds of the jurors at the trial of such articles as these justified their publication. This is an argument which we need scarcely say reduces the proposition almost to an absurdity; and, indeed, its chief foundation would appear to be a confusion between the course of justice and the result arrived at. I will add only this: a person accused of crime in this country can properly be convicted only upon evidence which is legally admissible, and which is adduced at his trial in legal form and shape. Assume the accused to be really

CR. CAS. RES.]

REX v. D'EYNCOURT.

[CT. OF APP.]

guilty of the offence charged against him. The due course of law and justice is perverted and obstructed, nevertheless, if those who have to try him are induced to approach the question of his guilt or innocence with minds into which prejudice has been instilled by published assertions of his guilt, or imputation against his life and character to which the laws of the land refuse admissibility as evidence. Mr. Foote attempted to restrict conspiracy to matters germane at least to those referred to in the statute *De Conspiratoribus* (33 Edw. 1, c. 2). It is obvious, however, that the statute is not giving an exhaustive definition, but other matters beyond those enumerated in that statute have been adjudged over and over again to be the subjects of criminal conspiracies. As to the expressions of Willes, J. in *Mulcahy v. The Queen* (L. Rep. 3 H. L., at p. 317), upon which Mr. Foote insisted so much, it is plain that Willes, J. was speaking of a case in which the criminal intention had not been carried into effect, and says that in such a case the very promise to do it, such a promise as would be binding if for a lawful purpose, is an act which negatives the suggestion that the matter rests in intention only. He never said that when the unlawful purpose has been carried out, no indictment for conspiracy can be maintained unless the concerted action has been preceded by such a contract between the conspirators as, if the purpose had been lawful, would have given ground for a lawsuit. His definition is not of conspiracy but of the kind of conduct which is sufficient to make the concerted action pass from the stage of intention to that of action. We have now only to consider the special points which were taken on behalf of the defendant Windust as regards the first six counts, and both the defendants as regards the conspiracy counts. We agree that in such a case some evidence must be given that the defendants were really parties to the publication complained of: (see *Reg. v. Holbrook*, 37 L. T. Rep. 530; 39 L. T. Rep. 536; 3 Q. B. Div. 60; 4 Q. B. Div. 42). The evidence against Windust submitted to the jury as appears from the case stated was as follows: That in 1897 he was the "Crime Investigator" of the *Weekly Dispatch*, and was engaged in June of that year in investigating a case then pending at the South London Sessions. That on several of the occasions when Allport and Chappell were before the magistrates Windust was present in court taking notes of the proceedings. He was seen on the 2nd May 1901 at the office of the *Weekly Dispatch*, and the articles in question purported to be written by the "Special Crime Investigator" of the paper. Under these circumstances we are of opinion that there was evidence to leave to the jury that Windust was party to and concerned in the publication of the articles, and was an accessory before the fact. As regards Tibbits, it was proved that he was the editor of the *Weekly Dispatch* at the time of the publication. He afterwards placed himself in communication with the Director of Public Prosecutions respecting the inquiries which were being made at Bristol as to the publication of papers. The articles formed an important part of the issues of the paper in question, and we think that in his case there was clear evidence to be submitted to the jury. There remains only to consider the conspiracy counts, on which the

defendants were also found guilty. Inasmuch as they were also convicted on the other counts the point is not very important, but we think it right to say that there was, in our opinion, evidence for the jury as to the conspiracy counts also. Such articles could not be published without the concurrence of someone at Bristol and the person in fact editing the paper, and we are of opinion that there was evidence to go to the jury on which they might properly draw the conclusion that the defendants combined for the purpose of publishing the articles in question. For the above reasons we think that the conviction should be affirmed as against both defendants.

Conviction affirmed.

Solicitor for the Crown, *The Solicitor to the Treasury*.

Solicitors for the defendants, *Mellor, Smith, and May*.

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Nov. 11, 1901.

(Before COLLINS, M.R., STIRLING and
MATHEW, L.JJ.)

REX v. D'EYNCOURT. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Appeal—Court of Appeal—Jurisdiction
"Criminal cause or matter"—Order to pull
down building in London—London Building
Act 1898 (61 & 62 Vict. c. cxxxvii.), s. 7—Judica-
ture Act 1873 (36 & 37 Vict. c. 66), s. 47.

A magistrate convicted a person of having erected a building beyond the general line of buildings in a street in London and made an order for the demolition thereof, under the provisions of the London Building Acts 1894 and 1898, and he refused to state a case for the opinion of the High Court.

The King's Bench Division refused to grant a rule nisi for a mandamus to the magistrate to state a case, but a rule nisi was granted by the Court of Appeal.

Held, that this was a "criminal cause or matter" within the meaning of sect. 47 of the Judicature Act 1873, and that the Court of Appeal had no jurisdiction to entertain the application for a mandamus.

RULE nisi, granted by the Court of Appeal, for a mandamus to a metropolitan police magistrate to state a case for the opinion of the King's Bench Division.

One J. Ellis was, on the prosecution of the London County Council, convicted by a metropolitan police magistrate for having erected a building beyond the general line of buildings in a certain street in London, and the magistrate made an order for the demolition of the building.

The magistrate refused to state a case for the opinion of the High Court; and the Divisional Court refused to grant a rule nisi for a mandamus to state a case.

The Court of Appeal, however, granted this rule.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

APP.] WALKER URBAN DIST. COUNCIL v. WIGHAM, RICHARDSON, & CO. LIM. [CH. DIV.]

The London Building Act 1894 (57 & 58 Vict. c. cccxiii.) provides :

Sect. 22 (1). No building or structure shall, without the consent in writing of the council, be erected beyond the general line of buildings in any street or part of street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall if required be defined by the superintending architect by a certificate, such certificate to be issued within one month from the date of the application therefor.

Sect. 166. All offences, penalties, costs, and expenses under this Act or any bye-law made under this Act directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts.

Sect. 200. Subject to the provisions of this Act every person who does any of the things specified in this section shall be deemed to have committed an offence against this Act and shall be liable upon conviction in a summary manner to a penalty not exceeding the amount hereafter specified in connection with such offence, and to a further penalty not exceeding the amount hereafter stated as the daily penalty in connection with such offence for every day on which the offence is continued after such conviction (that is to say): (3) Every person who (a) erects or brings forward any building or structure in contravention of any of the provisions of Part III. of this Act or of any conditions attached by the council to any consent given pursuant to such provisions.

The London Building Act 1894 (Amendment) Act 1898 (61 & 62 Vict. c. cxxxvii.) provides :

Sect. 7. Every person who does any of the things specified in paragraphs (a), (d), and (e) of sub-section (3) of section two hundred of the principal Act as amended by this Act shall be liable on conviction to a penalty not exceeding forty shillings for every such offence, and the court before whom an information is laid by the council in respect thereof may, in addition to imposing such penalty, make an order in writing directing such person to demolish the building or structure complained of, or any part thereof, or to comply with the conditions contained in any consent, licence, or approval granted by the council for the setting up, erection, adaptation, alteration, or retention of such building or structure, and such order of the court shall be deemed to be the order of the court within the meaning and for the purposes of the third sub-section of the two hundredth section of the principal Act, and the imposition of any penalty under the provisions of this present section shall be without prejudice to any proceedings under the third sub-section of the two hundredth section of the principal Act for the daily penalty therein mentioned, or under any other provisions of the principal Act or otherwise, but so that no person shall be liable to more than one penalty (other than daily penalties) for the same offence.

Avory, K.C. and Dady for the respondents.—There is a preliminary objection in this case. This is a "criminal cause or matter," within the meaning of sect. 47 of the Judicature Act 1873, and therefore there is no right of appeal to this court in any manner. A person who is convicted under sect. 200 (3) (a) of the London Building Act 1894, as amended by sect. 7 of the Act of 1898, is liable to imprisonment for nonpayment of the penalties thereby imposed, and therefore this is a "criminal cause or matter." If a man is sum-

moned for any offence for which a penalty may be imposed, the payment of which may be enforced by imprisonment, that is a "criminal cause or matter." It was said, upon the application for this rule, that this is not like an appeal from the decision of the Divisional Court in a criminal cause or matter, because this is an original application to this court. The whole question is, however, concluded by authority. In *Ex parte Schofield* (64 L. T. Rep. 780; (1891) 2 Q. B. 428) it was held in this court that, when the Queen's Bench Division had refused a rule nisi for a *mandamus* to compel a magistrate to state a case after he had made an order for the abatement of a nuisance, the Court of Appeal had no jurisdiction to entertain an application for a *mandamus* because it was a "criminal cause or matter." If the magistrate had stated a case, and the Divisional Court had given a decision upon that case, there could not be an appeal to this court. The fact that a case has been refused cannot give any better right to come to this court.

Freeman, K.C. and R. Cunningham Glen for the appellant.—This is not a "criminal cause or matter." The London Building Act is a private Act, and these proceedings are really only a peculiar kind of civil action under a private Act of Parliament for the purpose of preserving a uniform line of buildings in streets. The peculiar provisions of sect. 23 of the London Building Act 1894 for the pulling down of buildings which project beyond the general line and for compensating the owner show that these provisions are for the protection of the street and not for the purpose of creating criminal offences by the owner.

Collins, M.R.—I think that this is clearly a "criminal cause or matter." It is not necessary now to go through the authorities upon this question, which are all collected and applied in the case of *Ex parte Schofield* (64 L. T. Rep. 780; (1891) 2 Q. B. 428). This is a "criminal cause or matter" in which there is no right of appeal to this court in any manner. This rule nisi must, therefore, be discharged.

Stirling, L.J.—I agree.

Mathew, L.J.—I agree.

Rule discharged.

Solicitors for the appellant, *Gustavus Thompson and Son*.

Solicitor for the respondent, *W. A. Blawland*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 26 and 27, 1901.

(Before FAEWELL, J.)

WALKER URBAN DISTRICT COUNCIL v. WIGHAM, RICHARDSON, AND CO. LIMITED; WIGHAM, RICHARDSON, AND CO. LIMITED v. WALKER URBAN DISTRICT COUNCIL. (a)

Local authority—Arch built under carriage-way—*Public Health Act 1875, s. 26*—*Cross-action*—*Injunction to restrain interference with electric cables*.

W. R. and Co. were occupiers of land on both sides of F.-street within the urban district of which

(a) Reported by E. GREENWOOD, Esq., Barrister-at-Law.

CH. DIV.] WIGHAM, RICHARDSON, & CO. LIM. v. WALKER URBAN DIST. COUNCIL. [CH. DIV.]

the W. U. D. C. was the urban authority. In April 1901 W. B. and Co. constructed a tunnel or culvert 12ft. beneath the carriage-way of F.-street for the purpose of carrying electric cables in connection with their business. The tunnel consisted of a concrete flooring and a brick archway. They subsequently changed their plans, and, cutting through the concrete, laid the cables in pipes upon or nearly upon the clay subsoil, and filled in the flooring with fresh concrete.

The W. U. D. C. gave them notice to remove the tunnel in accordance with sect. 26 of the Public Health Act 1875.

W. B. and Co. then removed the keystone of the arch, the tunnel fell in, and the subsidence was made good with ballast. The W. U. D. C. not being satisfied, brought an action claiming a declaration that they as the urban authority might properly cause the arch, vault, or cellar constructed by the defendants under the carriage-way of F.-street to be altered, pulled down, or otherwise dealt with as the W. U. D. C. should think fit. W. B. and Co. instituted a cross-action for an injunction to prevent the W. U. D. C. from cutting, disturbing, or injuring their pipes or electrical wires. The two actions came on together. It was argued on behalf of the W. U. D. C. that they had a right to remove the whole of the structure, including the pipes and wires.

Held, that, on the evidence, the pipes were not in any part of the structure, and therefore it was unnecessary to decide whether the concrete flooring was part of the tunnel; the W. U. D. C. were entitled to remove the structure, which they could and must do without injuring the pipes or wires.

The injunction in the cross-action was granted.

WIGHAM, RICHARDSON, AND CO. were manufacturers, carrying on business at Walker, near Newcastle-on-Tyne, and had for many years occupied land abutting on both sides of Fisher-street, within the urban district of which the Walker Urban District Council was the urban authority. Fisher-street was a carriage-way vested in the Walker Urban District Council, which had powers to lay drains, but had not yet found it necessary to do so in Fisher-street.

In April 1901, Wigham, Richardson, and Co. constructed, at a depth of 12ft. below the surface of Fisher-street, an arch or tunnel for the purposes of their business to carry electric wires in pipes from one part of their premises to another. This consisted of a brickwork arch with concrete footings and floor.

The council gave notice to the company, under sect 26 of the Local Government Act of 1875, to remove the tunnel, it having caused a small subsidence of the roadway.

The company accordingly cut through the concrete flooring and relaid the pipes containing their wires upon, or almost upon, the clay subsoil. They then filled in the flooring with fresh concrete, removed the keystone of the arch, so that the brickwork fell in, and by means of ballast and other materials made good the roadway.

This did not satisfy the council, who said that the use of ballast was improper, and contended that concrete should have been used. They

accordingly brought an action against the company, claiming a declaration that they, as the urban authority, might properly cause the arch, vault, or cellar constructed by the defendants under the carriage-way of Fisher-street to be altered, pulled down, or otherwise dealt with as they (the urban council) should think fit. They claimed to be entitled to remove the whole structure, including the concrete flooring with the pipes and wires.

The council had powers authorising them to supply electricity, but they were not prepared to supply it on the polyphase system which the company required.

The company brought a cross-action in which they claimed an injunction to prevent the council from cutting, disturbing, or injuring their pipes or electrical wires.

An interim injunction was granted on motion by Buckley, J.

The two actions came on for trial together.

Robson, K.C. and B. J. Parker for the council.—They have not complied with our notice to remove the tunnel. The danger to the carriage-way is increased by their action in using ballast. Under our powers as sanitary authority we are entitled to remove everything they have placed under the road. At some future time we may require to lay down drains in Fisher-street, and if we do not do so, they may say we have lost our right. The concrete flooring is part of the arch, and it contains the pipes and wires. We have a discretionary right under the Act, and are the sole judges of the manner of exercising it, in the absence of *mala fides*.

Cripps, K.C. (Macmorran, K.C. and Gatey with him) for the company.—The real matter between the parties is something quite different. They wish to remove our wires, so that we must get our electric supply from them. But we want a polyphase system, which they cannot give us. We admit they have a right to deal as they please with the arch, but the concrete flooring is no part of the arch, and in any case the pipes and wires are now below the flooring. Sect. 26 comes in that part of the Act which deals with "urban" districts, and was inserted to prevent the extension of house accommodation under the street. Then they say they may want at some time to carry drains and sewers under the street. Though they may have that right under the Public Health Act that does not derogate from the rights of adjoining owners until the occasion for the exercise of such right in fact arises. We rely on

Cattle v. Stockton Waterworks Company, 33 L. T. Rep. 475; L. Rep. 10 Q. B. 453;

Mayor, &c., of Tunbridge Wells v. Baird, 74 L. T. Rep. 385; (1896) A. C. 434;

Battersea Vestry v. County of London and Brush Provincial Electric Lighting Company, 80 L. T. Rep. 31; (1899) 1 Ch. 474;

Doe d. Pring v. Pearsey, 7 B. & C. 304.

Evidence was given in support of the contentions on both sides.

Robson, K.C. in reply.—The flooring is part of the arch. This would be so in the case of a vault, and this is in fact a vault. It is none the less a floor because it has been cut into and filled up again for the purpose of putting in the pipes. There is nothing in the nature of preamble to limit the application of sect. 26. They admit now

that they were wrong to build the arch. But if they only remove the top of the arch, then the proper way to fill it up is with concrete. We say we are entitled to take away the whole structure as it stands and fill it up with anything, making it homogeneous with the substance of the road if we please. The cases they cite turn on the right to the soil, but here we make no claim to the soil at all.

FARWELL, J. (after stating the facts).—It is admitted that the company are tenants of the land on either side of Fisher-street for a term of which forty-four years remains unexpired, and that the subsoil under the road consequently belongs to them. It is also not suggested that the Public Health Act 1875 contains any provision such as that in sect. 109 of the Metropolis Management Act 1855, which was considered in the case of *Battersea Vestry v. County of London and Brush Provincial Electric Lighting Company*. Here the local authority rely solely on the powers given them by sect. 26 of the Public Health Act 1875. In my opinion, it is obvious that if the company had simply drilled a hole through the soil of the road from one side to the other at some depth, as their engineers might have chosen to do, and pushed their pipes through it, the local authority would have been powerless to prevent it. In the same way they would have been powerless to prevent the company digging a trench, laying the pipes, and rapidly filling up the trench again. But the company were desirous of having access to the pipes for repairs and such purposes, and therefore they proceeded to build a small tunnel, with a floor of concrete and a brick-arched roof, and walls resting on concrete footings. This, in fact, was such a structure as would come within the words "vault, arch, or cellar," in sect. 26, and should not have been built without the permission of the local authority, who could order its removal. But the company appear to have changed their plans, and, instead of laying their pipes through the "alveus" of the tunnel, they substantially cut right down through the concrete in the form of a trench from the centre of the floor. They then laid their pipes on the clay. There might have been an inch of concrete left here and there under the pipes, but, according to the evidence, I hold that in substance they were laid on the clay. Two of the pipes were directly on the clay, and the other two on those. Two pipes contained the electric wires, and the other two were empty, being spare pipes. The pipes were then covered in with concrete. The local authority now come in and say that they are entitled to remove the whole structure, including not only the tunnel and the floor but the pipes as being in or under that floor. In my judgment the pipes are not in any part of the structure, so that it does not become necessary for me to decide whether the floor is part of the structure. On the evidence I find as a fact that the pipes, in the position in which they now are, are not a part of the vault as built. It appears from the evidence that it is quite possible to remove the whole tunnel—by which I mean the roof, walls, and two footings—without touching or hurting the pipes or the added concrete which is round them, and I find as a fact that this concrete does not form part of the tunnel within sect. 26. As to the question of *bona fides* it is material that the local authority said the right way

to fill up was with concrete, and yet they claimed to be entitled to take up the concrete which is there. It is also material that the local authority, as their counsel candidly admitted, have taken proceedings in order that they may obtain the removal of the company's private wires for electric lighting, which they themselves have powers to supply; but I will leave it to another court to decide how far municipal bodies enjoying powers to trade in such commodities are justified in using the rights that were avowedly given them for the protection of public health for the purpose of defeating and possibly getting rid of a competitor in trade. I think it would not be a reasonable use of such powers, and I am therefore not sorry in this case to be able to hold that the pipes are not part of the tunnel. The interim injunction granted by Buckley, J., will therefore be continued, restraining the council from cutting, disturbing, or injuring the pipes or electrical wires lying in the company's land, or the bed of concrete or cement in which they are laid. The local authority, on the other hand, are entitled to their declaration that they may properly cause the structure to be altered or dealt with as they think fit, but this does not extend to the bed of concrete or cement. There will be a set off as to costs.

Solicitors: *Bowditches, Rawle, and Co.*, agents for *Newlands, Thompson, and Co.*, Newcastle-on-Tyne; *J. E. and H. Scott*, agents for *Daglish and Mulcaster*, Newcastle-on-Tyne.

June 12, 13, 14, and Nov. 19, 1901.

(Before JOYCE, J.)

LONDON AND NORTH-WESTERN RAILWAY COMPANY v. MAYOR AND CORPORATION OF THE CITY OF WESTMINSTER. (a)

Local authority—Sanitary conveniences—Subways—Soil of highway—Footway—Right of adjoining owner ad medium flum vis—Presumption—Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 44.

A local authority, whose primary object was the construction of sanitary conveniences (which by statute they had power to construct), erected such conveniences with requisite and proper means of approach thereto and exit therefrom on both sides of a street, so that the approaches in fact constituted a subway for crossing the street.

Held, that the local authority had acted bona fide in the exercise of their statutory powers, and that the erection of the conveniences and the approaches thereto, although capable of being used for crossing the street, was not ultra vires.

For the purpose of erecting such sanitary conveniences the subsoil of the road exclusive of the footway is vested in the local authority by statute.

The local authority in erecting the sanitary conveniences with the staircases and approaches thereto constructed them as to 2ft. 9in. in width of the staircase on the footway opposite the plaintiffs' premises.

Held, that the presumption of law, viz., "that in the absence of evidence to the contrary" (of which none had been adduced), "the soil of the highway

(a) Reported by P. S. OSWALD, Esq., Barrister-at-Law.

to the middle of the road (usque ad medium flum vis) belongs to the owner of land adjoining the highway," being equally applicable to streets in a town as to highways in the country (see *Re White's Charities*, 78 L. T. Rep. 550; (1898) 1 Ch. 659) applied, and that the land or soil as to the 2ft. 9in. in width was the property of the plaintiffs, and, being part of the footway, was not liable to be taken and used by the defendants, the local authority, under their statutory powers.

A mandatory injunction for the removal of the portion of the staircase as to 2ft. 9in. in width accordingly granted.

By an indenture of conveyance, dated the 26th July 1886, and made between Alfred Hooper, William Henry Wroot, and Milson Percy Wroot of the first part, Sir Edmund Antrobus and Hugh Lindsay Antrobus of the second part, Emma Elizabeth Matthews and Joseph Ebenezer Newsom of the third part, Emma Viner of the fourth part, the plaintiffs of the fifth part, and Stephen Reay of the sixth part,

All those freehold messuages or tenements situate in Parliament-street, in the parish of St. Margaret's Westminster, in the county of Middlesex, numbered 34, 35, and 36 in Parliament-street aforesaid, and also all those two freehold messuages or tenements situate in Bridge-street, in the said parish of St. Margaret's, Westminster, and numbered respectively 11 and 12 in Bridge-street aforesaid, which were formerly numbered 46 and 47 in the same street, all of which premises are more particularly delineated on the plan drawn in the margin of these presents and therein coloured red

were conveyed to the plaintiffs in fee simple in possession.

Between 1887 and 1890 the plaintiffs rebuilt their premises, and as rebuilt they consisted of a receiving office for parcels at the corner of Bridge-street and other offices and shops which were let off to tenants.

In 1899 Parliament-street was widened, and at the same time the footway or pavement in front of the plaintiff's premises was widened by being increased from 12ft. to 21ft.

About Nov. 1900 the defendants constructed underneath the middle of Parliament-street public sanitary conveniences, with approaches thereto from both sides of Parliament-street, the entrances and exits to the conveniences being by means of staircases at or near the edge of the footway.

One of the entrances was opposite the doorway of the plaintiff's premises; and the staircase and railings which formed part of it was to the extent of 2ft. 9in. on the footway or pavement as widened.

The plaintiffs, who claimed to be entitled to the soil of the roads adjoining their premises as far as the middle of such roads as they existed when conveyed to them, alleged that the defendants had committed a trespass in constructing their works and excavating the soil under the roadway and footway, and that the works were not sanitary conveniences but subways which the defendants had no statutory powers to erect. In the alternative they alleged that if the soil to the middle of the roads did not belong to them the defendants had obstructed the highway by erecting the staircase opposite their premises.

They therefore claimed (1) an injunction restraining the defendants from continuing to

trespass on their Parliament-street premises by permitting the tunnel staircase and railings and other works from remaining on the land; (2) alternatively an injunction restraining the defendants from continuing to cause an obstruction of the highway to the damage of the plaintiffs; and (3) damages.

The defendants by their defence alleged that they had acted in pursuance of their statutory powers vested in them for that purpose by the Public Health (London) Act 1891.

The material section of that Act is sect. 44 which is as follows:

Sect. 44. (1) Every sanitary authority may provide and maintain public lavatories and ashpits, and public sanitary conveniences, other than privies, in situations where they deem the same to be required, and may supply such lavatories and sanitary conveniences with water, and may defray the expense of providing such lavatories, ashpits, and sanitary conveniences, and of any damage occasioned to any person by the erection or construction thereof and the expense of keeping the same in good order as if they were expenses of sewerage. (2) For the purpose of such provision the subsoil of any road, exclusive of the footway adjoining any building or the curtilage of a building, shall be vested in the sanitary authority.

Younger, K.C. and Montague Shearman for the plaintiffs.—By our conveyance in 1886 we own the soil *ad medium flum* of the old road:

Platt on Highways, 14th edit., p. 39.

The presumption there stated has been held to apply equally to streets in a town:

Re White's Charities, 78 L. T. Rep. 550; (1898) 1 Ch. 659.

The description in the conveyance to the plaintiffs is sufficient to pass to them all the property in the road to which by presumption of law we are entitled:

Micklethwait v. Newlay Bridge Company, 55 L. T. Rep. 336; 33 Ch. Div. 133, at p. 145.

The roadway is vested in the defendants as sanitary authority. They get no seisin but only a statutory possession. We still have the seisin:

Metropolis Management Act 1855, s. 96.

The case of *Mayor, &c., of Tunbridge Wells v. Baird* (74 L. T. Rep. 385; (1896) A. C. 434) is very like the present, except that the defendants justify under sect. 44 of the Act of 1891. Their only defence is that what they are doing is under statutory authority. Sub-sect. (2) of sect. 44 was passed to get over the difficulties which were raised outside the metropolis, as in the case of *Mayor, &c., of Tunbridge Wells v. Baird* (*ubi sup.*). The works are not merely a sanitary convenience. They are in their essence a subway for foot-passengers. The plan shows that, and the defendants have described it in their own language as "a crossing for foot-passengers, with conveniences communicating therewith." The test is, if there had been no conveniences, would the tunnel have been a distinct thing of itself? The answer is it would have been a distinct subway. They have therefore no statutory powers, and the whole work is *ultra vires*. Secondly, if the works are merely conveniences they have exceeded their statutory powers by erecting a part of the staircase and railings on what was the footway when the work was commenced, and by sub-sect. 2 of sect. 44 the footway is excepted. They cannot now say that

part of the footway is not a footway because it was part of the roadway before the widening of Parliament-street. The footway must mean the footway as it existed when the works were commenced. The only other meanings which can be given to footway are (1) the footway as it existed at the time of the passing of the Act; and (2) such part as the defendants choose to leave after they have done their works. Neither of these meanings, we submit, are reasonable. [JOYCE, J. referred to sect. 72 of the Highways Act 1838 as to the meaning of footway.] They have also committed a nuisance by obstructing our private right of access to the highway, which is a right *per se* apart from any question of nuisance:

Fritts v. Hobson, 42 L. T. Rep. 225, at p. 233; 14 Ch. Div. 542, at p. 554;

Lyon v. Fishmongers' Company, 35 L. T. Rep. 569; 1 App. Cas. 662, at pp. 672 and 675.

The cases show that the obstruction is more than a public nuisance conferring special damage. We cannot now draw up our vans on the roadway opposite our premises. This is a serious matter, and a proper ground for an injunction, assuming that they cannot justify the work they have done.

Hughes, K.C. and Dighton Pollock for the defendants.—We admit that apart from statutory powers the entrance to the conveniences would be an obstruction of the highway and in that sense a nuisance, but, if we have come within our statutory powers as conferred by sect. 44 of the Act of 1891, the obstruction is authorised. See

W. H. Chaplin and Co. v. Mayor, &c., of the City of Westminster, 85 L. T. Rep. 88; (1901) 2 Ch. 329.

We are entitled to put up the railings and fence as the roadway is vested in us:

Metropolis Management Act 1855, ss. 96, 101, 102, 108;

Sub-sect. 2 of sect. 44 and sect. 45 of the Public Health (London) Act of 1891.

We also rely on sect. 44 with regard to the encroachment of 2ft. 9in. on the footway as now existing, because this was part of the roadway before the widening of Parliament-street. [JOYCE, J.—What do you say supposing I am against you with regard to the 2ft. 9in.?] We say that there is no damage with regard to the trespass:

Mayfair Property Company v. Johnston, 70 L. T. Rep. 485; (1894) 1 Ch. 508, at p. 515.

If we have a discretionary power to construct these works, there is no damage with respect to the interference of their approach:

Attorney-General v. Conservators of the Thames, 8 L. T. Rep. 9; 1 Hemming & Miller, p. 1.

The case of *Baker v. Vestry of St. Marylebone* (35 L. T. Rep. 129) is even stronger, because in that case there was an obstruction of light. As regards the thing itself, it is not a nuisance, but it is suggested that one of the things incidental to the works—viz., the staircase—is a nuisance. This is not so if it is reasonably necessary for the work:

Harrison v. Southwark and Vauxhall Waterworks Company, 64 L. T. Rep. 864; (1891) 2 Ch. 409, at p. 414.

Younger, K.C. in reply.—This is a question of taking property and nothing else. The main question is whether a subway is authorised by any

statutory power. The subsoil of the highway is not vested in the local authority by Parliament otherwise than for the purpose of sanitary conveniences. This is a definite system of subways for a definite purpose—viz., for relieving the congested traffic in Parliament-street—and obviating a dangerous crossing. We are entitled to a mandatory injunction:

Goodson v. Richardson, 30 L. T. Rep. 142; L. Rep. 9 Ch. App. 221;

He also referred to

Pollock on Torts, 6th edit., p. 308.

Cur. adv. vult.

Nov. 19.—JOYCE, J.—In 1886 the London and North-Western Railway Company, the plaintiffs in this action, purchased certain freehold property situate at the corner of Parliament-street and Bridge-street, Westminster, which was described in the conveyance by reference to a plan and thereon coloured red. [His Lordship referred to the conveyance and plan, and continued:] This plan appears to me to comprise not merely the site of the buildings then on the premises but also a small area outside, being a portion of the foot pavement in Parliament-street. The pavement of such portion is said to have stood originally a few inches above the payment of the general footway, but this difference of level has since been removed. I consider it highly improbable that either party supposed any interest in the soil of the adjacent footway, outside the area coloured red on the plan, or the moiety of Parliament-street as then existing, to be the subject of the sale or of the conveyance. But as a matter of fact, there were in connection with the premises certain vaults underneath the footway and projecting into Parliament-street beyond the boundary line of the premises as shown upon the plan. At the date of the conveyance, and thenceforward until certain alterations made by the then local authority and completed in June 1899, the pavement for pedestrian traffic in front of the plaintiffs' premises in Parliament-street was of the width of no more than 12ft. or thereabouts, measured from the front wall of the plaintiffs' buildings. In the year 1899, upon the removal of the block of buildings between Parliament-street, as it then was, and King-street, and the consequent widening of Parliament-street, the kerb of the footway in front of the plaintiffs' premises was advanced into the roadway so as to make the width of the footway about 21ft., and the edge of this footway was the line of the kerbing before the alterations in question in this action. Parliament-street as widened is nearly 100ft. in breadth. At the corner where the plaintiffs' premises are situate between Parliament-street and Bridge-street leading to Westminster bridge there is very considerable traffic of all kinds, as everybody knows, and it was at one time contemplated by the local authority to construct, there or thereabouts, certain sanitary conveniences and a general system of subways underground, so as to enable foot passengers thereby to cross the streets in safety. For some reason or other this project for a general system of subways had to be given up, but it was finally decided to construct extensive sanitary conveniences for the use of both sexes respectively under the middle of Parliament-street with approaches thereto by a descending staircase from the footways on either side, one effect of this

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being, of course, that if anyone chose to descend from the foot pavement, pass underneath the street, using or not using one of the conveniences in passing, he or she might cross the street without danger of being run over by any of the vehicles which there at certain hours crowd the roadway. At first it was proposed to place the descending stairs, from the eastern side of Parliament-street to these conveniences, upon or within the outer portion of the foot pavement, widened as it was in 1899 opposite the plaintiffs' premises; but it was found that this could not be done without acquiring or interfering with a small portion of the vaults I have mentioned belonging to the plaintiffs. They objecting to these stairs being in front of their premises, though at a distance of 15ft. or thereabouts from the front of their buildings, the stairs were placed further away, so as to stand for a portion of their width on the roadway as then existing and for the rest—viz., 2ft. 9in. or thereabouts—upon the foot pavement as extended in the previous year 1899 in the manner I have mentioned. At the time of the trial the works were nearly completed, what I may call the general line of the kerb on the edge of the foot pavement having been put back so as to be distant about 19ft. or a little less from the adjacent buildings. It is not alleged or suggested that this has not left more than ample width for the use of foot passengers there. Indeed, I suppose the footway was widened as it was in 1899 not so much from necessity as to improve the appearance of the street. It was stated, and is probably the fact, that the only power the defendants had to do what they have done, must be found in sect. 44 of the Public Health (London) Act 1891, and it was argued that, apart from any question of the right of property in the subsoil, the situation selected for the conveniences was unreasonable and improper, and that, inasmuch as people could cross Parliament-street by means of the approaches to the conveniences, those approaches did in fact constitute a subway which the defendants had no authority to make, and that all that they have done is thus *ultra vires* and ought to be removed. Apart from any question depending upon the legal right to the subsoil, or assuming this to be vested in the defendants, I have come to the conclusion that what the defendants have done is in no way *ultra vires*, unreasonable, or improper. Their primary object was, in my opinion, the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom, and because, by reason of there being approaches from both sides, these may be used for crossing the street, I decline to hold that the defendants have not acted *bona fide* in the exercise of their statutory powers, or that they have occasioned any nuisance that was not authorised by law. In other words, I think this action fails, unless the plaintiffs can establish that a portion of the site of the eastern approach or staircase down to the conveniences is their property, and a part of the footway within the meaning of that expression in the 44th section of the Public Health Act 1891. The plaintiffs relied upon the presumption which is thus stated in Pratt's Law of Highways, 14th edit., p. 39: "It is a presumption of the law, in the absence of evidence to the contrary, that the soil of a highway to the middle of the road (*usque ad medium filum viæ*) belongs to the owner of the

land adjoining the highway. This presumption has been said to rest on the supposition that, when the road was originally set out, the proprietors of the adjoining land each contributed a portion of their land for its formation." And the presumption is also stated in Elphinstone, Norton and Clark on the Interpretation of Deeds, at p. 179, as follows: "By the conveyance of land abutting on a highway or separated from it by a strip of uninclosed land, the *prima facie* presumption of law, in the absence of evidence of ownership, is that the strip and the soil of the road *usque ad medium filum viæ* pass." The defendants hardly contested the application of this presumption to the present case, notwithstanding what is said in *Beckett v. Corporation of Leeds* (26 L. T. Rep. 375; L. Rep. 7 Ch. 421), *Romer, L.J.* having held in *Re White's Charities* (78 L. T. Rep. 550; (1898) 1 Ch. 659) that the presumption that half the soil of the road is intended to pass to a purchaser of land described as bounded by a public thoroughfare is equally applicable to streets in a town as to highways in the country." I cannot say that I consider this last case to be an altogether satisfactory authority. Still it is a deliberate decision to the effect above stated. In considering my judgment it occurred to me that Parliament-street was quite a modern street and that it was very possible that the land required for making it might have been purchased by some road authority. Upon referring to Wheatley's London I found it there stated that Parliament-street was made pursuant to 29 Geo. 2 c. 38, King-street having been previously the only highway from Whitehall to Westminster. That Act provided the Commissioners of Westminster Bridge with funds for the purchase of houses and grounds for the purpose of widening the ways and making more safe and commodious the streets, avenues, and passages from Charing-cross to Westminster. In J. T. Smith's Antiquities of Westminster (1807) an elaborate plan is given, showing the streets, courts, alleys, and yards near the *locus in quo* as they appeared before the erection of Parliament-street. If this plan be correct, the site of the portion of Parliament-street now in question must have been purchased, or the right to use it somehow acquired—it is hardly likely to have been given—by the Commissioners of Westminster Bridge. I thought it my duty under the circumstances to mention the case again in court and to call counsel's attention to the point. Upon a subsequent day, however, counsel for the defendants informed me that he had nothing more to say, and that his clients did not desire or were unable to adduce further evidence. I may add that by 16 & 17 Vict. c. 47, the estates of the Commissioners of Westminster Bridge were transferred to the Commissioners of Her Majesty's Works and Public Buildings. The Act 50 & 51 Vict. c. 34, also deals with the approaches to Westminster Bridge. Now, whatever I may conjecture to be the true facts if investigated and ascertained in reference to the ownership of the sub-soil in Parliament-street where the staircase has been constructed, I suppose I must act upon such evidence only as was before the court at the trial, and hold that the presumption I have mentioned applies, and consequently that the land or soil where the staircase is constructed as to 2ft. 9in. in width is the property of the plain-

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tiffs, and, being part of the footway, not liable to be taken and used by the defendants under the Act of 1891 for the purpose of the construction of sanitary conveniences. I must, therefore, as it seems to me, grant an injunction for the removal of this portion of the staircase. This result appears, under the circumstances, to be most unsatisfactory. I cannot help suspecting that the soil in question does not belong to the plaintiffs. My order will do the plaintiffs no real good if the defendants choose, as they may, simply to put the staircase 2ft. 9in. further out into the roadway, thus making it to stand clear of the footway as it was before the works were commenced. Nor do I see how I can compel the defendants to restore the old line of the kerb or edge of the footway as it existed at the end of 1899. His Lordship then dealt with the costs of the action, and directed the operation of the injunction to be stayed for six months with liberty to apply in chambers for a further stay in the event of an appeal from this decision.

Solicitor for the plaintiffs, *Charles Henry Mason*.

Solicitor for the defendants, *Percy Gates*.

KING'S BENCH DIVISION.

Nov. 5 and 6, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

STODDART (app.) v. HAWKE (resp.). (a)

Gaming and wagering—Coupon issued in England—Money sent abroad—Betting Act 1853 (16 & 17 Vict. c. 119), ss. 1, 4.

The appellant was the owner of an office in England from which a newspaper was issued containing coupons, and also coupons without the paper. Those coupons, which related to horse-racing competitions which had been held to be illegal in this country, were to be filled up by the competitors and sent with the money to the offices of the appellant in Holland.

Held, that the office in England was kept for the purpose of money being received by the appellant, contrary to the Betting Act 1853.

It is not necessary that the money should be received at the office, but if the office forms part of the system whereby the money is received, wherever it is in fact received, that office is within the Act.

CASE stated upon five summonses charging Joseph Stoddart, the appellant, that he being the owner of a certain office or place kept and used the same at various dates for the purpose of money or valuable things being received by or on behalf of him as or for the consideration for an undertaking or promise to pay or give thereafter on events or contingencies relating to horse races and football; and, further, that he kept and used the same place for the purpose of one G. Stoddart using it for the same purposes.

The following facts were proved or admitted:—

On and between the dates specified in the summonses the appellant was the owner of an office in the city of London, and also the registered proprietor of a newspaper called *Sporting Luck*. The office was the principal office at which

the newspaper was published and the business thereof conducted.

Copies of the newspaper were put in evidence at the hearing, as was also one of the posters of the newspaper.

The copies contained advertisements relating to sporting coupon competitions, and copies of coupons called "International Supplement," which accompanied the copies of the newspaper, were also put in evidence.

The coupons were procurable at the office by intending competitors, either with or separately from the newspaper, free of charge.

All the coupons filled up and dispatched by the competitors, together with the remittances accompanying them were, in accordance with the instructions in the advertisements and coupons, addressed to *Sporting Luck*, Middelburg, Holland, and in one of the issues of the newspaper remittances were to be made payable to the appellant, but in the subsequent issues to G. Stoddart.

It was proved, however, that subsequently to that issue remittances in the form of postal orders were sent in registered envelopes addressed to J. Stoddart, *Sporting Luck*, Middelburg, Holland, payable to the appellant, and were accepted for the competitions as well as those made payable and sent to G. Stoddart. It was further proved that between the 8th March and the 3rd April 1901 the authorities at the General Post Office cashed postal orders payable either to the appellant or to G. Stoddart, and returned from Holland, amounting to 9683*l.*, and that between the 28th Feb. and the 3rd April there were 87,556 of such orders. It was also proved that English postal orders are not payable in Holland, and cannot be cashed except in this country. Among the postal orders produced by the postal authorities as having been returned for payment through Dutch bankers with whom G. Stoddart had an account were numerous orders identified as having been sent to the appellant and G. Stoddart for the competitions.

A copy of the *London Gazette* of the 19th March 1901 was produced by the prosecution, which contained an announcement of the dissolution of the partnership previously existing between the appellant and his son G. Stoddart, as Turf accountants at Middelburg, as from the 14th March 1901.

It was proved that G. Stoddart was between twenty-one and twenty-two years of age, and that he had previously assisted the appellant, his father, at 10, Red Lion-court, Fleet-street, where he also carried on a betting business under the style of J. and H. Drew, being guaranteed by the appellant, his father.

It was proved that the competitions for which the moneys were received were in some cases in respect of horse races and in others football matches, and that they were described in the newspaper as *Sporting Luck* contests, and that the address in Holland was given as *Sporting Luck*, Middelburg, Holland.

It was proved that one of the prize-winners received his prize by a cheque drawn by George Stoddart, and dated the 22nd March 1901, on an account in his name at the London and South-Western Bank, Fleet-street.

Upon the above facts counsel for the appellant contended (1) that in order to bring the case

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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within the Act it was necessary to prove that the appellant had kept or used the office, 10, Red Lion-court, Fleet-street, for the purpose of money, &c., being received by the appellant at that office; (2) that there was no evidence that the appellant kept the office for the receipt of money, &c., by him within the meaning of the Act; (3) that the receipt of money, &c., to be within the Act must be a receipt at the time the bet was made and the promise to pay given, or, at all events, before the events the subject of the competition had come off.

Counsel for the respondent contended (1) that the sending of moneys, &c., to the appellant and his son, George Stoddart, by the way of Middelburg, the bulk being in the postal orders which can only be cashed in this country, was merely a subterfuge; (2) that if the receipt of the moneys, &c., by the appellant or any person acting on his behalf had not been proved, the real gist of the offence created by the statute is the opening and keeping of a house (as advertised in *Sporting Luck* and the coupons) for the purposes which it forbids.

The following reported cases were referred to: *Bowes v. Fenwick* (L. Rep. 9 C. P. 339), *Cox v. Andrews* (12 Q. B. Div. 126), *Reg. v. Brown* (1895) 1 Q. B. 119, and *Davis v. Stephenson* (62 L. T. Rep. 436).

The magistrate found as a fact that George Stoddart was acting at Middelburg as the agent for or as jointly interested with the appellant in the receipt of moneys, &c., posted to Middelburg as described. He also found that the appellant in fact had himself received some of the postal orders, and he held that the office, 10, Red Lion-court, Fleet-street, had been opened and kept for the purpose of money, &c., being received, contrary to 16 & 17 Vict. c. 119.

He accordingly convicted the appellant upon each of the five summonses.

By the Betting Act 1853 (16 & 17 Vict. c. 119), s. 1:

No house, office, room, or other place shall be opened, kept, or used for the purposes of the owner, occupier, or keeper thereof or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto, or for the purpose of any money or valuable thing as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid, and every house, office, or room, or other place opened, kept, or used for the purposes aforesaid or any of them is hereby declared to be a common nuisance and contrary to law.

And by sect. 4:

Any person being the owner or occupier of any house, office, room, or place opened, kept, or used for the purpose aforesaid or either of them, or any person acting for or on the behalf of any such owner or occupier, or any person having the care or management or in any manner assisting in conducting the business thereof, who shall receive directly or indirectly any money or valuable thing as a deposit on any bet on condition of paying a

sum of money or other valuable thing on the happening of any event or contingency of or relating to a horse race or any other race, or any fight, game, or sport or exercise, or as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any valuable thing on any such event or contingency, and any person giving any acknowledgment, note, security, or draft on the receipt of any money or valuable thing so paid or given as aforesaid purporting or intended to entitle the bearer or any other person to receive any money or valuable thing on the happening of any such event or contingency as aforesaid, shall upon summary conviction thereof before two justices of the peace forfeit and pay such penalty not exceeding fifty pounds as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, and on the nonpayment of such penalty and costs or in the first instance, if to such justices it shall seem fit, may be committed to the common gaol or house of correction with or without hard labour for any time not exceeding three calendar months.

Lord Coleridge, K.C. (*M. Shearman and Stutfield* with him) for the appellant.—No money was received in the house. All that was done in this country was to issue the coupons without charge. It is necessary for the prosecution to show that the house was kept for the purpose of money being received, or that money was in fact actually received. The receiving cannot be a continuing act. That is clearly shown by the case of *Davis v. Stephenson* (62 L. T. Rep. 436; 17 Cox C. C. 73; 24 Q. B. Div. 529), where the defendant, who kept a licensed house, allowed a person who made bets near it to deposit in the house the money received by him, such money being received by him outside the house. It was there held that a conviction could not be upheld for permitting the house to be used for the purpose of money being received by way of betting. It was also held in *Bradford v. Dawson* (76 L. T. Rep. 54; 18 Cox C. C. 473; (1897) 1 Q. B. 307) that a person who uses a house for paying bets which he has previously made elsewhere does not commit an offence under sect. 3 of the Betting Act 1853. *Cox v. Andrews* (12 Q. B. Div. 126; 53 L. J. 34, M. C.) decided that the Betting Act 1874 is confined to bets mentioned in the Act of 1853—that is, bets made in any house, &c., kept for betting—and so does not apply to advertisements offering information for the purpose of bets not made in any house, &c. Mathew, J.'s judgment in the *Law Journal* report is not in the same words as in the *Law Reports*, but it is in my favour. Phillimore, J. in *Stoddart v. Argus Printing Company Limited* confirms the opinions of Lord Coleridge and Lord Esher in *Davis v. Stephenson* and Mathew, J. in *Cox v. Andrews* that the office aimed at is the office where money is received. The judgment of Lord James of Hereford in *Powell v. Kempton Park Racecourse Company* (80 L. T. Rep. 538; (1899) A. C. 143), at p. 191, as to the origin and scope of the Act shows that the preamble should be looked at to see what is meant by the sections. The receipt mentioned in sect. 1 of the Act of 1853 means a receipt in this country, and the receipt in sect. 4 of that Act must be the same kind of receipt—namely, in this country. A receipt in Holland is not sufficient. [Lord ALVERSTONE, C.J.—But the payment of the winner was in this country.] Yes; but the offence is not payment, but receipt.

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Avory, K.C. (Mackay with him) for the respondent.—The offence created is money being received by or on behalf of the owner. If the house is used for the purpose of money ultimately getting into the hands of the owner of such house, then that is within the words of and the mischief aimed at by the statute. It does not matter that the money comes by a circuitous route. [Lord ALVERSTONE, C.J.—I think you must go further and say that it does not matter whether the money ever comes back at all.] The contention of the other side is that the words “received in the house” must be read as in the Act. In *Davis v. Stephenson* the publican was charged with allowing his house to be used for a purpose contrary to the Betting Act, and the court held that there was no evidence that he allowed his house to be so used. The whole question in *Cox v. Andrews* was whether an advertisement in a newspaper that a correspondent would give tips was an offence against the Betting Act 1874. He referred to

R. v. Worton, 72 L. T. Rep. 29; 18 Cox C. C. 70; (1895) 1 Q. B. 227.

The first part of sect. 1 of the Act of 1853 requires physical resort, but under the second part all that is necessary is that the house, &c., is used for the purpose of enabling money to be received. He referred to

Stoddart v. Argus Printing Company (sup.).

Lord Coleridge, K.C. in reply.—The purpose for which the house is kept must be illegal, but keeping a house abroad for the purpose of making bets is not illegal. He referred to

Macnee v. Persian Investment Corporation, 62 L. T. Rep. 894; 44 Ch. Div. 306.

Lord ALVERSTONE, C.J.—Notwithstanding the very able argument of Lord Coleridge, and with the assistance of the equally able argument of Mr. Avory, we are of opinion that this conviction ought to be affirmed. I adopt, not only am I bound by it, but I agree entirely with, the view of the object of the Act expressed by Lord James of Hereford in the House of Lords in *Powell v. Kempton Park Racecourse Company* (80 L. T. Rep. 538; (1899) A. C. 143), and if it is taken to be, as undoubtedly it is, at any rate for our purpose, a true exposition of the objects of the Act, no one can have the least doubt that this particular transaction is within the mischief aimed at. It is only fair to say that Lord Coleridge in his argument did not attempt to say it was not, but he said, I think quite correctly, you must find some language in the Act of Parliament which without undue straining, without construing it otherwise than the natural meaning of language, would enable you to do so, in case of doubt referring to the preamble in construing the Act. I think it right that I should say what I understand the material part of the statute to be. This defendant is charged under the second part of the statute that he has kept a place, or had care or management of a place, for the purpose of money being received by and on behalf of such persons for illegal consideration—namely, betting consideration. The facts, as I understand them to be, are these: The present defendant does carry on some business in Red Lion-court and he occupies it, and from that place *Sporting Luck* is, I presume, published. I have not looked to see if it is the registered office. At any rate, from that

place are issued, and people can get by going there, the coupons without which the defendant cannot for this purpose, or would not for this purpose, receive any of the money at all. I am not going to say, of course, for the purposes of to-day, that there is any evidence of resorting by persons who went there to get coupons, because the defendant is not charged under that section, and we are not considering that. It seems to me that the statute is not to be confined to the money being received upon the place. I think, having regard to the judgment in *Powell v. Kempton Park Racecourse Company (sup.)* in the House of Lords, we ought to say the main substantial offence intended to be hit at by the statute is keeping a place for the purpose of the owner or proprietor of that place receiving the money, and it would defeat the obvious intention of the Legislature if we were to add to the words “for the purpose of the money or valuable thing being received,” the words “being received at that place.” And I do not think I could put a better illustration than was put by Mr. Avory in argument. If the whole transaction had been carried on at Red Lion-court by the issue of coupons, when the coupon had been delivered to men there with a notice on them or a verbal intimation, “Do not pay the money to me; be good enough to pay it at the bank round the corner,” then, it seems to me, if the argument of Lord Coleridge is true, the proprietor of this particular place would not be within the section. Taking the view that I do of the facts, it was a necessary part of the system such as was being carried on there at the office at which the coupons were issued, and formed a necessary part of the business and system which is being carried on—namely, that this gentleman, Mr. Stoddart, was to receive money. On the construction of the section, I am clearly of opinion that there is evidence upon which the magistrate could convict. I wish to say one or two words on the authorities, because if there is a decision against the view, as I take it, we might not be bound by it, but we should have to consider whether we should not have to take further steps to have it reviewed. As I read the judgment in *Davis v. Stephenson* (62 L. T. Rep. 436; 17 Cox C. C. 73; 24 Q. B. Div. 529) it is certainly not an authority against us. There the innkeeper was charged, and what was done in that case was that the betting man who collected his money had gone to the house where he kept his accounts and where the money had been sent by a messenger or someone on his behalf. Now it is, of course, to be observed that the charge was not against the person who was carrying on the business of betting, but against the keeper of the house. It seems to me that the principle which I have endeavoured to lay down upon the construction of the statute is that the court must be satisfied that the defendant has permitted his house to be used for the purpose of receiving the money. I have looked again, in consequence of what was properly pressed upon us by Lord Coleridge, at the fuller report of the judgment of Lord Coleridge, C.J. in the *LAW TIMES* Reports, and I think the submission is on the very lines I have been indicating, because the words are, “Now, Mr. Poland has stated—and his case fails unless he can show that it was so—that Hicks received the money in the house of Davis and that Davis

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suffered his house to be used for the purpose of Hicks receiving his money therein, and Mr. Poland admits that, unless the facts of the case will make out that conclusion, in point of law this conviction is bad." I point out it is not the mere receipt or landing of the money in the house of Davis, but that Davis suffered his house to be used for the purpose of Hicks receiving the money therein, and if you look at the shorter judgment in the *Law Reports*, where it is much condensed, you read: "After having received the money he sent it into the tavern by a messenger by an arrangement with the defendant, and there he resumed possession of it; but there is no pretence for saying that he received it in the tavern." If I am right, the broad test which I have endeavoured to lay down with regard to the mischief aimed at in the section is obvious. The mere permission by a third person that the house may be used by a bookmaker to make up his accounts and handle his money after the money had been received would be no essential part of the system whereby the bookmaker or the betting man was enabled to get hold of the money. In other words, it would not be for the purpose of money being received, because, if we look at the case of *Cox v. Andrews* (12 Q. B. Div. 126; 53 L. J. 34, M. C.)—it is strange that there again is a variation in the two reports—in the *Law Journal* report Mathew, J. does seem to use the words: "Cockburn's Act was directed to suppressing betting houses, as appears from the preamble, and the keeping of such houses and receiving money in advance in them is prohibited." It is perfectly obvious that what my learned brother Mathew was deciding was not necessary for the purposes of the case, but perhaps, again, it is not unimportant. That was one of the objects which the Act was intended to hit, but you will notice the words "receiving money in advance in them" is not in the judgment in the *Law Reports*, but the particular passage is considerably altered in one sense. "The Betting Act 1853 was intended to suppress betting houses, and it prohibits the use of any house, office, room, or other place opened, kept, or used for the purpose of betting, and imposes a penalty on the person who keeps such a house." That is the corresponding passage. Of course, what my learned brother Mathew says is quite true with regard to one of the matters which was intended to be stopped by this Act. I do not think anyone can suggest, at any rate I do not think we ought to hold, that it is an exhaustive statement and that the words there are an authority that unless the money was actually received in the house, although the house is necessary on the facts for the purpose of the receipt of money, no offence has been committed. The other authorities which have been cited to us do not bear directly upon the point. I am glad to be able to come to this conclusion, though I do not say it is a case that is absolutely plain. That it is a system within the mischief of the Act, by which great mischief and irreparable mischief is done, is obvious from the facts stated in this case. Coming to the conclusion, as I do, that the main offence intended to be struck at is the keeping of a place, localising a business, to enable the proprietor of that place of business to receive the money, I am of opinion that the magistrate came to a right conclusion, and that this conviction must be affirmed.

DARLING, J.—I am of the same opinion. The words of the Act are: "Using this place for the purpose of any money or valuable thing being received by or on behalf of such owner"; and the contention of the appellant is that it is not forbidden to do what he does, because he does not receive the money in that house, nor indeed in England. Has he done so? He has been convicted, in my opinion rightly, and has not evaded the statute, and it is admitted by Lord Coleridge himself that what the appellant does is really within the mischief aimed at by the Act. If it had been pointed out to the Legislature that anybody would ingeniously contrive to do what the appellant has done, they would have used other words to prevent it, and therefore Lord Coleridge calls this a *casus omissus*. I do not think it is. I think the words are wide enough. They do not say the money must be received in the house. Lord Coleridge has been able to quote one or two passages from which it might be supposed that some of the learned judges have thought it ought to be received in the house. I do not think so. I do not think they were saying so as a part of their decisions, at all events. But these words are not in the statute. Why should we read them in? I have heard no reason why we ought to construe this statute to make betting easier, and it is notorious that the amount of harm which is done in this country by betting among such people as this and of this character is enormous. The amount of crime to which it leads, no judge can go on assize without knowing—robbery of employers and all kinds of things. With all these facts staring us in the face, why should we cut down the statute and read into it words which the Legislature has not put there, and which, if they were put there, would narrow down the meaning of the statute? I look at what the appellant himself says in this paper, and I think he is under a misapprehension as to what is the value of the scheme he contrived or had contrived for him. He says, bear in mind, that the competitions as at present conducted in Holland are still legal in Middelburg, Holland, and I suppose he was of opinion that they were legal in this country. But the mistake into which he has fallen seems to me to be this: the competitions are not conducted in Holland; they are not exclusively in Holland—part of the competition is conducted here. What is done here is, a person desiring to make a bet goes to this house and gets coupons. He gets coupons, as stated in this case, either with the paper *Sporting Luck* or without it. When he gets the coupon he sends the money. To whom was the coupon so sent? He receives a prize, if he wins, here in England as the result of the contest. How can that be called a competition conducted in Holland? If the question arose in Holland he might very well argue that the competition is conducted in England. At all events part of it is. What is done in England? The contest could not be conducted at all without the coupon, for it would be no good to pay the money in Holland if you had not got the coupon, and the coupon is obtained in England and the prize is obtained in England. What is the interest of a man who bets unless it is to get the prize? And the prize is obtained in England. It appears to me what was done in the defendant's house in London was an essential and necessary part of the contest. It was a thing *sine quâ non*

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and when I came to that conclusion it seems to me the contest—at least a great part of it—a necessary part of it—the only interesting part of it to the English bettor—is conducted, not in Holland, but here, and it is conducted in the house of the appellant here. That being so, it seems to me that, wherever the money may reach him, he does use this house for the purpose of money or valuable things being received by or on behalf of him, the owner of the house, and those are the words of the statute, and he is within them. Therefore, it seems to me, the plain language of the statute warrants us in affirming his conviction, and there can be certainly no reason of public policy why we should not give to the words their proper meaning.

CHANNELL, J.—I am of the same opinion. I do not think it throws much light on the matter to consider whether or not the defendant, the present appellant here, is avoiding the statute. The question we have to consider is whether the thing he has been doing is a thing forbidden by the statute. If it is not, he is entitled to do it. We all know that his object was to get this money. The question we have to consider is whether it is forbidden by statute for him to get it in the way he is doing. Now, what is forbidden by the statute is the use of a place or office (we need not discuss the word "place," "office" is sufficient for the purpose) for certain purposes. One purpose is betting with certain persons resorting to the place. We are not concerned with that now. The second branch is one we are concerned with—namely, using it for the purpose of any money being received, and so on. The statute has been very much considered in the House of Lords in the case of *Powell v. Kempton Park Racecourse Company* (sup.), and although that case related to a different branch of the section—the first branch, and not the second, with which we have now to deal—the greater part of the judgment has a great bearing, as it seems to me, on the case before us, and it was pointed out, as Lord Coleridge has drawn our attention to it, particularly by Lord James, that what was forbidden was not certain businesses or occupations, or things of that sort, but the localisation of them. The object was to put down betting houses, and to get rid of the temptations to indulge in those practices which the establishment of offices and houses held out. As is so neatly and pithily expressed, it was the localisation of the business that was the thing intended to be forbidden. Now, this business, if I may call it so—that is, the coupon system—has been decided in *Reg. v. Stoddart* (83 L. T. Rep. 538; (1901) 1 K. B. 177) to come within the words of the second branch of the statute. That is to say, that this system is a system of receiving money by the owner or the occupier of the premises as and for the consideration of a promise to pay and give hereafter money or other valuable things. That is what was held in *Reg. v. Stoddart* (sup.), and it was so held, of course, without much doubt or difficulty, it being, as the law seemed to me, quite clear upon the plain words of the statute. But that does not necessarily conclude the matter as to whether or not the case comes within either one or the other of the clauses of this statute, because what has got to be seen is, Is this business—the coupon system, which in itself is not illegal any more than ready-money betting is made illegal—localised

by this system? What is done here is that there is an office in this country from which is issued the paper, and an appendix to it called the coupon and an "International Supplement." Those are issued here. In my judgment those documents are an essential part of the system, for without those documents the money cannot be received. Those coupons are filled up, and with them is sent certain money. Now, is it or is it not necessary that the actual receipt of the money should take place in the house or office? What is forbidden is the use of the house for the purpose—the purpose for which the house is used is the expression. Is not this house used for the purpose of receiving money when there was done in it the one thing which is the commencement of the whole rather complicated transaction resulting in the receipt of the money? It seems to me that it is, and I think that the case to which I referred in the course of the argument is precisely analogous to this—namely, the case in which it has been decided (or rather the cases, for it is not only one, it is the interpretation of the previous cases) that the provision against keeping open a public-house for the sale of intoxicating liquor during certain prohibited hours is infringed when there takes place within the prohibited hours any material part of the transaction of sale, and that it is not confined to the particular moment of time when the property in the thing passes. I think that is precisely analogous to this. Here a material part of the whole complicated transaction of the receipt of money through these papers takes place in this house, and the house is kept for that particular purpose and for nothing else. I cannot help seeing that that is so, and it seems to me that the case which decides that after the money has been received, subsequent dealing with the money cannot be considered a continuing receipt, really has nothing to do with the matter. I quite agree that there are phrases in one case and in the other cases which, if they are taken literally and without regard to the circumstances under which they are used and the facts to which they are applied, might be considered as a decision that the money must be received in the house. I see no reason for that holding, and I do not think the words of the statute say so. The statute forbids the house to be used for certain purposes. It is perhaps an object for which it is being used rather than a particular portion of the transaction which took place there. I agree, therefore, that this appeal must be dismissed and the conviction confirmed.

Appeal dismissed.

Solicitors: *Le Brasseur and Oakley; Malkin and Co.*

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Nov. 6 and 7, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MASTERS (app.) v. FRASER (resp.). (a)

Landlord and tenant—Exemption from distress—Machine on hire-purchase agreement—Law of Distress Amendment Act 1888 (51 & 52 Vict. c. 21), s. 4—Estoppel—Substitution of complainant in summons.

A sewing machine in the possession of a tenant under a hire-purchase agreement, and used by the tenant's wife to support the family, is exempt from distress, under sect. 4 of the Law of Distress Amendment Act 1888, as a tool and implement of the trade of such tenant.

Upon a distraint being made upon such a sewing machine, and a man being put in possession, a letter was written to the landlord: "I hereby request you to remove the sewing machine and other goods you have distrained on my premises."

Held, that this did not estop the respondent from raising the question whether the machine could be distrained upon at all.

Semble, that although the husband was the tenant and the hirer, the proceedings could be maintained by the wife, but that in any case the proceedings could be put right, either by having fresh proceedings or substituting the husband for the wife as complainant.

CASE stated upon a complaint laid by the respondent against the appellant for the recovery of a sewing machine which had been distrained upon by the appellant.

The material facts were as follows:—

The respondent lived with her husband, John Alfred Fraser, an iron foundry moulder, and their children, at a small dwelling-house rented by him at 4s. a week. He being in arrear with his rent and much out of work, the respondent, to help to maintain the household by sewing, obtained, on the 1st April 1901, from the Singer Manufacturing Company, a sewing machine, she having previously worked by hand and needing to work more rapidly.

The machine was obtained upon a hire-purchase agreement made in the form of the agreement in *Helby v. Matthews* (72 L. T. Rep. 841) and between the Singer Manufacturing Company and the respondent's husband.

The sewing machine was thenceforth until the distraint used by the respondent at the dwelling-house in sewing for neighbours, from whom she obtained employment, and also in making clothing for herself and family. By these means she helped to support the family.

On the 18th April 1901 the appellant, a certificated bailiff for levying distress, levied at the dwelling-house on behalf of the landlord a distress for 2l. 11s., the rent then in arrear and owing therefor to the landlord, and under such distress took (*inter alia*) the sewing machine, thereby depriving the respondent and her husband of the use of it.

On making such distress the appellant left a man at the dwelling in possession of the sewing machine and other goods distrained, who so remained in possession until the 22nd of the same month, on which day the respondent called at the office of Mr. H. E. Porter (the appellant's

principal) (her husband remaining outside) and asked the appellant to take the man out of possession. The appellant said he could only do so upon having a request to remove the goods. He thereupon wrote a letter as follows:

To Henry E. Porter. April 22nd 1901. Dear Sir,—I hereby request you to remove the sewing machine and other goods you have distrained at my premises, No. 5, Brunswick-retreat.

Which request the respondent then signed in the name of her husband.

The appellant thereupon removed the goods (including the sewing machine) and withdrew the man in possession.

On the part of the appellant it was contended:

(a) That the sewing machine was not a tool or implement of trade of John Alfred Fraser, the tenant within the meaning of the County Courts Act 1888, s. 147, and therefore was not exempt from distress under sect. 4 of the Law of Distress Amendment Act 1888; (b) that the respondent was not competent to make the complaint, since she had proved no title to the property in or custody of the machine; (c) That the letter or request of the 22nd April was an authority to the appellant to remove the sewing machine, and a ratification of the distraint upon it.

The justices, upon the facts before them, held that at the time of the distress the sewing machine was an implement of trade of John Alfred Fraser, and exempt from distress under sect. 4 of the Law of Distress Amendment Act 1888: (see *Churchward v. Johnson*, 54 J. P. 326, and *Jones' Sewing Machine Manufacturing Company v. Porter*, 61 J. P. 378).

They also considered that the respondent, who by the distress was deprived of the use of the sewing machine, was competent to make the complaint, under sect. 4 of the Law of Distress Amendment Act 1895 (58 & 59 Vict. c. 24), but they offered to add the respondent's husband as a complainant and to adjourn the hearing if the appellant's solicitor desired it. This he declined. They considered that the request by the respondent, on the 22nd April, for the removal of the goods distrained, was made to obtain the removal from the house of the man in possession, and did not legalise the distraint four days before of the sewing machine.

By the Law of Distress Amendment Act 1888 (51 & 52 Vict. c. 21), s. 4:

From and after the passing of this Act the following goods and chattels shall be exempt from distress for rent: namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under section ninety-six of the County Court Act 1846, or any enactment amending or substituted for the same, provided that this enactment shall not extend to any case where the lease term or interest of the tenant has expired, and where possession of the premises in respect of which the rent is claimed has been demanded and where the distress is made not earlier than seven days after such demand.

By the County Courts Act 1888 (51 & 52 Vict. c. 43), s. 147, which re-enacts the County Court Act 1846 (9 & 10 Vict. c. 95), s. 96:

Every bailiff or officer executing any process of execution issuing out of the court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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trade, to the value of five pounds, which shall to that extent be protected from such seizure), and may also seize and take any money or bank notes (whether of the Bank of England or of any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties, or securities for money, belonging to any such person against whom any such execution shall have issued as aforesaid.

Joseph (Hohler with him) for the appellant.—The sewing machine was not a tool or implement of Fraser within the meaning of the Distress Amendment Act. The only goods that are protected by the County Court Act are the goods of the person against whom the execution is levied. Here the husband was the tenant. I submit, first of all, that this sewing machine was not the goods either of the husband or of the wife. The sewing machine was the property of the Singer Sewing Machine Company. The agreement under which it was hired is exactly similar to the agreement which was considered in the House of Lords in the case of *Helby v. Matthews* (72 L. T. Rep. 841; (1895) A. C. 471), where it was held that until the last instalment was paid no property passed to the hirer. Under those circumstances I submit that this sewing machine was not the goods either of the husband or of the wife, and therefore is not exempt from execution under the County Courts Act 1888, or the Law of Distress Amendment Act. It was not necessary to put that exemption into the Act of 1888, the County Courts Act, because nobody's goods except the goods of the debtor can be seized in execution. The exception in the County Courts Act excepts property of the debtor. There was no necessity to except any other property. [Lord ALVERSTONE: You mean that the words "any of the goods or chattels of the family" do not include any more than the wearing apparel of the family; that they do not include the goods of the family which do not belong to the person liable for the rent.] Yes. I submit that that is quite clear under the two sections of the Acts read together, for no execution could by any possibility have been made against the goods of anybody but the person who was the debtor. Here, if this sewing machine is not the goods of either the husband or wife, I submit it is not exempt from distress under the Law of Distress Amendment Act. [CHANNELL, J.—The result is peculiar, for where a workman earns his living with his own tools, and to the value of those he has the means of paying, those cannot be taken; but if he has hired tools these can be taken.] That is the natural construction of the Act, and where the Legislature has meant to protect goods in the possession of a person, apt words have been used, as in the Lodgers Act 1871, where it says: "being the property or in the possession of." But the machine being hired by the husband, and he apparently paying the rent for it, if the machine is worked by the wife as the servant of the husband, and for the purpose of defraying the household expenses, it may be that, under the decision of *Churchward v. Johnson* (sup.), it is a tool or implement of his trade. But it is found that the respondent obtained the sewing machine—that is to say, the wife. This case can be distinguished from *Churchward v. Johnson* (sup.) in that there it was found that the wife was working the machine as the servant of the husband. This at the most is the tool of the trade of the

wife. It was not the trade of the husband. The third point which is raised by the case is this: The goods are the goods of the husband, and the wife is not competent to make the complaint. It is a proceeding under the Summary Jurisdiction Act, and, excepting under Jervis's Act, there is no power to amend. [Lord ALVERSTONE.—Do you say they could not have amended?] Only by substituting. By the finding in *Churchward v. Johnson* the wife's property or rights are absolutely gone. She has no right to the machine at all; therefore it is in the husband, and the order was: "The court doth order that the defendant do forthwith return the said sewing machine to the said Cecilia Fraser." There is no power to substitute parties under these proceedings. There may be power to make amendments—no doubt there is power—but there is no power to substitute one complainant for another in these proceedings. Although there may be power to amend an informal matter in the summons, there is no power to substitute parties. In *City of Oxford Tramways Company v. Sankey* (54 J. P. 564) S. summoned H., the manager of the Oxford Tramway Company, for breach of a bye-law, and, on objection taken, the justices amended the summons by substituting Oxford Company for H., and then convicted the Oxford Company, and it was held that the justices had no power to amend by substituting one name for the other. [Lord ALVERSTONE.—Wills, J. says: "No doubt if the person charged had been before the court, he might have waived any irregularity. But here there was no person in court, as the corporation could not appear in person, so as to enable the justices to amend by making them parties. It is true they acted to some extent as if they were the parties summoned, and in that case were aggrieved, and thereby could demand a case for the opinion of this court. But, although the justices acted rightly in stating the case, they had no jurisdiction to amend the summons in the way they did here."] That was a case of a fresh defendant. A fresh defendant and a fresh complainant seem rather different. He referred to

Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43);

Whittle v. Frankland, 5 L. T. Rep. 639; 2 B. & S. 49.

The respondent, having signed the request to the appellant to go out, is estopped from raising these proceedings. [Lord ALVERSTONE, C.J.—If you say estopped from claiming damages for removing the machine as distinguished from its being left on the premises, possibly yes, but not from saying the machine should never have been taken at all.] He referred to

Palmer v. Moore, 82 L. T. Rep. 166; (1930) A. C. 298.

Bullen, for the respondent, was not called upon.

Lord ALVERSTONE, C.J.—In this case a sewing machine, which had been hired by the husband of the complainant who took out the summons, had been seized under distress of rent. The first question is whether or not it was protected from distress for rent under the combined effect of the Law of Distress Amendment Act 1888 and sect. 147 of the County Courts Act 1888. The main point that has been argued is that because the machine was Singer's, that is to say, had been lent by the

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Singer Company to the husband under a hire agreement—for the purposes of this point it would make no difference whether it had been lent to the wife or the husband—therefore it was not the goods of even the husband, which would be protected by the combined effect of the two Acts. Dealing with it for a moment as being a sewing machine hired by the husband, we are of opinion that it does come within the meaning on the fair construction of the section. The words are: "Seize and take any of the goods and chattels of such person, excepting the wearing apparel and bedding of such person or his family and the tools and implements of his trade." I say that that means the tools which he is entitled to the possession of for the purposes of his trade, and that, therefore, if he has hired, or borrowed, or has become lawfully possessed of a tool which would come within the words, the landlord cannot, nor could the execution creditor, set up a *jus tertii*. Of course, the execution creditor could not, but the landlord could not, set up a *jus tertii* of the property being in Singer, and say: "That entitles me to distrain on the goods." Then a difficulty arose because the actual use of the sewing machine was by the wife. Now, if a case had been made under the Married Women's Property Act that the wife was carrying on some separate trade, and that she was entitled to the possession of the chattel as a *feme sole*, or having the rights of *feme sole* to carry on the trade, we might have a different set of circumstances. In this case it is found in the case that the wife was using the sewing machine to make clothes for the family, and sometimes for the neighbours, and did in fact assist to maintain the family by that kind of use. Therefore, I do not think it is a case which would justify the view that the wife was using this machine independently of the husband. Inasmuch, therefore, as it was used by the wife on behalf of the husband, I think it fairly comes within the description, and that we ought not to come to the conclusion, it being used by the wife for that purpose, that it prevents it coming within the relief intended to be given by the section. Speaking for myself, I should have come to that conclusion if there had been no authority, but we certainly could not decide otherwise without expressly overruling the case of *Churchward v. Johnson (sup.)*. The facts are identical, because in that case the machine had been hired by the husband and used by the wife as a seamstress; she applied the earnings for the maintenance of the house, and the landlord had distrained upon the machine; and it was held that the machine was an implement of his trade within the meaning of this very section. And I must say that I think that the late Lord Coleridge's judgment, in which Mathew, J. concurred, gives very good reasons for coming to the same conclusion at which I have arrived. It is said that the point that the machine was the property of the Singer Company was not argued in that case, and that therefore it is not an authority. I think that is a very strong view to take, having regard to the patent fact that here was a machine hired under the agreement, and, having regard to the learned judges who dealt with that case, and the learned counsel who appeared in the case, I think we ought to assume that at any rate that point was present to their minds. I do not think we could decide otherwise without overruling

Churchward's case, which I am not prepared to do. One of the points which was raised by Mr. Joseph was that these proceedings were wrong because they were taken in the name of the wife. It would be a mere matter of form. There was an offer to adjourn. I do not think it is seriously disputed that the proceedings could be put right, even if they are not now right, by adjourning the one proceeding and either having fresh proceedings or substituting the name of the husband for the wife. I am at present disposed to think that the complaint could be properly maintained by the wife. I certainly am not inclined to decide the case on a highly technical point of that kind, which was offered to be put right by the magistrates if the point was really pressed. Those are two of the points on which Mr. Joseph argued. Our opinion is against him on both points, and this appeal must be dismissed. We do not think it is possible to say that the wife or husband is estopped from raising the question as to whether the bailiff ever had a right to touch the sewing machine at all. The appeal also fails on this point.

DARLING, J.—The only difficulty I ever felt during the argument of Mr. Joseph was by his contention that although tools and implements of the debtor whose goods were seized were protected by the Act, that meant tools which were really his personal property, and would not protect tools which he had hired of somebody else for the purpose of his trade. But on looking at the words of the Act the words are that the tools and implements protected are the tools and implements of his trade—not his tools and implements at all. The tools and implements of his trade are protected. I think that means the tools and implements which he uses in his trade, and they are equally protected, in my opinion, whether they be actually his own personal property or whether they be hired by him for the purposes of his trade and used by him in his trade. This sewing machine, although not his property, was a tool or implement of the trade which he carried on, and I think the intention of the Legislature was this: that a man who had become in low circumstances and could not pay his rent should not be thrown upon the community as an expense, being a poor man, by depriving him of the means of carrying on the trade which he was carrying on. That was the object of the Legislature, and that would be frustrated whenever you get a man so poor that he could not own the tools of his trade himself and had to hire them; and it seems to me that the injustice would be very considerable, that you should spare the tools if they were the tools of the debtor—of the man who did not pay his rent—but that you should go out of your way and make an exception and seize them if they were the tools of somebody else who did not owe the money at all. It seems to me that the words of the statute carry out what was the intention of the Legislature, and that the tools are protected whether they are his personal property or whether they are hired by him for the purposes of his trade.

CHANNELL, J.—I agree in both the judgments which have been delivered, and I only desire to add this: as a general rule, lawful possession of goods is equivalent to the full ownership of them, except against persons who claim

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under or by virtue of the authority of the true owner.

Appeal dismissed. Leave to appeal refused.

Solicitors for the appellant, *Sisney and Cook*, for *Tolhurst and Co.*, Gravesend; for the respondent, *Gilbert D. Wansbrough*.

Monday, Nov. 18, 1901.

(Before LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GREEN (app.) v. CAESTANG (resp.). (a).

Wild birds—Exposing for sale—"Recently taken"
—*Wild Birds Protection Act 1880 (43 & 44 Vict. c. 35)—Wild Birds Protection Act 1881 (44 & 45 Vict. c. 51).*

A wild bird is not of necessity not recently taken because it has been in the possession of a person for a period of three weeks.

The offence of exposing for sale or having possession of any wild bird recently taken, is dependent upon sect. 3 of the Act of 1880, as amended by the Act of 1881, and it is incumbent upon the prosecution to show that the birds were wild birds and have been recently taken.

CASE stated upon an information charging the respondent, under the Wild Birds Protection Act 1880 (43 & 44 Vict. c. 35), s. 3, that he, on the 24th May 1901, did unlawfully, knowingly, and wilfully expose for sale certain wild birds—to wit, three ravens—contrary to that statute.

On the hearing on the 26th June 1901, the summons served in pursuance of the information was amended by the addition thereto of the words "recently taken" upon an objection being taken by the respondent's solicitor that no offence was disclosed by the information as originally laid.

Upon the hearing of the information, the following facts were proved or admitted:—

The respondent was a dealer in wild birds. The ravens were young birds, and came into the possession of the respondent on the 4th May 1901, being sent to him direct from Holland on the 3rd May 1901.

The birds, at the time they were sent from Holland, must have been two or three weeks old.

The close time for wild birds in the United Kingdom is between the 1st March and the 1st Aug. in each year as provided by 43 & 44 Vict. c. 35, s. 3.

Ravens are not included in the schedule to that Act, and the Act contains no definition of words "recently taken."

It was contended on behalf of the appellant that the Wild Birds Protection Act 1881 (44 & 45 Vict. c. 51) took away from the Wild Birds Protection Act 1880 (43 & 44 Vict. c. 35) any meaning of the words "recently taken."

The magistrate was of opinion there was not sufficient evidence that the wild birds had been recently taken within the Wild Birds Protection Act 1880, as, on the 24th May 1901 (the date of the alleged offence), the birds had been in the possession of the respondent for the period of twenty-one days, and, further, that the Wild Birds Protection Act 1881 only applied to wild birds recently killed and so did not apply to live birds, and he therefore dismissed the information.

By the Wild Birds Protection Act 1880 (43 & 44 Vict. c. 3), s. 3:

Any person who, between the first day of March and the first day of August in any year after the passing of this Act, shall knowingly and wilfully shoot or attempt to shoot, or shall use any boat for the purpose of shooting or causing to be shot any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale or shall have in his control or possession after the eighteenth day of March any wild bird recently killed or taken shall, on conviction of any such offence before any two justices of the peace in England and Wales and Ireland or before the sheriff in Scotland, in the case of any wild bird which is included in the schedule hereunto annexed, forfeit and pay for every such bird in respect for which an offence has been committed a sum not exceeding one pound, and in the case of any other wild bird shall for a first offence be reprimanded and discharged on payment of costs and for every subsequent offence forfeit and pay for every such wild bird in respect of which an offence is committed a sum of money not exceeding five shillings, in addition to the costs, unless such person shall prove that the said wild bird was either killed or taken or bought or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom. This section shall not apply to the owner or occupier of any land killing or taking any wild bird on such land not included in the schedule hereto annexed.

Wild Birds Protection Act 1881 (44 & 45 Vict. c. 51):

Whereas under sect. 3 of the Wild Birds Protection Act 1880 a person who within the period herein mentioned exposes or offers for sale, or has in his control or possession any wild bird recently killed or taken, is liable to certain penalties therein mentioned, subject to the following exception, unless such person shall prove that the said wild bird was either killed or taken or bought or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom; and whereas doubts have arisen with respect to the construction of the above cited enactment, and it is expedient to remove such doubts: Be it therefore enacted . . . as follows: The above cited exception in sect. 3 of the Wild Birds Protection Act 1880 shall be repealed, and in lieu thereof the following enactment shall have effect: A person shall not be liable to be convicted under sect. 3 of the Wild Birds Protection Act 1880 of exposing or offering for sale, or having the control or possession of it, any wild bird recently killed if he satisfies the court before whom he is charged either that the killing of such wild bird, if in a place to which the said Act extends, was lawful at the time when and by the person by whom it was killed, or that the wild bird was killed in some place to which the said Act does not extend; and the fact that the wild bird was imported from some place to which the said Act does not extend shall, until the contrary be proved, be evidence that the bird was killed in some place to which the said Act does not extend.

Colam for the appellant.

Arthur Powell for the respondent.

LORD ALVERSTONE, C.J.—This case certainly, to my mind, raises to me very difficult questions, and I am by no means sure that I yet understand exactly what the combined effect of the Wild Birds Protection Acts 1880 and 1881 is. However, I think that the magistrate has dismissed the case upon two grounds, neither of which appear to me to be right, but if we are to lay down any definite rules as to what the word "recent" means, we had better have a statement of facts in

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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some concrete case in which we can really consider it a little more carefully and endeavour to apply it to a given state of facts. Now, I understand the magistrate dismissed this summons on two grounds. He first says that there was no sufficient proof before him that the wild birds had been recently taken, as on the 24th May they had been in the possession of the respondent twenty-one days. In my opinion it was quite unnecessary to state the fact that they had been in the possession of the respondent twenty-one days unless he meant that to be the reason why they could not have been "recently taken," and if he decided on that ground I think it goes too far. I think it may well be that a keeper of birds may have had birds in his possession even longer—I will not say how long, because that would be a difficult matter—and still they might be "recently taken." As we know, birds are imported and kept alive which may have been caught a couple of days before, and therefore I think on that particular point the reason given by the magistrate is not a good reason. The next reason he gives is that the Wild Birds Protection Act 1881 only applies to wild birds recently killed, and consequently did not apply to these live wild birds. That seems to me to be founded on misconception through not looking sufficiently carefully at the somewhat conflicting mode of dealing with the Act. The Act of 1880 dealt with offences by both killing birds and catching them and taking them, and it allowed an offence which apparently covers all the cases—namely, killing, taking, buying, or receiving under certain circumstances. For some reason, I think I can imagine why, but I will not speculate upon it, it was thought that particular proviso would not do, and accordingly those words were struck out, and in lieu thereof there was substituted sub-sect. 1 of the Act 1881, which certainly only deals with the killing of birds, and the dealing with birds recently killed—"control or possession of birds recently killed." In my opinion, that leaves the taking and the offence of having possession of birds recently taken dependent upon the Act of Parliament as altered as though that proviso had not been there at all. It is repealed. Then I think the prosecution have to show that the birds have been recently taken. Now, if we are to take the magistrate as stating everything that was before him, then I do not hesitate to say that, in my opinion, I should not think it possible to convict, because there is nothing to show these birds were not hatched in captivity, or that a person had not had raven's eggs and simply allowed them to be hatched and sent them over here; but, at the same time, Mr. Colam suggests that that is not satisfactory, because we have not got a case stated except to raise this particular point, and in that respect he is probably right. I think with this expression of opinion the case should go back to the magistrate, and I will only say this much more for myself, that I think where the offence is "taking" the prosecution have to show evidence from which the magistrate can come to the conclusion as a matter of fact that the birds were wild birds, and that they have been recently taken.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Case remitted to the magistrate.

Solicitors: S. G. Polhill; C. V. Young and Co.

Monday, Nov. 18, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GENTEL (app.) v. RAPPS (resp.). (a)

Bye-law—Tramway—Use of obscene or offensive language — Validity — Tramways Act 1870 (33 & 34 Vict. c. 78), s. 46.

A tramway company, in pursuance of the Tramways Act 1870, made a bye-law as follows: "No person shall swear or use obscene or offensive language whilst in or upon any carriage . . ."

Held, that the bye-law was valid.

Strickland v. Hayes (74 L. T. Rep. 137; 18 Com. C. C. 244; (1896) 1 Q. B. 290) considered.

CASE stated upon an information preferred by the appellant against the respondent for that he, being in or upon a carriage using a tramway, unlawfully used obscene or offensive language, contrary to the bye-laws made in pursuance of the Tramways Act 1870.

By the Tramways Act 1870 (33 & 34 Vict. c. 78), s. 46:

Subject to the provision of the special Act authorising any tramway, and this Act, the local authority of any district in which the same is laid down may from time to time, make regulations as to the following matters: The rate of speed to be observed in travelling upon the tramways; the distances at which carriages using the tramways shall be allowed to follow one after the other; the stopping of carriages using the tramway; the traffic on the road in which the tramway is laid.

The promoters of any tramway and their lessees may from time to time make regulations for preventing the commission of any nuisance in or upon any carriage, or against any premises belonging to them, for regulating the travelling in or upon any carriage belonging to them, and for better enforcing the observance of all or any of such regulations, it shall be lawful for such local authority and promoters respectively to make bye-laws for all or any of the aforesaid purposes, and from time to time repeal or alter such bye-laws and make new bye-laws, provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect.

Notice of the making of any bye-laws under the provision of this Act shall be published by the local authority of the promoters making the same by advertisements. . . .

The bye-laws were duly made, allowed, and published in 1877; and were proved and put in evidence before the justices. No. 6 was as follows:

No person shall swear or use obscene or offensive language whilst in or upon any carriage, or commit any nuisance in or upon or against any carriage, or wilfully interfere with the comfort of any passenger.

The clauses "with respect to obstructions and nuisances in streets" of the Town Police Clauses Act 1847 are in operation, and apply to the whole of the city and county of Bristol, as to which sect. 28 contains the following provision:

Every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences, shall be liable to a penalty . . . (that is to say) . . . Every person who publicly offers for sale or distribution, or exhibits to public view any profane, indecent, or obscene book, paper, print, drawing, painting, or representation, or sings any profane or obscene song or ballad, or uses any profane or obscene language.

A local and personal Act declared to be a

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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public Act, received the Royal assent on the 19th June 1840, intituled "An Act for regulating the buildings and party-walls within the city and county of Bristol, and for widening and improving several streets within the same," is still in operation in the city. One section of which enacts:

That every person who within the said city and county shall be guilty of any of the following offences, shall be liable to a penalty . . . (that is to say) . . . Every person who shall sell or distribute or offer for sale or exhibit to public view any profane, indecent, or obscene book, paper, drawing, painting, or representation, or sing profane, indecent, or obscene song or ballad, or write or draw any indecent or obscene word, figure, or representation, or use any profane, indecent, or obscene language to the annoyance of the inhabitants or passengers.

It was proved by a conductor of the tramway company that at 9.45 a.m. on the 29th July last, when his tramcar was near Ashton-gate, in Bristol, the respondent got on the carriage, and when he was asked for his fare that he said to the conductor, "You are a blackleg lot of b—s here; you ought to be chucked off the cars."

The uttering of these words was not disputed.

The conductor also proved that there were two other passengers on the car on the front seat who did not hear the words and who made no complaint.

A dispute had arisen between the tramway company and some of their servants, and the words objected to had reference to the dispute.

The justices found as a fact (so far as it is a matter of fact) and as a matter of law (so far as it is a matter of law) that the words were obscene and were actually "offensive language," considering to whom they were spoken.

No objection was taken to the information on account of duplicity, but if any such objection had been taken the justices would have amended the same by dividing the allegations, and would have heard the case or taken it as two cases as if there were separate charges, one for using obscene and the second for offensive language.

It was contended on behalf of the respondent that the bye-law under which the respondent was summoned was *ultra vires* on the following grounds: (a) That it went beyond the provisions which gave power to the promoters to make bye-laws, as that power was simply to prevent the commission of any "nuisance" upon a carriage; (b) that the word "nuisance" had a technical meaning, and would not include swearing or the use of obscene or offensive language; (c) that the bye-law was unreasonable because it prohibited using obscene and offensive words, which words were not necessarily when uttered a criminal offence, and could not be made crimes except by the express words in a statute; (d) that the Act of 1870 contained a proviso that the bye-laws were not to be repugnant to the laws of that part of the United Kingdom where they were to have effect, whereas this bye-law was repugnant to the provisions of the Town Police Clauses Act 1847, and the hereinbefore mentioned local or personal Act, inasmuch as the words "to the obstruction, annoyance, or danger of the residents and passengers," and "to the annoyance of the inhabitants and passengers" were omitted from the bye-law; (e) that the evidence had gone so far as to prove that no person had been annoyed or complained, and that

the only person who heard the words was the conductor to whom they were specially addressed; (f) that the bye-law created new offences, viz., "swearing or using offensive language" which when committed would not be *mala in se*, and could only be prohibited by Act of Parliament, such as 19 Geo. 2, c. 21, and that the penalty under that statute was limited, and could not be extended by any bye-law; (g) that the bye-law containing such a vague term as "offensive language" which might if valid render merely slanderous words punishable on summary conviction, and must be *ultra vires*, and *Strickland v. Hayes* (74 L. T. Rep. 137; 18 Cox C. C. 244; (1896) 1 Q. B. 290) was cited.

It was contended, on behalf of the appellant, (1) That the offence of swearing or using obscene language could be made the subject of a bye-law when committed on a tramcar, and *Burnett v. Berry* (74 L. T. Rep. 494; 18 Cox C. C. 325; (1896) 1 Q. B. 641) was cited to show that what might not in itself be *malum in se* (e.g., betting) might be prohibited by a bye-law in connection with persons resorting to a public place, and that a tramcar was a place to which the public resorted as passengers, and as such they were not to be subjected to anything offensive or likely to become a nuisance, and, moreover, as passengers they were not allowed to use offensive words or to be a nuisance to others; (2) that tramway carriages were like railway stations and railway carriages and to be specially regarded as to superior privileges in the shape of bye-laws and regulations that would not apply to the open streets, and that the passengers paid for their seats and were to be specially protected from what might not be an actual nuisance in a public street where persons were free to go away or turn aside, but which would be an annoyance from a fellow passenger; (3) that the case of *Mantle v. Jordan* (75 L. T. Rep. 552; 18 Cox C. C. 467; (1897) 1 Q. B. 248) had modified the case of *Strickland v. Hayes* (sup.) and a more liberal interpretation should now be given; (4) that the bye-law was good and within the powers conferred by statute, inasmuch as the company or promoters had thereby power to prevent their servants and their passengers from being annoyed by such nuisance as a person becoming a passenger for the purpose of saying offensive words, as in this very case; and to prevent a person from committing a nuisance which might deter other persons from becoming passengers in their carriages and from molesting or interfering with their officials in the discharge of their duties: (*Lowe v. Volp*, 74 L. T. Rep. 143; 18 Cox C. C. 253; (1896) 1 Q. B. 256, and *Hanks v. Bridgman*, 74 L. T. Rep. 26; 18 Cox C. C. 224; (1896) 1 Q. B. 253); (5) that the conductor did not cease to be a person and one of the public, and that he was himself necessarily a passenger, and that the words were especially offensive and annoying to him; (6) that the bye-law was within the power which the company had as promoters for "regulating the travelling in or upon any carriage belonging to them."

In reply for the respondent it was contended that the company could only make bye-laws as to passengers, for the prevention of any "nuisance," a term well understood to mean annoyance to the public generally, and not to special individuals, and *Thomas v. Sutters* (19 Mag. Cas. 378; 81 L. T. Rep. 469; (1900) 1 Ch.

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10) and *Kruse v. Johnson* (78 L. T. Rep. 647; (1898) 2 Q. B. 91) were cited.

The justices came to the conclusion that they were bound by the decision in *Strickland v. Hayes* (74 L. T. Rep. 137; (1896) 1 Q. B. 290), and as no such words as "to the annoyance of passengers" were embodied in the bye-law, it should be considered to be *ultra vires*. They consequently dismissed the information.

Macmorran, K.C. (*H. H. Gregory* with him) for the appellant.—The magistrates here have held that the bye-law is *ultra vires*. It was contended that as by the Tramways Act 1870, in pursuance of which this bye-law was made, the bye-law is not to be repugnant to the laws of that part of the United Kingdom where the same is to be in force, the bye-law in question was bad, as it was repugnant to both the Towns Police Clauses Act 1847 and the Local Bristol Act of 1844, which are in force in the city of Bristol. But in a bye-law like this that applies to tramcars, the omission of the words "to the annoyance of passengers" does not render the bye-law invalid. It is very different to the bye-law in the case of *Strickland v. Hayes* (74 L. T. Rep. 137; 18 Cox C. O. 244; (1896) 1 Q. B. 290). He also referred to

Thomas v. Sutters, 19 Mag. Cas. 378; 81 L. T. Rep. 469; (1900) 1 Ch. 10;

White v. Morley, 80 L. T. Rep. 761; (1899) 2 Q. B. 34;

Burnett v. Berry, 74 L. T. Rep. 494; 18 Cox C. C. 325; (1896) 1 Q. B. 64;

Mentle v. Jordan, 75 L. T. Rep. 552; 18 Cox C. C. 467; (1897) 1 Q. B. 248;

Kruse v. Johnson, 78 L. T. Rep. 647; (1898) 2 Q. B. 91.

This bye-law does not affect the streets but only the tramcars. Many things are nuisances in tramcars which would not be so in a street. In order to make a bye-law repugnant to the statute you must show they both deal with the same subject-matter in a different way. Here the statute gives the bye-law making body the power of making bye-laws for preventing the commission of any nuisance in a tramcar, and the bye-law here merely declares that certain things are nuisances. The bye-law is therefore *intra vires* and good.

Schiller for the respondent.—A bye-law is bad if it creates a new offence, as it cannot increase or decrease the existing law. This bye-law enables the tramway company to place their cars upon the same footing as a public street. This power is given by the Tramway Act 1870, and if it was not for that statute they would be private property. The statute makes the bye-law apply to the tramcars. Unless the offence falls within the Profane Oaths Act 1745 (19 Geo. 2, c. 21), the offence must rest on the bye-law which makes language like this a nuisance. The bye-laws here make the car a public place. [Lord ALVERSTONE, C.J.—Would not your argument apply to the betting cases? Hardly so, for those bye-laws are made under the Municipal Corporations Act 1832, which is very wide, and almost enables the authority to create a new offence. There is nothing of this kind in the Tramways Act 1870. In *Kruse v. Johnson* (*sup.*) it was laid down that bye-laws made by private companies should be jealously watched to guard against their unnecessary or unreasonable exercise to the

public disadvantage. Bye-laws by public representative bodies can be "benevolently" interpreted. Here the bye-law should be construed strictly against the tramway company. *Strickland v. Hayes* (*sup.*) is in point, and the magistrates were right in saying that this bye-law was *ultra vires*.

Macmorran, K.C. in reply.

Lord ALVERSTONE, C.J.—In this case I have no doubt that the magistrates should have held the bye-law valid, and that the principle upon which they have decided is not sound. If *Strickland v. Hayes* (*sup.*) is to be held as deciding more than that a bye-law cannot make an offence which has been created by statute into a different offence, then that case is not law. And I think if the effect of the decision is that when the Legislature gives a public authority or company authority to make bye-laws for the prevention of nuisances, they can in no case make a bye-law defining a particular act, which can be a nuisance, to be a nuisance, and which would not otherwise be a nuisance, it cannot now be supported. I think Lindley, L.J., in dealing with this matter, meant that a bye-law, provided that it is not repugnant to the law, may deal with a matter with which the law has not already dealt, when he said: "Looking at that section, I cannot find that it was intended to give power to make bye-laws creating any new criminal offence. Of course bye-laws must do more than merely reiterate the provisions of Acts of Parliament, otherwise they would be nugatory; but it is important to see that they are strictly within the authority under which they are made." I think *Kruse v. Johnson* and the betting cases recognise the right of the local authority which makes the bye-law to define and describe what shall be a nuisance under particular circumstances, and it is enough if the circumstances render annoyance certain or even probable, as where a bye-law provided that no pig should be kept within 100 yards of a house in a populous place: (*Wanstead Local Board v. Wooster*, 37 J. P. 404). Here the Legislature has given the tramway company, subject to the approval of the Board of Trade, the power of making bye-laws for preventing the commission of any nuisance in or upon any carriage belonging to them. I think it is quite within the authority of the bye-law making body to say that particular things done in a tram, although not nuisances elsewhere, shall be forbidden as nuisances, such as smoking, music, or obscene language. In doing so, the tramway company are acting within their powers, and I cannot see that in holding so we are straining what is laid down in *Strickland v. Hayes* (*sup.*), so as to say that as there are no such words as are in the Towns Police Clauses Act 1847, viz., to the annoyance of the passengers, there was no nuisance. In my opinion that Act was not dealing with the power to make special regulations as are made by the bye-law in this case, but was dealing with offences in the streets. I think the case must go back to the magistrates to convict.

DARLING, J.—I am of the same opinion. As to the case of *Strickland v. Hayes* (*sup.*), after the decisions that have been given since, and particularly *Kruse v. Johnson* (*sup.*), I do not think that it can be regarded as an undoubted authority. The Tramways Act 1870

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gives power to the promoters of any tramway to make regulations for the preventing the commission of any nuisance in or upon any carriage belonging to them, and for regulating the travelling in or upon any carriage belonging to them. Under that power they made a bye-law which provides that no person shall swear or use obscene or offensive language whilst in or upon any carriage. It is said that that bye-law is *ultra vires*. I do not think so. The tramway authorities could prohibit nuisances on their tramcars, and the bye-law enumerates certain things which amount to nuisances. If the things called nuisances can be reasonably so considered, when regard is had to the place where they are committed, then I think the bye-law is good. It must go further than the statute in that it enumerates the things that are nuisances. In my opinion the bye-law is sensible and reasonable, although the words "to the annoyance of passengers" are omitted. It would be intolerable if passengers, besides being annoyed by language as was used in the present case, should have to be further annoyed by having to come into court and repeat such language. For the reasons I have stated I think this bye-law is a good one.

CHANNELL, J.—I am of the same opinion. I think that the recent cases, such as, for instance, *Kruse v. Johnson*, have settled that where an authority has power to make bye-laws to prevent nuisances they can declare particular things to be nuisances in particular places if those things are of a character which may possibly be a nuisance. That is because it is for the authority to say under their power of making bye-laws whether it is a nuisance in the place to which the bye-law applies—e.g., in a tram. The cases clearly establish that it is not necessary to add the words "so as to be in fact a nuisance." That is not necessary where you are specifying in the bye-law the particular place. If, however, the bye-law applied to a large area not uniform in character, so that what might be a nuisance in one part of the area might not be so in another part of it, it might be advisable to insert the words. A bye-law is not repugnant to the general law merely because it creates a new offence and says that something is unlawful which no other law says is unlawful. It is only when it makes unlawful something which the general law by express enactment or necessary implication makes lawful. I say by "necessary implication," because where the Legislature has declared that travelling without a ticket with intent to defraud is an offence, a bye-law which left out the words "with intent to defraud" was held to be invalid, as repugnant to the general law. Again, a bye-law is repugnant to the general law if it declares to be lawful what is declared by the general law to be unlawful. In my opinion the bye-law here was not repugnant to the general law either express or implied.

Appeal allowed.

Solicitors: *Thos. White and Sons for Stanley, Washbrough, and Doggett, Bristol; Hare and Co. for E. G. Watson, Bristol.*

Tuesday, Nov. 19, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PEARKE, GUNSTON, and TEE LIMITED (apps.) v. RICHARDSON (resp.). (a)

Summary jurisdiction — Procedure — Summons under Food and Drugs Acts—Service on registered company.

A summons issued against a company incorporated under the Companies Acts, under the Food and Drugs Acts, to appear before a court of summary jurisdiction must be served in accordance with sect. 62 of the Companies Act 1862.

A solicitor for a company not served in this way appeared before the justices in order to bring to their notice the irregularity of the service and then withdrew from the case.

Held, that this was not a waiver of the irregularity.

CASE stated upon an information preferred by the respondent against the appellants under sect. 3 of the Sale of Food and Drugs Act 1875 for unlawfully selling butter by W. G. Worsfold, their agent, mixed with an ingredient injurious to health.

The appellants are a limited joint stock company incorporated under the Companies Act 1862 to 1898, and carry on business as grocers and provision dealers, amongst many other places, at 13, High-street, Canterbury. The registered office of the company is at 6, Bayer-street, Golden-lane, in the city of London.

The respondent is an inspector under the Sale of Food and Drugs Act in the city of Canterbury.

On the 1st June 1901 the respondent went to the appellants' shop at 13, High-street, Canterbury, and asked for one pound of each of two kinds of butter. The assistant in the shop handed the butter to the respondent, each pound of butter being separately wrapped in paper. The respondent there and then divided each sample or pound of butter into three parts. After dividing each sample or pound of butter into three parts the respondent paid for the butter and stated that it was his intention to have the samples analysed by the public analyst and left one part of each with the assistant in the shop.

The respondent sent samples of the butter to the public analyst, who certified that the sample contained 11 per cent. and upwards of water in excess of the maximum amount which should be present, which is 15 per cent., and that it also contained 0.32 per cent. of boracic acid, which is equivalent to 22.4 grains of boracic acid per pound avoirdupois.

The justices convicted the appellants upon the information.

The summons calling upon the appellants to appear before the court of summary jurisdiction at the Guildhall in the city and borough of Canterbury on the 28th June 1901 to answer the information, was served by Harry Ewell, a police sergeant, handing it to W. G. Worsfold in the appellants' shop at 13, High-street, Canterbury, W. G. Worsfold being an assistant employed by the appellants in their shop. In the summons the appellants were properly described as "*Pearke, Gunston, and Tee Limited.*"

The appellants appeared under protest by their

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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solicitor, and, before the hearing of the information, objected to the mode of service of the summons.

It was contended that, the appellants being a joint stock company incorporated under the Companies Acts 1862 to 1898, the summons should have been served at the registered office of the company, 6, Bayer-street, Golden-lane, London, and that service of the summons at the appellants' shop, 13, High-street, Canterbury, upon an assistant employed in the shop was not a legal and proper service upon the appellant company, and that the justices had no jurisdiction to hear the information. They overruled the objection, and held that the summons had been legally and properly served, and thereupon the appellants' solicitor took no further part in the proceedings.

Macmorran, K.C. (Bonsey and Ricardo with him) for the appellants.—The service of the summons here was bad. It was issued under the Summary Jurisdiction Acts, and should have been served in conformity with sect. 62 of the Companies Act 1862. That section says that any summons, notice, or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter addressed to the company, at their registered office. [DARLING, J.—But how would it have been served before the Companies Acts?] Upon the proper officer. In *Newby v. Van Oppen* (26 L. T. Rep. 164, at p. 167; L. Rep. 7 Q. B. 293) Blackburn, J. says: "At common law the service of a writ upon a corporation aggregate, which from the nature of the body could not be personal, was by serving it on a proper officer, so as to secure that it came to the knowledge of the corporation, and then proceeding by distress: (see 1 Tidd's Practice, 121, edition of 1828). The 2 Will. 4, c. 39, s. 13, and 15 & 16 Vict. c. 76, s. 16, in fact only re-enact the old law as to what should be service on a corporation. The clerk or officer must be in the nature of a head officer whose knowledge would be that of the corporation." He also referred to

Wood v. Anderston Foundry Company, 86 W. R. 918;

Dixon v. Wells, 62 L. T. Rep. 812; 17 Cox C. C. 48; 25 Q. B. Div. 249.

[DARLING, J.—*Newby v. Van Oppen* (sup.) was followed in *Haggin v. Comptoir d'Escompte de Paris* (61 L. T. Rep. 748; 23 Q. B. Div. 519).]

The respondent did not appear.

Lord ALVERSTONE, C.J.—It seems to me that, in the absence of any special legislation or rule dealing with the question of service upon a limited company, the service of a summons upon a limited company should be in accordance with sect. 62 of the Companies Act 1862. It is not unimportant to note that, when dealing with friendly societies, there is a special power given by the Friendly Societies Act 1896 to serve at a branch office. It seems clear that in the Supreme Court and in the County Courts process must be served in the way indicated by sect. 62. The passages referred to—the one in the judgment of Blackburn, J. in *Newby v. Van Oppen* (sup.) and the other in the judgment of Cotton, L.J. in *Haggin v. Comptoir d'Escompte de Paris* (sup.)—show that the question is one of substance. I do not see why criminal proceedings should have a more lax rule than civil proceedings. I think,

therefore, that the point which has been taken is a good one, and that the summons in this case was not properly served. I am clearly of opinion that where a person attends to bring to the notice of the tribunal an irregularity of this kind, and then withdraws—an act which he is under no obligation to do—that that does not constitute an appearance, and does not waive the irregularity of the service.

Appeal allowed.

Solicitors: Neve, Beck, and Kirby.

Tuesday, Nov. 19, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

VENTERS (app.) v. FREEDMAN (resp.). (a)

Summary jurisdiction—Offence under Bread Act 1822 (3 Geo. 4, c. vi)—Previous conviction—Dismissal as trivial offence—Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), s. 16.

A previous conviction for the same offence does not prevent a magistrate dealing with the case under sect. 16 of the Summary Jurisdiction Act 1879 if he considers the offence is one of a trifling nature, and that, too, where the statute creating the offence enacts certain penalties for second and subsequent offences.

CASE stated upon an information charging the respondent for that he being a master baker did unlawfully make and bake bread on the Lord's Day.

It was proved on behalf of the appellant that the respondent was a baker carrying on business within the limits of the Act, and that at 5 a.m. in the morning of Sunday, the 21st July, the respondent was causing bread to be there baked in his bakehouse.

It was proved on behalf of the respondent that he and all the persons employed by him were of the Jewish persuasion, that they always ceased baking operations on Friday at midday, that his premises were entirely closed on Saturday until 8.30 p.m. both for baking and selling, and that it was only then that any baking was resumed.

The respondent referred to sect. 51 of the Factory and Workshops Act 1878 (41 Vict. c. 16), and contended that upon the principle of that section no penalty should be inflicted.

The magistrate was of opinion that, although the charge was proved, the offence was in the particular case of so trifling a nature that it was inexpedient to inflict any punishment, or any other than a nominal one, so he, without proceeding to conviction, stated his intention to dismiss the information under sect. 16 of the Summary Jurisdiction Act 1879.

Thereupon the appellant's solicitor tendered evidence of a previous conviction under sect. 16 of the Bread Act (3 Geo. 4, c. vi.), and contended that under that Act the magistrate was precluded from dismissing the information under sect. 16 of the Summary Jurisdiction Act 1879 however trifling the offence, and must inflict the full penalty for a second offence—viz., 20s.

The magistrate refused to receive this evidence and dismissed the summons under sect. 16 of the Act of 1879.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

K.B. Div.]

STODDART (app.) v. WILLIAM MITCHELL LIMITED (resps.).

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The questions for the court were (1) whether the magistrate legally had the power to dispose of the information under sect. 16 of the Summary Jurisdiction Act 1879; and (2) whether, if he had such power, on the facts of the case he was right in so dismissing it.

The Bread Act 1822 (3 Geo. 4, c. vi.) provides by sect. 16 that no master exercised or employed in the trade or calling of a baker within the prescribed limits shall on the Lord's Day make or bake any bread, rolls, or cakes of any sort or kind, and that every offender shall, for the first offence, be liable to a penalty of 10s., for a second offence 20s., and for a third or subsequent offence 40s. This Act gives no power to the court to mitigate the penalties.

E. Brown (*C. Edwards* with him), for the appellant, referred to

Murray v. Thompson, 60 L. T. Rep. 151; 16 Cox C. C. 554; 22 Q. B. Div. 142.

B. S. Q. Henriques for the respondent.

LORD ALVERSTONE, C.J.—It is said that the magistrate could not take the course he has taken because there had been previous convictions for the same offence. I cannot see why sect. 16 of the Summary Jurisdiction Act 1879 should not apply in the case of a second conviction. That section says that: "If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act, whether past or future, the court of summary jurisdiction think that though the charge is proved the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment, the court, without proceeding to conviction, may dismiss the information, and if the court think fit may order the person charged to pay such damages, not exceeding 40s. and such costs of the proceedings, or either of them, as the court think reasonable"; or the court may convict and discharge on sureties for appearance or good behaviour with or without payment of costs and damages. Why should not these salutary provisions apply to the case of a second conviction. If they were only to apply to a first conviction the section would have said so. I think the appeal must be dismissed.

DARLING, J.—I am of the same opinion. I cannot see why sect. 16 should only apply to a first offence. The magistrate heard all the facts, and considered that an offence had been committed, but that it was of such a trifling nature, and he therefore dismissed the summons. It was then said that there were previous convictions. The magistrate said that, even admitting that they were all proved, he should still think the present one trifling, and deal with it under sect. 16. I think if all the convictions were proved the magistrate might apply sect. 16.

CHANNELL, J.—I quite agree. Previous convictions are only to be taken into consideration when considering whether or no the present offence is trifling. They do not take away the jurisdiction of the magistrate to deal with the offence under sect. 16 if he thinks proper.

Appeal dismissed.

Solicitors: *Pattinson and Brewer*; *D. Romain.*

Nov. 18 and 19, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

STODDART (app.) v. WILLIAM MITCHELL LIMITED (resps.). (a)

Master and workman—Wages minimum per week—Deductions—Waiver by not claiming at end of each week.

By an agreement made between the respondents and the appellant the wages were to be at the rate of 24s. per week, and so in proportion for any less period than a week. The wages were to be at the rate of 24s. per week at the least.

During the employment, owing to various causes the appellant was not employed for certain periods, and no wages were paid to him in respect of those periods, but the wages were settled up at the end of each week when the deductions were made.

Held, that the appellant could not recover the amount of these deductions at the end of the employment, as it was a claim that could be waived, being a claim for damages, and not a liquidated debt.

CASE stated.

On the 14th June 1901 the appellant commenced an action in the police court against the respondents to recover the sum of 10l. damages under the Employer and Workman Act 1875 (38 & 39 Vict. c. 90) and the rules made in pursuance thereof.

The claim was for damages for breach of an agreement for employment from Dec. 1900 to June 1901—viz., 10l.

The respondents counter-claimed 10l. damages for wrongfully quitting their employment and absenting himself from their service on the 13th June 1901 and refusing to perform his contract.

The following was the agreement between the parties:

Memorandum of agreement, made the 31st day of October 1898, between William Mitchell Limited, a company duly registered under the Companies Acts 1862 to 1893, carrying on business at Saltley Works, Saltley, in the county of Warwick, by Edmund William Mitchell, their manager (hereinafter called "the employers") of the one part, and William Stoddart, of 144, Dartmouth-street, Birmingham, in the county of Warwick (hereinafter called "the workman") of the other part. (1) The workman doth hereby agree that he will, from the 31st day of October 1898, for the term of five years, work for and serve the employers, their successors or assigns, carrying on the same trade, as his or their workman, at their aforesaid works, and will execute and do such work as may be reasonably allotted to him by the employers or by their representatives or manager for the time being, in the best way and manner that he the said workman shall be capable of, and will perform and comply with all reasonable orders and directions to be from time to time given to him in the ordinary way of business, by the said employers or their representatives or manager as aforesaid, in connection with the said work, and will not injure or waste any tools or materials entrusted to him in the course of his employment, but will, on the contrary, take all possible care of the same. (2) The wages of the workman shall be at the rate of 24s. per week, and so in proportion for any less period than a week. (3) The workman failing or neglecting to perform the agreement hereby made, or becoming drunken or dissipated in his habits, or dishonest, shall be liable to instant dismissal from his

(a) Reported by W. DE B. HERBERT Esq., Barrister-at-Law.

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said employment, whereupon this agreement shall be void. (4) Subject as hereinbefore provided, the wages of the workman during the said term of five years shall be at the rate of 24s. per week at the least. (5) The said employers undertake to instruct their solicitor to protect any workman who is interfered with or molested.—As witness the hands of the said parties. . . .

It was proved that the appellant had worked for the respondents under this agreement from the 31st Oct. 1898 to the 13th June 1901. That at various dates the respondents, owing to various causes, such as holidays, stock-taking, and lack of orders, had been unable to provide the appellant with employment, and that no wages were paid to him in respect of the time for which he was unemployed. The appellant had sometimes absented himself, and had not been paid for those periods.

The appellant's wages were paid at the end of each week when due, and a deduction was made at the time of such payment for all the periods when the appellant had not been employed. He assented to such deductions, and never made any claim in respect of them until the 13th June 1901.

On the 13th June 1901 the appellant left his work, contrary to the express orders of the respondents, and was discharged.

The magistrate was of opinion that the appellant, having from the commencement of the agreement without objection accepted his wages each week subject to such deductions, had waived his right to make any claim, and could not now recover any of such deductions, and the accounts between the parties must be taken as settled at the time of payment of wages in each week. He found that the respondents were justified in refusing to allow the appellant to return on the 13th June, and he dismissed the claim, and awarded the respondents 5s. on the counter-claim.

McHardie for the appellant.

A. T. Lawrence, K.C. and Gandy for the respondents.

LORD ALVERSTONE, C.J.—If this case stated facts in order to raise the question whether the sums paid were a discharge for a liquidated debt it would raise a difficult and interesting point. But here there was no debt. On the face of the agreement the wages were at the rate of 24s. a week. If the master failed to employ the workman there might be an action for damages for that breach of the agreement. The highest way in which the case can be put is that there was a claim by the appellant to be paid 24s. weekly, and there being a shortage of work the employer excludes the wages for those days upon which the appellant was not employed. The workman, however, goes on working, and at the end of each week takes less than the 24s. a week. I think he waived his claim to be paid the larger sum. There was no ascertained liquidated sum due in respect of which he took the smaller sum, for as I have said all that the appellant could do was to bring a claim for damages for not employing. When the magistrate says the appellant had waived his right to any claim, he came to that conclusion as a question of fact, and we cannot say that he was wrong in law in so doing.

DARLING and CHANNELL, JJ. concurred.

Appeal dismissed.

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Solicitors: *Morgan, Price, and Newburn*, for *Hargreaves and Heaton*, Birmingham; *Thomas and Guest*, Birmingham.

Tuesday, Nov. 19, 1901.

(Before LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

TYLECOTE (app.) v. MORTON (resp.). (a)

Mine—Building bye-laws—Exemption—“Building used exclusively for the working of such mine.”

“Any building (not being a dwelling-house) erected or intended to be erected in connection with any mine, or intended to be used exclusively for the working of such mine,” was not to be subject to certain bye-laws.

Held, that the words “used exclusively for the working of such mine” were not to be confined to the getting of the minerals, but included putting such minerals into a deliverable state as a commercial product. They would not, however, cover buildings used for carrying on another business which the owner of the mine might carry on in addition to the mining in order to make the mine profitable.

CASE stated on an information preferred by the appellant against the respondents, under a bye-law made by the corporation of Halifax acting as the sanitary authority, for erecting a new building without depositing plans and sections in conformity with the bye-law.

The respondents were the owners and occupiers of brickworks in connection with which was a mine from which fireclay was worked and some coal obtained.

A brick kiln had been erected by the respondents without notice to and without submitting plans for the approval of the corporation, and notice had been given them that they were acting contrary to the bye-law.

The kiln was about 18 yards from the entrance to the mine, and was connected by a little tramway.

By bye-law No. 2:

The following buildings shall be exempt from the bye-laws relating to new . . . buildings . . . (a) any building (not being a dwelling-house) erected or intended to be erected in connection with any mine, or intended to be used exclusively for the working of such mine.

The question raised was whether the brick kiln was exempted by this enactment.

It was contended on behalf of the appellant that the brick kiln was used simply for dealing with the clay that came from the mine, and was not a building used exclusively for the working of the mine, and that the brick kiln was not essential to the working of the mine, as when the clay reached the surface the mining operation ceased. Further, that there was no statutory or legal definition of a mine applicable to this case, and that the word “mine” must be understood in its ordinary meaning—namely, a pit or excavation in the earth from which mineral substances are obtained—and that the expression “the working of such mine” in the exemption meant simply the getting the mineral substance from the earth and bringing it to the surface. That the function of

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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the kiln was to fire the bricks made out of the clay, and there was no necessary connection between the kiln and the mine, as the mine could be worked just the same if the clay was sent miles to be manufactured. That the working referred to in the exemption meant the physical or mechanical working, and not the commercial or profitable working.

On behalf of the respondents it was contended that—the kiln being necessary for the conversion of the product of the mine into a commercial commodity, it was therefore a building used exclusively for the working of the mine, as it could not be worked commercially without the produce being made into bricks. That the exemption covered any building used in connection with the working of the mine. That “mine” in the bye-law must have the same meaning as in the Mines Regulation Act 1887, and that the object of the exemption was to prevent the overlapping of jurisdictions, as the Home Office had jurisdiction over the respondents’ premises.

The justices were of opinion that the word “mine” should be construed according to the Mines Regulation Act 1887, and upon the evidence they found as a fact that the kiln was used exclusively for working such mine, and they were prepared to hold, if necessary, that “working” was not merely physical or mechanical working, but also commercial working.

Scott Fox, K.C. and Cohen for the appellant.

Manisty, K.C. for the respondents.

LORD ALVERSTONE, O.J.—This case presents to my mind a very great difficulty, and I by no means am sure that I should have arrived at or drawn the same conclusion of fact as the magistrates have done, but I think we must deal with the case as far as we can gather any light from it as a mixed question of law and fact, and apply our view of the law to the magistrates’ finding of the facts. I think the Coal Mines Regulation Act has nothing to do with the matter at all, and in so far as the magistrates have thought that some construction must be put upon this word “mine” because the Coal Mines Regulation Act would include the works above ground, and that therefore they must construe the word “mine” in a particular way. I think they were wrong if they came to the conclusion they did because there was some definition in the Mines Regulation Act which decided the question for them, and if I had thought that I could dispose of the case upon the ground that that had been the real basis of their decision, I should have thought that the judgment ought to have been reversed. Nor, again, do I think that it is at all exhaustive to say that the words “exclusively for the working of such mines” included all processes, as, for instance, any commercial process that may be carried on, and I desire to postpone any judgment I may have to pronounce or any opinion I may have to form upon any subsequent case until I have to consider some process which was merely carried on on the same premises, and in no way, if I may use the word, incidental to the actual utilisation of the product, except that it was turned into some other form or some other manufactured article. But the difficulty I have in this case is that as I understand this finding of the facts the substance of it is this, that the magistrates have found that this particular kiln is

only used for the purpose of making the material available at all—that is to say, they differentiate it from the case of a brick kiln by finding that the kiln was used exclusively for the working of the mine. I confess I am not altogether satisfied in my own mind with that view, because, as was pointed out in the course of the argument, it does not seem to me to be disputed that ordinary brick kilns would be within the bye-law, although the clay might be brought from a distance or might be dug close by. But I think the magistrates have in effect said in this case that they came to the conclusion that this kiln was used solely for the purpose of making the stuff that is got out of the workings available at all. There is a finding that no coal is got out in any quantity, but only the fireclay, and I think, therefore, they have really come to the conclusion on the facts that this particular kiln is used exclusively for the working or winning of the particular material in the sense that the clay would not be got at all unless there was a kiln to turn it into bricks, practically speaking, at the mine. I have said, and I say again, that it is not altogether a satisfactory decision to my mind, but I do not see my way to hold that this was not a building which was erected in connection with the mine (which is not disputed) and used exclusively for the working of such mine in the sense that in this case the magistrates have thought that the fireclay would not be worked unless the kiln was there to turn it into bricks. I do not think in any decision I have given I shall be laying down any wide general rule; if I did I should hesitate about it; but on this finding I do not see my way to reverse the decision of the magistrates.

DARLING, J.—I am of the same opinion. These bye-laws are made by the mayor, aldermen, and burgesses of the borough of Halifax, acting as the council of the urban sanitary authority, and they are made with respect, as it is stated on them, to new streets and buildings. Now, there are certain things as to which they may not make bye-laws, and amongst other things exempt are: “Any building not being a dwelling-house erected or intended to be erected in connection with any mine, and used or intended to be used exclusively for the working of such mine.” Mr. Scott Fox has pressed upon us that those words “for the working of such mine” must be read exactly as though they meant “for the winning of the minerals”; but I do not think they mean that. The words before are, “erected in connection with any mine, and used or intended to be used exclusively for the working of such mine.” Now, “for” is a word which may mean several things. It may mean what Mr. Scott Fox says, “for the winning of the minerals.” I do not think it does; I am much more inclined to think it means something very much as if the words “in connection with” had been repeated “exclusively in connection with the working of the mine.” I think that is the real intention of it. If the thing happens to be a dwelling-house, it is not exempt, because it may be a very proper thing for the urban authority to interfere with it, but I cannot see that any harm will be done by excluding from their jurisdiction a brick kiln any more than is done by excluding an engine-house, in which a man would certainly be at work attending to the engine, and

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the engine-house would most certainly by this rule, read it how you will, be exempt from the operation of the bye-laws. I do not think the decision that we are giving would be of the least good towards deciding any other case, and I do not think it lays down any principle. It seems to me to proceed upon the construction of this particular bye-law, and upon that, especially having regard to what the magistrates have found as to what the working of the mine is, and what is meant by it, I think they were right.

CHANNELL, J.—I concur with some reluctance in dismissing this appeal, and on the ground only that the magistrates have found a question of fact which we cannot interfere with. I do not myself in any way disguise my opinion that they have found it wrongly. It seems to me that the words "used exclusively for the working of such mine," are not to be confined, as Mr. Scott Fox contends, merely to the getting of the minerals. I think they include beyond that the putting of the material actually extracted from the earth into a deliverable condition as a commercial product, and that would cover many of the cases that Mr. Manisty has put before us. But I do not think that they cover buildings used for the purpose of carrying on another business as a manufacture, for that is what it is in this case, which the mine owner chooses to carry on in addition to his mining, in order to make his mine profitable. Here, after extracting fireclay, he carries on the business of a brickmaker, because that is the only way in which he can profitably be a mine owner. I will illustrate what I mean by a thing which is exactly analogous to this and is pretty well known. Take the case of cement works. In the lower part of the Thames there are cement works carried on in which the people who carry on the business of making cement lease or own their own chalk quarries, out of which they extract the chalk, and it would be perfectly useless for anybody to carry on the business of quarry owners for extracting the chalk unless at the same time they carried on the more profitable business of cement making. Nobody would say that the cement works were used exclusively for the purpose of working the quarry, although commercially nobody would work the quarry unless he could use the product profitably in that way near or upon the spot. It seems to me in this case there was a manufacturing business of manufacturing bricks which could not be said to be carried on exclusively for the working of such mine, although the mine would not be profitably worked unless the owner had the other business on which to earn the substantial profit. I should have certainly come to a different conclusion from that which the magistrates have done; but they had evidence before them that the fireclay was otherwise not commercially saleable, and they would appear to have been warranted in coming to that conclusion. I therefore think that as a matter of fact we cannot interfere.

Appeal dismissed.

Solicitors: John B. Hall, for Keighley Walton, Halifax; Williamson, Hill, and Co., for Storey, Willans, and Storey, Halifax.

Wednesday, Nov. 20, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. JUSTICES OF ESSEX AND OTHERS. (a)

Rating—Poor rate—Appeal—Assessment committee—Decision of special sessions—Appeal to quarter sessions against subsequent rate—Necessity of second notice to assessment committee—Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96), s. 6—Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), s. 1.

The appellants were assessed in the valuation list then in force in respect of their occupation of certain premises, and in May 1900 a poor rate was made upon that assessment. The appellants gave notice of appeal to the assessment committee, and their objection was in Sept. 1900 heard by the committee, who reduced the assessment, but not to the extent claimed by the appellants, and the appellants appealed to special sessions, who in Nov. 1900 still further reduced the assessment. Before this appeal was heard by the special sessions in November, the overseers made a poor rate in October, which was the rate current when the special sessions determined the appeal, and the appellants paid this rate. The next poor rate made was in May 1901, against which the appellants, without giving further notice to the assessment committee, appealed to quarter sessions.

Held, that the appellants, not having appealed against the October rate, could not appeal to quarter sessions against the rate made in the following May, without giving a second notice of objection to the assessment committee, as provided by sect. 1 of the Union Assessment Committee Amendment Act 1864, and that, the appellants not having given such fresh notice of objection to the assessment committee, the quarter sessions were right in dismissing their appeal upon that ground.

RULE for a *mandamus* to the justices of the peace for the county of Essex requiring them at their next general quarter sessions of the peace to be held in and for such county to enter continuances and hear the appeal of the appellants against a certain poor rate.

The facts as set out in the affidavits were as follows:—

The appellants, B. and F. Tolhurst and Cox, were a firm of solicitors practising at No. 61, High-street, Southend-on-Sea. In May 1900 the overseers of the poor of the parish of Prittlewell, in the Rochford Union, in the county of Essex, made a rate for the relief of the poor, and such rate was afterwards duly allowed and published.

In this rate the appellants were assessed in respect of their premises, No. 61, High-street, on the basis of the valuation list then in force—namely, on a gross estimated rental of 180*l.* and a rateable value of 150*l.*—so that the premises for which the appellants were rated were in the valuation list in force for the parish in and before the month of June 1900 assessed at the gross estimated rental of 180*l.* and at the rateable value of 160*l.*

Being dissatisfied with this assessment, the appellants on the 23rd June 1900 duly gave notice of objection thereto to the assessment

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

committee of the Rochford Union, and this objection was heard by the assessment committee on the 5th Sept. 1900, when they reduced the assessment of the premises to 150*l.* gross estimated rental and 135*l.* rateable value, but they refused to reduce the assessment to the extent claimed by the appellants—namely, to 90*l.* gross estimated rental and 81*l.* rateable value.

The appellants, being still dissatisfied, duly appealed to the justices in special sessions assembled, in pursuance of sect. 6 of the Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96), against a poor rate which had been made for the parish on the 8th May 1900, and on the 6th Nov. 1900 this appeal was heard and the justices in special sessions determined not to reduce the assessment of the premises to the extent claimed by the appellants, but amended the rate by reducing such assessment to 130*l.* gross estimated rental and 117*l.* rateable value, and the valuation list was altered accordingly. The appellants did not appeal against the decision of the justices in special sessions.

Before this appeal was heard by the special sessions—namely, on the 26th Oct. 1900—the overseers had made a further poor rate which was duly allowed and published. This was the rate which was current when the justices in special sessions heard and determined the appellants' appeal, and the appellants paid this rate on the reduced assessment of 150*l.* gross and 117*l.* rateable value without objection after the above decision of the justices in special sessions.

The next poor rate made was that of the 4th May 1901, which was the rate now in question. In this rate the appellants were entered as occupiers of the premises No. 61, High-street, the gross estimated rental was inserted as 130*l.* and the rateable value at 117*l.*, and the rate at 1*s.* 7*d.* in the pound was 9*l.* 5*s.* 3*d.*

On the 12th June 1901 the appellants duly gave notice of appeal against the rate of the 4th May 1901 to the next general quarter sessions of the peace for the county to be held at Chelmsford, and this notice set out their grounds of appeal—namely, (1) that their premises were assessed at sums exceeding the true gross estimated rental and rateable value thereof; (2) that certain premises mentioned in a schedule to the notice, in respect of which the persons whose names were set opposite to such hereditaments in the schedule are assessed in the rate, were therein assessed unfairly and incorrectly, and at sums less than the true gross estimated rentals and rateable values thereof; and (3) that the rateable hereditaments mentioned in another schedule to the notice in respect of which the persons whose names were set opposite to such hereditaments were liable to be rated were omitted from the rate and ought to have been inserted therein and duly assessed in their true gross estimated rentals and rateable values.

The appeal came on for hearing at the general quarter sessions for the county held on the 3rd July 1901, and the appellants, the assessment committee of the Rochford Union, and certain other respondents whose premises were alleged in the notice of appeal to be underrated, were respectively represented by counsel.

Before the appeal was heard the following preliminary objections were made on behalf of the respondents—namely, (a) that, as regards the

first of the grounds of appeal as given in the notice of appeal, the appellants were concluded by the finding of the special sessions on the 6th Nov. 1900, that finding not having been appealed against, and being therefore binding and conclusive under sect. 67 of the Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96), and that the appellants were not entitled to appeal to quarter sessions on any ground whatever until they had again objected before the assessment committee; (b) that, as regards the same ground of appeal, the appellants were not entitled to appeal to quarter sessions against the said poor rate on any ground whatever without again objecting before the assessment committee to the valuation list on which such rate was based, the appellants not having so objected since they made the objection on the 23rd June 1900, as above mentioned; and (c) that, as regards the second and third of the grounds of appeal, the appellants could not be heard because they had not at any time objected to the valuation list on any of such grounds.

After hearing these preliminary objections, the Court of Quarter Sessions allowed such objections and dismissed the appeal with costs and refused to hear the case upon the merits.

The appellants then obtained the above rule for a *mandamus* requiring the justices at their next general quarter sessions to hear and determine the appeal.

The appellants in their affidavit in support of the rule stated that no alteration in the premises, or in the value thereof, had taken place, or had been alleged by the overseers or assessment committee to have taken place, since the appellants objected to the assessment thereof, and that the assessment committee had already decided not to grant to the appellants the relief which they (the appellants) deemed just in relation to the assessment. They also stated that they had not objected before the assessment committee to the assessments of the premises mentioned in the schedule to their notice of appeal, which they alleged to be underrated, or to the omission from the valuation list in force of any assessment of the premises mentioned in their notice of appeal; and they submitted that they were not required by sect. 1 of the Union Assessment Committee Amendment Act 1864, or otherwise, to make such objection before appealing to quarter sessions against a poor rate on the ground of the inadequacy of the assessments of other persons, or the omission from the rate of the premises of other persons, nor would the committee be authorised by that section or otherwise to grant to the appellants the relief which they claimed in relation thereto.

Sect. 1 of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39) provides:

Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act 1862 applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union; provided that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee unless he shall have given to such

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committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed in the said Act, with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly.

Avery, K.C. (J. C. Earle with him) for the respondents, the assessment committee, showed cause.—The justices in quarter sessions in refusing to hear the appeal acted upon the three objections to the appeal put forward by the respondents. These were sufficient objections to the hearing of the appeal. The main question in the case arises under sect. 1 of the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39), which provides that before any appeal shall be heard by any special or quarter sessions against a poor rate, notice of the appeal must be given to the assessment committee of the union, and that no person shall be empowered to appeal to any sessions against a poor rate unless he has given to such committee notice of objection against the valuation list, and has failed to obtain relief. Then the section relating to appeals to special sessions is sect. 6 of the Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96), which gives the justices for the petty sessions division power to hold special sessions four times a year to hear appeals against these rates, and their decision is to be binding and conclusive on the parties unless notice of appeal shall be given within fourteen days to the then next quarter sessions. By that section what the justices in special sessions are to hear and determine are "all objections to any such rate on the ground of inequality, unfairness, or incorrectness in the valuation of any hereditaments included therein." Dealing with the grounds of objection taken by the respondents, the first was that the decision of the special sessions was conclusive: (sect. 1 of the Act of 1864). This we rather pray in aid in support of the second objection that the appellant ought to go again to the assessment committee before going to quarter sessions. The words of sect. 1 are explicit on the point: "No person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list . . . unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief," &c. There are some decisions on this point, and the principle established by them is that, although a person who has once made his objection before the assessment committee may appeal against the next rate subsequently made, without again going before the committee, he cannot appeal again a second time without giving a fresh notice of objection to the committee and going before the committee again. There cannot be a second appeal against a second rate without a second notice to the assessment committee:

Reg. v. Great Western Railway Company, 20 L. T. Rep. 481; L. Rep. 4 Q. B. 328;

Reg. v. Justices of Wiltshire, 40 L. T. Rep. 681; 4 Q. B. Div. 326;

Reg. v. Justices of Derbyshire, 25 L. T. Rep. 43;

Reg. v. Justices of Denbighshire, 53 L. T. Rep. 388; 15 Q. B. Div. 451.

If the contention for the appellants were well founded, the result would be that a person who has once made his objection to the assessment committee may appeal to special sessions and quarter sessions for years to come without going again before the assessment committee, and giving that committee the opportunity of making an alteration. The appellants cannot give their objection to the May rate, then lie by for six months, and appeal without a fresh notice. With regard to the third objection also, the appellants must fail; they are not entitled to appeal against the underrating or omission of rateable hereditaments—that is, against the valuation list—without giving notice under sect. 18 of the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103). The quarter sessions were therefore right in refusing to hear the appeal upon the ground that the conditions precedent to the appeal in sect. 1 of the Act of 1864 had not been complied with. He referred to

Reg. v. Justices of Kent, L. Rep. 6 Q. B. 132.

Macaskie, K.C. and Alexander Glen for the appellants in support of the rule.—The first section it is necessary to look at is sect. 4 of the Poor Relief Act 1743 (17 Geo. 2, c. 38). That provides that persons aggrieved by a poor rate may appeal to quarter sessions, and it is the original root of the appeal in such cases. Sect. 18 of the Act of 1862 is permissive merely; it says that the person "may" give a notice of objection to the committee. It is therefore permissive only, and has its operation confined to the twenty-eight days there specified. Then as to sect. 1 of the Act of 1864, notice of objection has been given by the appellants to the list, and, if the matter rested on the statutes alone, we should contend that the one notice of objection given to the assessment committee was sufficient; but whether or not it was sufficient must be decided on the cases in point. As to the case of *Reg. v. Great Western Railway Company* (*ubi sup.*), the court made the mistake of confusing the valuation list with the poor rate made in conformity with it. The argument there used for the appellants is the correct view of the matter, showing that the notice required by the Act is a notice to the assessment committee against the valuation list, and not against the rate made in conformity with it. That notice has been given here, and there is no use in going to the assessment committee again, when they have dealt with and decided the very point. When the appellants have been to the assessment committee once and got their decision, then they are not required to go to the assessment committee again where there is no evidence of any change having taken place in the property or the value of it in the meantime, and it is for the other side to show any change in the circumstances. *Reg. v. Justices of Denbighshire* (*ubi sup.*) shows that you need not go before the committee again when it is the same question that has to be decided—that is, when there is no alteration. *Reg. v. London and North-Western Railway Company* (46 L. J. 102, M. C.) goes some length in showing that the appellants had a right of appeal without going before the assessment committee; and *Reg. v. Price* (68 L. T. Rep. 171), *Reg. v. Overseers of Langrville* (52 L. T. Rep. 253; 14 Q. B. Div. 83), and *Assessment Committee of Reigate Union v. South-Eastern Railway*

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Company (70 L. T. Rep. 353; (1894) 1 Q. B. 411) support the same view. The quarter sessions were therefore wrong in holding that the appellants ought to have given a fresh notice of objection to the assessment committee before appealing to the quarter sessions.

Lord ALVERSTONE, C.J.—This rule was resisted upon three grounds. The first ground was that there had been an appeal to special sessions that was final in the sense of binding the value for the purpose of that valuation list, whatever rates might be made under it. That ground is not insisted upon, and could not, I think, be insisted upon, because it is quite clear that there may be subsequent proceedings. The second ground was that no proper notice had been given to the assessment committee; and the third ground was that the notice which was given included the undervaluation of other persons and the omission of certain hereditaments which, it was admitted, had not been before the assessment committee at all. I think the second objection—which was the first insisted upon—that no proper notice was given to the assessment committee is a good objection, and that the rule ought to be discharged because there was not a proper notice of objection to the assessment committee before the second appeal was brought. I think that when the authorities upon the question are carefully considered, there is really no discrepancy between them. What I understand to be the substance of those decisions is this, and no more than this: That under the 1st section of the Act of 1864, if you have been before the assessment committee and have failed to obtain relief in respect of the matter which you are making the subject of the appeal, then you need not go before the assessment committee again; but, unless that is the real state of things, it is a condition precedent to the appeal that you shall have gone before the assessment committee and have failed to obtain relief, and you shall not be empowered to appeal unless you have done so. The case of *Reg. v. Great Western Railway Company* (*ubi sup.*), it is not disputed, is a distinct authority that where there is a second rate, and a second appeal, a second notice shall be given. It is said that that case has been doubted and is no longer to be regarded as law, and is inconsistent with the case of *Reg. v. Justices of Denbighshire* (*ubi sup.*). Of course, if that were the true view, we should be bound by that case, and I should adhere at once to that view. But I do not think that any of the criticisms upon it touch the substance of the decision in the case of *Reg. v. Great Western Railway Company* (*ubi sup.*). True, there is a case in which I was counsel (*Reg. v. Justices of Wiltshire*, *ubi sup.*), in which Cockburn, C.J. said he rather doubted its correctness; but in each of these cases the real question was entirely different. In the case of *Reg. v. Justices of Wiltshire* (*ubi sup.*) it was pointed out that you need not go a second time before the assessment committee on the same rate; that is to say, where you have been before the assessment committee, and a rate is made, and you determine to appeal, if you have been before the assessment committee with regard to the valuation on which that rate is founded, you need not go before them a second time. The case of *Reg. v. Justices of Derbyshire* (*ubi sup.*) went a little further, and said that where you have been before the assess-

ment committee and have got a certain amount of relief, but you are not satisfied and you intend to appeal, you need not go a second time before them, because you have not got the relief which you asked for and to which you think you are entitled. Then came the case of *Reg. v. Justices of Denbighshire* (*ubi sup.*); and the real discussion there was this, and this, I think, only, that where a rate is made, which is the first effective rate after any relief which you may have obtained from the committee, then you can appeal without going a second time before them. In other words, it is only a development, under slightly different circumstances, of the two cases of *Reg. v. Justices of Wiltshire* (*ubi sup.*) and *Reg. v. Justices of Derbyshire* (*ubi sup.*). The point was whether it was necessary to go to the assessment committee a second time after the September hearing, having regard to the November rate, and the court held that it was not necessary. That being so, I think the case of *Reg. v. Great Western Railway Company* (*ubi sup.*), when properly regarded, is applicable to a second appeal; and the subsequent cases show that persons must fulfil, with regard to that state of circumstances, the conditions of the statute, and that seems to me to be most reasonable. Valuation lists in the country are not the same as valuation lists in London. They last for a considerable number of years until someone is minded to have the parish revalued. Circumstances may alter. A person goes before an assessment committee immediately after a rate is made, and he either gets relief or he does not. If he does not get relief he need not appeal; he may pay the rate, and years go on and then the circumstances in the parish or the character of the land alter, and he thinks he ought to be rated at a lower rate. Counsel for the appellants does not dispute that under those circumstances it would be a monstrous thing that a person should not, if he thinks he is overrated, go before the assessment committee. Their answer is that they do not contend that, when there is an altered state of circumstances; and my brother Channell has pointed out that nothing of the kind can be done. The notice of appeal only states that the person is overrated as far as he himself is concerned, and then he goes before the assessment committee and brings forward his grounds. I think this is a much stronger case for saying that, where there is a subsequent rate and a subsequent set of proceedings, the formalities of sect. 1 of the Act of 1864 must be fulfilled. In this case everything with regard to the previous rate—the May rate, the appeal as to which was, as a matter of fact, heard in November—was over. There was an October rate, against which there might possibly have been an appeal, which was paid, and in May 1901 this person is minded to raise the question again. It is a period of twelve months and it was not the same rate, and, in my opinion, as poor rates are made from year to year, the person rated has a right to appeal if he thinks fit, and, having that right, he must fulfil the provisions of sect. 1 of the Act of 1864. With regard to the last point, I propose to express no opinion upon it beyond saying that I think it is an extremely difficult point and will have to be argued in some case where it is necessary to decide it. There are, as has been pointed out, authorities both ways. There are authorities which assume that the only

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means of raising the question as to the valuations of other persons and including omitted hereditaments is by a proceeding under sect. 18 of the Act of 1862; and there are authorities, which adopt the view that the Act of 1864, by necessary implication, gives the assessment committee power to summon persons before them and deal with the matter on a representation by a person who is going to appeal. There is a good deal to be said for both views, but it is not necessary to decide the point, and it must not be supposed that I am expressing any opinion upon it in this particular case. I decide this case on the ground that no proper notice of objection was given to the assessment committee, and, in the words of the statute, there was no failure to obtain relief. I think therefore that the rule should be discharged.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Rule discharged with costs.

Solicitors for the appellants, *Simey and Cook*, for B. and F. Tolhurst and Cox, Southend-on-Sea.

Solicitors for the respondents, *Kingsford, Dorman, and Co.*, for W. and F. Gregson, Southend-on-Sea.

Thursday, Nov. 21, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

NASH (app.) v. FINLAY (resp.). (a)

Local government—Bye-laws—Bye-law prohibiting wilful annoyance of passengers in the streets—Validity of bye-law—Uncertainty.

A bye-law made by a municipal corporation for the good rule and government of their borough provided that "No person shall wilfully annoy passengers in the streets"; and other bye-laws made at the same time dealt with particular kinds of annoyances in the streets.

Held, that the bye-law was void for uncertainty.

CASE stated by justices of the peace for the borough of Stafford, the question being as to the validity of a certain bye-law made for the borough.

At a petty sessions held at Stafford for the borough on the 8th July 1901, an information was preferred by Finlay, the respondent, against Ann Nash, the appellant, for that she, the appellant, on the 4th July 1901 in the borough of Stafford, in a public street called Union-street, unlawfully did wilfully annoy the respondent, being then and there a passenger, contrary to bye-law No. 1 of the bye-laws duly made for the borough by the council of the borough on the 10th Jan. 1882.

The information was heard and determined by the justices, who convicted the appellant of the offence, and adjudged her to pay a fine of 40s., or to suffer imprisonment for one month.

The bye-laws were bye-laws made for the borough of Stafford, "For the good rule and government of the borough, and for prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout the borough," which at a meeting of the town council

of the borough, held on the 10th Jan. 1882, were duly made in accordance with sect. 90 of the Municipal Corporations Act 1835 (5 & 6 Will. 4, c. 76), and were allowed by the Home Secretary.

No. 1 of these bye-laws provided:

No person shall wilfully annoy passengers in the streets.

A penalty not exceeding 40s. was imposed for the breach of any of the bye-laws.

The complainant, Finlay, stated in his evidence that on the 4th July in the afternoon he was in Union-street, and that the defendant Nash, who was then in her house, came out into her garden and used abusive language towards him, and he called witnesses in support of his statements. The defendant admitted that she was in her garden, but denied that she had used any abusive language towards the complainant, and called witnesses in support of her statements.

The defendant objected to the validity of the bye-law as being wholly bad, and further objected that the street in which the complainant was a passenger, although called Union-street, was not a street within the meaning of the bye-law, it not being controlled by the council of the borough, or open to the public, but was admittedly a footway leading from Union-street and terminating at a stream, and over which the owners and occupiers on each side of the footway only had a right of way; and, further, that, as she was not in a street at the time of committing the alleged offence, the bye-law had no application.

The justices were of opinion that the appellant had committed an offence against the bye-law, and that such bye-law was valid and in force in the borough, and they convicted the appellant accordingly.

The question of law for the opinion of the court was whether the bye-law is valid, and whether there was sufficient evidence to support the conviction.

W. Wills for the appellant.—The conviction is bad on the three grounds taken for the appellant. With regard to the first objection, the bye-law is invalid on two grounds. First, it is a bye-law which covers a number of subject-matters as to which the council have no power to make bye-laws, and is therefore *ultra vires*; and, secondly, even if it is not *ultra vires*, it is unreasonable and void by reason of its uncertainty. The bye-laws were made under sect. 90 of the Municipal Corporations Act 1835, which gave the council of any borough power "to make such bye-laws as to them shall seem meet for the good rule and government of the borough, and for prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any Act in force throughout such borough." The intention of this section was that no bye-law should be made for prevention or suppression of any offence which was summarily punishable under any Act in force in that place. This bye-law deals with matters which are punishable in a summary manner by virtue of an Act in force in the borough. By sect. 171 of the Public Health Act 1875, certain provisions of the Towns Police Clauses Act 1847 (10 & 11 Vict. c. 89) are incorporated; amongst others, the provisions "with respect to obstructions and nuisances in the streets." Amongst these incorporated sections is sect. 28, which deals with this very subject, and gives a code of offences which are thus summarily punish-

(a) Reported by W. W. Oza, Esq., Barrister-at-Law.

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able within the borough by virtue of the Towns Police Clauses Act. The objection to this bye-law is, not that in that section wilful annoyance of passengers in streets is specifically dealt with, but that a bye-law in these terms is wide enough to cover, and obviously does cover, many of the offences which are included in and covered by that section. It covers many things which are already punishable in that borough in a summary manner by the Towns Police Clauses Act 1847, and is therefore *ultra vires*. Next, the bye-law is too vague, and is therefore void. There is no case in which a bye-law has been held to be good where the offence has not been specified. There is no word more vague than the word "annoy," and as Lord Russell, C.J. said in *Kruse v. Johnson* (78 L. T. Rep. 647, at p. 650; (1898) 2 Q. B. 91, at p. 101): "What is to be the standard of annoyance?" It is therefore void for uncertainty:

Johnson v. Mayor, &c., of Croydon, 54 L. T. Rep. 295; 16 Q. B. Div. 708.

The respondent did not appear.

LORD ALVERSTONE, C.J.—This case has been argued on one side only, and some little difficulty arises on that account. In the judgment I am about to pronounce, I must not be understood as saying that no valid bye-law could be framed with the object to which this bye-law is directed. It is possible that a bye-law could be framed of a general character to carry out that object. But in this case we have to apply the test laid down by Mathew, J. in *Kruse v. Johnson* (78 L. T. Rep. at p. 653; (1898) 2 Q. B. at p. 108): "From the many decisions upon the subject it would seem clear that a bye-law to be valid must, among other conditions, have two properties—it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable," and he then gives authorities for that proposition. If this bye-law were not open to other objections, no doubt it would come within those words. But when we look at the other bye-laws of this borough, several of them seem to point to some things which are specifically said to be annoyances or nuisances, as, for example, No. 23, which says: "No person shall in any street use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned"; and No. 24, which says: "No person shall use to the annoyance of passengers or others any syringe, squirt, or thing of a similar character." Several of the bye-laws enacted at the same time dealt with different and particular kinds of annoyances. Therefore it seems to me that the bye-laws have endeavoured to deal with specific annoyances, and, that being so, it is difficult to understand what this particular bye-law was intended to cover that is not within the ambit of the others. I therefore think that this bye-law is not valid.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion. I think we must be understood to base our decision on the want of certainty in this bye-law. It may mean, or perhaps was intended to mean, that the other things specifically dealt with should be offences if done wilfully. If it said that, perhaps it might be good; but in my opinion it does not give an adequate intimation of what it is that it

intends to prohibit. On that ground I am of opinion that it is void and should be set aside.

Appeal allowed.

Solicitors for the appellant, *Sharpe, Parker, and Co.*, for *G. B. Underhill*, Stafford.

Nov. 21 and 22, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PIDGEON (app.) v. GREAT YARMOUTH WATERWORKS COMPANY (resps.). (a)

Water—Supply of—Boarding-house keeper—Business of—Supply to boarding-house for domestic uses of boarders—Supply for "domestic purposes"—Great Yarmouth Waterworks Act 1853 (16 & 17 Vict. c. xvii.), ss. 30, 32—Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), s. 43.

A special Waterworks Act provided that a waterworks company should furnish to the owners or occupiers of houses a sufficient supply of water for domestic use, at certain specified rates according to the annual value of the house, but that a supply for domestic purposes should not include (inter alia) a supply of water for any trade, business, or manufacture whatsoever:

Held, that a supply of water to a house in which the occupier carries on the business of a boarding-house keeper and uses the water in connection therewith solely for the domestic uses of himself and the boarders who are boarded and lodged in his house, is a supply of water for "domestic purposes," and that the company must furnish such supply at the specified rates according to the annual value of the house.

In such cases a supply of water for all the inmates of a house (including boarders or lodgers) is a supply for "domestic purposes," provided that the water be used for the domestic uses only of such inmates.

CASE stated by justices of the peace for the borough of Great Yarmouth, sitting as a court of summary jurisdiction.

On the 29th July 1901 the Great Yarmouth Waterworks Company (the respondents) were summoned before the justices upon the information of John Pidgeon (the appellant) charging that they (the respondents) had within the last six months refused to furnish to the appellant a supply of filtered water for domestic purposes in his dwelling-house, Redenhall House, Marine Parade, in the borough within the limits of the Great Yarmouth Waterworks Act 1853, he, the appellant, being a person entitled to demand such supply, and having requested the respondents to furnish him with such supply, and having paid or tendered to the respondents the rates for the same, contrary to sect. 30 of the Great Yarmouth Waterworks Act 1853 and the Acts incorporated therewith.

The sections of the Great Yarmouth Waterworks Act 1853 (16 & 17 Vict. c. xvii.), which the appellant referred to are as follows:

SECT. 30. That the company shall, at the request of the owner or occupier of any house or part of a house in any street, lane, way, row, or passage in which any pipe of the company shall be laid, or on the application of any

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person who, under the provisions of this Act or any Act incorporated herewith, shall be entitled to demand a supply of filtered water for domestic purposes, furnish to such owner or occupier, or other person, a sufficient supply of such water for domestic use at rates not exceeding the rates hereinafter specified; that is to say (Then follow the rates according to the annual value of the tenement).

Sect. 31. That such rates shall include a supply of water for one water-closet, and for every additional water-closet beyond one, and for every bath, the company may charge any sum not succeeding 5s. per annum.

Sect. 32. That a supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or washing carriages, where such horses or carriages are kept for hire, or by common carriers, nor a supply of water for any trade, manufacture, or business whatsoever, or for watering gardens, or for fountains, or for any ornamental purpose whatsoever.

Sect. 34. That it shall be lawful for the company to supply any person with water for other than domestic purposes for such remuneration and upon such terms and conditions as shall be agreed upon between the company and the persons desirous of having such supply of water.

The penalties sought to be recovered by the appellant are made payable by sect. 43 of the Waterworks Clauses Act 1847, one of the statutes incorporated in the special Act.

At the hearing it was proved or admitted, and the justices found as a fact, that the appellant was the occupier of the dwelling-house referred to in the summons, into which there was only one communication or service pipe from the respondent's main, and that he had requested the respondents to furnish him with a supply of water for domestic purposes in the house, and that he had tendered to the respondents the rates for the same, and that the respondents, alleging that the appellant used the water for his business of a boarding-house keeper, had refused to comply with such request, but had supplied water by meter, also that the house contained ordinary sitting-rooms, ten bedrooms, two water-closets, but no fixed bath, and that water was only used in the house for cleansing, cooking, drinking, and sanitary purposes.

It was proved or admitted, and the justices found as a fact, that the appellant received into his house for reward persons to board and lodge therein, who used the respondents' water, and that the appellant carried on therein the business of a boarding-house keeper, and used the respondents' water for the purposes above stated in connection therewith, and that his wife and family also resided upon the premises.

It was contended on behalf of the appellant that, notwithstanding that he carried on upon the premises such business as aforesaid, he was entitled upon the true construction of the statutes to a supply of filtered water for the purposes for which such water was used in his house, such purposes being those ordinarily understood as domestic purposes only, and that in deciding whether he was so entitled the justices ought only to consider the purposes for which the water was required and used, and that in the carrying on of a business water might be properly used for domestic purposes, and that the respondents were bound to furnish such a supply. In support of the appellant's contention, the justices were referred to the following cases: *Liskeard Union*

v. Liskeard Waterworks Company (7 Q. B. Div. 505); *Vestry of St. Martin's v. Gordon* (64 L. T. Rep. 243; (1891) 1 Q. B. 61); *Smith v. Muller* (70 L. T. Rep. 170; (1894) 1 Q. B. 192).

It was contended, on behalf of the respondents that where the householder carries on the business of a boarding-house keeper in his house, and water is used for any purpose whatsoever therein in connection with such business other than for the domestic purposes of the householder and his family, the respondents are entitled to treat such user as a user for business purposes, notwithstanding that the user is confined to the purposes above mentioned, and are only bound to supply water for such purposes by agreement.

The justices were of opinion that the respondents' contention was the correct one, and they accordingly dismissed the summons.

The question for the opinion of the court was whether the justices, upon the above statement of facts, came to a correct determination and decision in point of law, and if not what should be done in the premises.

Sect. 43 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) provides:

If, except when prevented as aforesaid, the undertakers . . . neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered, they shall be liable to a penalty of ten pounds, and shall also forfeit to the town commissioners, and to every person having paid or tendered the rate, the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply.

F. Low for the appellant.—By sect. 30 of the special Act the respondents are bound to furnish a sufficient supply of water for domestic purposes. The supply demanded in this case was a supply for domestic purposes, although there was carried on there the business of a boarding-house. It does not follow that because the house was kept as a boarding-house, therefore the supply was not for domestic purposes. In *Liskeard Union v. Liskeard Waterworks Company* (7 Q. B. Div. 505), the house in question was a workhouse, and the supply demanded was a supply for domestic purposes for the use of the officers and inmates of the workhouse, and the waterworks company refused to furnish the supply. Lord Coleridge, C.J. there said: "It is then said that the water supplied to a workhouse is not supplied for domestic purposes within the meaning of sect. 33"—which corresponded with sect. 30 in this case—"because the maintenance of paupers in England is a public purpose. No doubt this is true, but in the prosecution of that which is a public purpose there may be domestic uses, and this is one." So here there may be domestic uses though the business of a boarding-house is carried on. Again Lord Coleridge says: "I think that the paupers in the workhouse are one family within the meaning of the statute." The inhabitants of this boarding-house are as much one family as the inmates of a workhouse. That case shows that although there may be a public purpose, there may be a supply of water to the inmates for domestic purposes. Buckley, J., in *Barnard Castle Urban District Council v. Wilson* (ante, p. 322; 85 L. T.

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Rep. 481; (1901) 2 Ch. 813), decided that water supplied for the swimming bath of a school carried on as a charity was water supplied for domestic purposes, though he thought that the school was a business. That case precisely covers the present, as the only uses to which the water was put are domestic uses. As to this being carried on as a business, we do not contend that a boarding-house is not a business; but the mere fact that a business is carried on in these premises is not conclusive to show that this water was not used for domestic purposes:

Vestry of St. Martin's v. Gordon, 64 L. T. Rep. 243; (1891) 1 Q. B. 61.

The meaning of "domestic purposes" is illustrated by the case *Smith v. Muller* (70 L. T. Rep. 170; (1894) 1 Q. B. 192), under the Boiler Explosions Act 1890. The water must be used directly for domestic purposes, and it was so used here. If the contention of the water company were correct, they would not be bound to supply water at all.

H. H. Gregory (Balfour Browne, K.C. with him) for the respondents.—The justices were right in deciding in favour of the respondents. Upon the construction of the Act it is really a question of fact whether the supply was or was not for domestic purposes, and the justices so treated it, as they find as a fact that the appellant received boarders into his house, and carried on therein the business of a boarding-house keeper, and that the water was used by these boarders. These are actual findings of fact that the appellant was there carrying on a business, and was receiving this water in connection with such business. The real test is, what use does the consumer make of the water, and not the ultimate use to which it is put. The consumer is using it solely for his customers and for his own profit, and there is no difference in this respect between a hotel and a boarding-house. The cases cited do not throw much light on the question, as they deal with different words. The case of *Vestry of St. Martin's v. Gordon (ubi sup.)*, had reference to a different matter altogether—namely, as to what was refuse of a trade, manufacture, or business within the meaning of a different Act passed for different purposes. So, as to the case before Buckley, J. of *Barnard Castle Urban District Council v. Wilson (ubi sup.)* what was carried on was not a business, but a charity school; there was no business in the sense that any person got a profit or livelihood out of it. Sect. 32 of the special Act says that a supply of water for domestic purposes shall not include a supply for certain specified things, amongst others, a supply "for any trade, manufacture, or business whatsoever." This section, taken in conjunction with the finding of the justices that there was a business carried on here, clearly shows that it was not intended that the supply of water to this boarding-house should be considered as a supply for domestic purposes.

F. Low in reply.

Nov. 22.—Lord ALVERSTONE, C.J.—In this case the question is raised as to whether a person who keeps a boarding-house is entitled to have water supplied to his house upon the scale of supply applicable to water supplied to occupiers for domestic purposes. The scheme of these Acts

is nearly always the same, that for ordinary domestic purposes the water is paid for according to a scale based upon the annual value of the house. The section upon which the question arises is sect. 30 of the special Act, the Great Yarmouth Waterworks Act 1853, which provides as follows: [His Lordship read sects. 30 and 32 of the Act and proceeded.] In order to deal with this particular case, I think it is necessary to bear exactly in mind what is found in the case. In one paragraph of the case stated by the magistrates it is found: "That the appellant was the occupier of the dwelling-house referred to in the summons into which there was only one communication or service pipe from the respondents' main, and that he had requested the respondents to furnish him with a supply of water for domestic purposes in the said house, and that he had tendered to the respondents the rate for the same, and that the respondents, alleging that the appellant used the water for his business of a boarding-house keeper, had refused to comply with such request, but had supplied water by meter, also that the said house contained ordinary sitting-rooms, ten bedrooms, two water-closets, but no fixed bath, and that water was only used in the said house for cleansing, cooking, drinking, and sanitary purposes." I think those findings of fact are in this case conclusive in favour of the customer or the consumer. I think that under ordinary circumstances "domestic purposes" does include the use of the water for the ordinary purposes of domestic life by inmates of the house, and in this case it is found as a fact that the only persons who use the water are the inmates of the house who board and lodge in the house. Though it is quite true that the appellant is carrying on the business of a boarding-house keeper, he is not, in my opinion, in any proper or just sense of the word, using the water for the purposes of his business in any other sense than that it has been supplied for the domestic use of inmates of the house. If the facts in any particular case show either that the water is not being used for "domestic purposes," or that it is used for persons who are not inmates of the house, who are not living in the house in the sense of being in it as ordinary occupiers, different questions may arise. But all that I intend to decide is that if it is found that there is no use for the water except for domestic uses, and that there is no use of it by any person who is not an inmate of the house in the ordinary sense of the word, then the company are bound to supply the water according to the scale for "domestic purposes." I think, therefore, that this appeal should be allowed.

DARLING, J.—I am of the same opinion, but I must say that I come to this conclusion only after a good deal of hesitation and difficulty. It seems to me that a good deal of difficulty may arise if it is attempted in any way to extend the decision we are now giving to any other case the facts of which may be different to the present; for example, if it is attempted to extend it so as to include an inn or hotel. The words of the statute do, it seems to me, permit of such a case as this, where the water is used entirely for the domestic purposes of persons who are resident in the dwelling-house which has been turned into a boarding-house. What the statutes have done is this: They have not attempted really to make

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each person pay for the water which he uses, except in this way that it is calculated and paid for by the water rate, which itself is calculated on the annual value of the house. The annual value of the house would obviously be raised if it were turned into a very profitable boarding-house from what might have been an unprofitable dwelling-house, and thereby the company might be remunerated in that rough and ready way. I daresay that is why it is that no difficulties arise about many large hotels; the water companies do not care to go into the question whether some of the water is used for the business purposes of the hotel, because the annual value of the hotel is taken so high that the question really does not interest the companies. The present case would be very different if the water were used for purposes which could not very accurately be described as "domestic," for anything in fact beyond washing, drinking, and so forth. If, for example, the person who kept the house used the water for laundry purposes, for washing clothes which were delivered to persons outside the house, then I think that would be a case of "carrying on business" as distinguished from a user for "domestic purposes." I think some difficulty has been caused in this case by the decision which was cited for the appellant in *Barnard Castle Urban District Council v. Wilson (ubi sup.)*. I should myself very much have doubted whether such a thing as a swimming bath was ever contemplated by the words "domestic purposes"; and it must be a very exceptional sort of domestic life where persons have a private swimming bath attached to their house. That question was not argued in that case, and for some reason it suited the council not to argue it. Therefore I do not understand that to be a decision that a swimming bath really would be a "domestic purpose" if it were seriously argued to the contrary. I was pressed by the fact that there might possibly be a difference between that case and the present one. In that case the institution which was supplied with water was a charitable institution. It was a school, but it was also a charitable institution, and I have heard from the learned judge who decided it that, even if had been otherwise, it would have made no difference to his judgment. I therefore think the case of *Barnard Castle Urban District Council v. Wilson (ubi sup.)* goes a very long way to help us in deciding the present case. I concur in the judgment of my Lord.

CHANNELL, J.—I also agree. I think that the words "a supply of water for any trade, manufacture, or business" mean some more direct use of the water in that business than the mere use of it for "domestic purposes" by the inmates of the house. That is the thing which is covered by the water rate, based upon the annual value of the house. It is therefore a rough way of measuring the amount of water that is likely to be used for "domestic purposes" by the number of inmates which that house is capable of containing and accommodating. I think it is likely that there was an additional reason why water was, as a rule, for domestic purposes to be paid for in that way, because it is not desirable to let people pay for it for those purposes in a way that would induce them to stint the use of it. It is supplied for sanitary purposes, and therefore it is desirable that people should pay for it in a way which will

not induce them to use less of it than they should use. At any rate, it seems to me that, though the supply is determined and covered by the value of the house, it does not make any difference whatever whether the inmates of the house are guests who are entertained by the occupier of the house at his own expense, or whether they pay for their board and lodging, or whether they are pupils whose parents pay for their board and lodging, or whether they are paupers for whom the parish pay. Those cases have been dealt with, and decided, and therefore it seems to me that our decision to a certain extent is governed by authority. As to cases of restaurant and hotel keepers, I thoroughly concur in what has been said. In the large majority of such cases, beyond all doubt there was a use of the water for the purposes of trade which could not come within the use covered by the ordinary rate; but whether there may or may not be some kind of hotels which would bring themselves within our definition is a question upon which I desire to express no opinion. With regard to the case before Buckley, J. of *Barnard Castle Urban District Council v. Wilson (ubi sup.)*, I would only observe that the learned judge was a judge, as we are now and as Chancery judges always have been, who was trying law and fact together, and his decision as to the swimming bath being a "domestic purpose" is entirely a question of fact, and probably does not govern future cases. If the school were a school for the teaching of swimming, I should myself think that the supply of water for a swimming bath would clearly be a supply for the purposes of a trade or business which would have to be paid for separately. As to whether it was or was not so in that case I do not know, and there is nothing that appears in the report about it. But the important part of that case, which seems to me to support our decision, is that the learned judge was obviously intending to include the pupils of an ordinary school as inmates of a house whose use of water, for domestic purposes only, would not require a special payment beyond the water rate. On these grounds I think the appeal ought to be allowed.

LORD ALVERSTONE, C.J.—I wish to add, with regard to such matters as swimming baths, the question is always a question of fact, and I certainly must not be assumed to have expressed an opinion that a swimming bath must be a "domestic purpose."

Appeal allowed. Case remitted to the justices to be dealt with.

Solicitors for the appellant, *Tarry, Sherlock, and King*, for *E. E. Blyth*, Norwich.

Solicitors for the respondents, *Williams and James*, for *Worship and Bising*, Great Yarmouth.

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HALL v. MICHELMORE.

[K.B. Div.]

Friday, Nov. 8, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HALL v. MICHELMORE. (a)

Registration of voters—Qualification—"Occupier as owner or tenant"—Wife owner—Husband ratepayer—Representation of the People Act 1867 (30 & 31 Vict. c. 102), s. 3.

A. resided with his wife B. in a house of which B. was the owner. A. paid all the rates and taxes of the house and provided for the household generally. There was no other evidence that A. occupied as B.'s tenant. A. applied to be put on the register of voters as "resident occupier as tenant" of the house, within sect. 3 of the Representation of the People Act 1867.

Held, that, while if A. and B. had not been husband and wife the evidence might be sufficient to give rise to a presumption that A. occupied as tenant of B., the fact that A. and B. were husband and wife explained why A. resided in B.'s house and prevented any such presumption from arising.

CASE stated by the revising barrister appointed to revise the list of voters for the Torquay division of the county of Devon.

At the hearing before the revising barrister it was proved or admitted that John Hall (hereinafter called the appellant) resided with his wife in a house of which the latter was the sole and separate owner, the wife's name appearing on the rate-book as the owner, and the appellant's name as the occupier of the house.

The appellant was the bread-winner; the furniture in the house belonged to him, the rates and all the expenses of maintaining the house and household were paid by him, the wife having no means of support save and except the value of her ownership in the house.

No agreement of tenancy had been entered into between the appellant and his wife, nor had any rent at any time been paid by him to her in respect of the said premises.

There were forty-seven other persons being either voters already upon the list or claimants to be inserted therein who were objected to under similar circumstances.

The revising barrister held that there was, upon the above facts, no evidence that the appellant occupied the qualifying premises as owner or tenant, and that therefore he was not entitled to remain upon the register in respect of the qualification of inhabitant occupier of a dwelling-house, and expunged the names of the appellant and of forty-five of the forty-seven other persons from the list, and disallowed the claims of the other two of such forty-seven persons.

Representation of the People Act 1867 (30 & 31 Vict. c. 102):

Sect. 3. Every man shall in and after the year 1868 be entitled to be registered as a voter and when registered to vote for a member or members to serve in Parliament for a borough who is qualified as follows (that is to say) . . . (2) Is on the last day of July in any year and has during the whole of the preceding twelve calendar months been an inhabitant occupier as owner or tenant of any dwelling-house within the borough.

Percival Hughes for the appellant.—The appellant is on the rate-book and pays the rates. No point

therefore arises on sub-sect. 3 of sect. 3. The sole point is whether or not he is "an inhabitant occupier as owner or tenant." I submit that he occupies under an implied tenancy sufficient to support his claim. In *Gillo's* case, which is reported with *Loveridge v. Gardner* and *Mathew's* case in Smith's Registration Cases, at p. 186, the claimant with his wife and family occupied a house with the claimant's mother, who was the owner. The claimant was the bread-winner, the mother having no other property than the house. It was held that the claimant did not occupy as tenant of his mother. The distinction between that case and this is that there the mother was on the rate-book; here it is the claimant.

The respondent did not appear.

LORD ALVERSTONE, C.J.—We do not think it is possible to reverse the decision of the revising barrister. It seems to me that this is an *ad fortiori* case as compared with *Gillo's* case. The late Lord Chief Justice and my brothers Wright and Grantham decided in that case, where the son was living with the mother and was the bread-winner, that there were no evidence of tenancy or facts from which tenancy could be presumed, and that there was no proper qualification. There may be a case of a claimant occupying a house, a third person being the landlord and no rent being paid, where the revising barrister might come to the conclusion that the claimant's occupation could only be justified on the basis of some tenancy, and that there was, therefore, evidence from which he could infer a tenancy. In this case the house is the property of the wife; the husband not unnaturally lives with the wife; and it seems to us that on these bare facts being found—namely, that no agreement of tenancy had been entered into between the appellant and his wife, and that no rent had at any time been paid by him to her—it would be quite impossible for us to hold that there was evidence upon which we ought to overrule the barrister's decision that there were no facts here to justify him in holding that the claimant was an inhabitant as owner or tenant. Therefore the appeal must be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion also. I should think that there may be cases where without any rent being paid and without any express agreement of tenancy you have to account for the occupation of a person whom you find on the premises, and you may then infer that the person occupies as tenant at will in some way; but nothing of that kind arises when you can account for the occupation. Here you do account for the occupation. The appellant occupies it because his wife is the owner. That is why he is living there and in occupation. These circumstances absolutely negative any inference which might have arisen otherwise from your not being able to account for his presence there without holding that he was a tenant at will.

Appeal dismissed.

Solicitors for the appellant, *Brooks, Jenkins, and Co.*

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MAYHEW v. SUTTON.

[K.B. Div.]

Saturday, Nov. 9, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MAYHEW v. SUTTON. (a)

Highway — Light locomotive — Driven "to the common danger of passengers" — Locomotives on Highways Act 1896 (59 & 60 Vict. c. 36), s. 6 — Light Locomotives on Highways Order 1896, art. 4, s. 1.

Under art. 4, sect. 1, of the Light Locomotives on Highways Order 1896 it is an offence to drive a light locomotive on a highway "to the common danger of passengers."

A person who is shown to have driven a light locomotive on a highway at a fast pace may be guilty of the offence although there is no evidence to show that there were any passengers on the highway at the time he so drove it.

CASE stated by four justices of the peace for the county of Bucks.

On the 18th May 1901 an information, under art. 4, sect. 1, of the Light Locomotives on Highways Order 1896, was preferred by George Sutton, superintendent of police (hereinafter called the respondent), against Mark Mayhew (hereinafter called the appellant).

The information charged that on the 28th April 1901 the appellant, then being a person driving a light locomotive on a certain highway within the parish of Denham and called the Oxford-road, unlawfully drove the same to the common danger of passengers.

The evidence given at the hearing was as follows:—

One William Payne stated that about 7 p.m. on Sunday, the 28th April, he was on duty at Denham, and saw a motor car coming down Red Hill, on the Oxford-road, at a terrific pace. He walked into the centre of the road and held up both arms, and when the car came round the corner, about 340 yards from where he stood, the appellant, who was driving, could see him and drove straight up to him, and he just had time to step on one side when the car passed him, and the appellant brought the car to a standstill 60 yards away from where it had passed him.

No evidence was given that at the time in question there were any passengers or passenger on the Oxford-road, or that any passenger was endangered.

No evidence was tendered by the appellant, but it was argued on his behalf: (1) That, in the absence of affirmative evidence that at the time in question there were passengers on the highway who were endangered by reason of the speed at which the motor car was being driven, the offence charged was not made out, and the appellant could not be convicted; (2) that, in order to convict the appellant of the offence charged, the prosecution must prove that at the time in question there were passengers upon the highway, and, further, that such passengers were endangered: (*Stinson v. Browning*, 13 L. T. Rep. 799; *Hill v. Somerset*, 51 J. P. 742; *Smith v. Boon*, 84 L. T. Rep. 593.)

The justices found as a fact that the appellant was driving his motor car on the highway to the common danger of passengers, and that the appellant's contention that direct evidence of a

passenger being endangered was necessary to support a conviction was ill founded in law, and they convicted and fined the appellant,

Roger Wallace, K.C. (Samuel Fleming with him) for the appellant.—The charge here is driving the motor car "to the common danger of passengers." In order that it may be sustained there must be evidence that there were passengers on the highway to be endangered. No such evidence was offered. I submit, then, that no case was made and the conviction is wrong. Under sect. 72 of the Highway Act 1835 it is an offence to make a fire within 50ft. of a public carriage-way "to the injury of such highway, or to the injury, interruption, or personal danger of any persons travelling thereon." But in *Hill v. Somerset (sup.)* it was held that a conviction under this section was wrong where no evidence of any such injury was given. In *Smith v. Boon (sup.)* it was held that the driving of a motor tricycle through such a place as the High-street of Esher at the rate of eighteen or twenty miles an hour was driving at a speed "greater than is reasonable and proper, having regard to the traffic," without direct evidence as to the traffic. That decision is, however, on the earlier words of this section, and besides the evidence showed that the highway on which the tricycle was running at this speed was the high street of a village, and this might be considered indirect evidence as to the traffic. Here there was no evidence that there was any but one passenger on the highway, and there cannot, I submit, be a conviction unless there were "passengers," though I admit that if there were several passengers it would be enough to show that one was actually endangered.

The respondent did not appear.

Lord ALVERSTONE, C.J.—It is no part of our duty to consider whether and, if so, which of the regulations laid down by the lawful authority should be altered or modified. All we have to do is to apply the law. The regulation laid down by art. 4, sect. 1, of the order of 1896 is that the driver of a light locomotive when used on a highway shall not drive "at any speed greater than is reasonable and proper, having regard to the traffic on the highway, or so as to endanger the life or limb of any person or to the common danger of passengers." In *Smith v. Boon* my brother Lawrance and I held that justices were justified in holding that the speed of a motor tricycle driven through the High-street of Esher at eighteen or twenty miles an hour was not "reasonable or proper, having regard to the traffic on the highway," and that a conviction by them of the driver was good though there was no direct evidence before them that any particular person or vehicle using the highway was interrupted, interfered with, incommoded, or affected by reason of the speed at which the motor tricycle was driven. That was, it is true, a decision on the earlier words of the section, but counsel for the appellant has hardly attempted to argue that the principle of it does not apply to the words now in question. In my opinion, to drive a motor car at a "terrific" speed, as it was alleged that this one was here driven, may be "to the common danger of passengers" although no passengers were actually endangered. The collocation of words is sufficient to allow us to place such a construction

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McDONALD (app.) v. HUGHES (resp.).

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on the regulation. Counsel cited *Stinson v. Browning* (sup.) and *Hill v. Somerset* (sup.). They do not affect the present case. On the evidence here, first, that the motor car was driven at such a speed that it could not be stopped for 60 yards after it passed the policeman, and, secondly, that from the corner it came round the driver had a clear view on the road of 340 yards, the justices might have reasonably found as a fact that the car was not driven to the common danger of passengers; but they have found as a fact that it was, and it is altogether impossible for us to say that as a matter of law they were wrong. There was evidence to support their finding, and, when that is so, there is no appeal from their finding on a question of fact.

DARLING, J.—Evidence was here given that the motor car was coming along the road at a terrific pace; but the appellant says that as a matter of law there can be no offence under the regulation unless there are two or more passengers on the road. I think the regulation means just what my Lord says it means.

CHANNELL, J.—I agree. *Appeal dismissed.*

Solicitors for the appellant, *Firth and Co.*

Tuesday, Nov. 19, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

McDONALD (app.) v. HUGHES (resp.). (a)

Licensing — Death of licence-holder — Business carried on by executrix — "Licensed person" — Licensing Act 1872 (35 & 36 Vict. c. 94), ss. 17, 74.

The executrix of a licence-holder, who carries on the business from the death of such licence-holder until the transfer sessions, is a "licensed person" within sect. 74 of the Licensing Act 1872, and as such is liable to penalties for unlawfully suffering gaming upon the licensed premises within sect. 17 of that statute.

CASE stated upon an information preferred by the appellant, a superintendent of police, under sect. 17 of the Licensing Act 1872, charging the respondent, of the Green Lodge hotel, Hoylake, that on the 27th May 1901, being the executrix of one Margaret Hughes, late of the same hotel, who died on the 1st April 1901, and who was at the time of her death duly licensed to sell by retail intoxicating liquors, and that she (the respondent) being a licensed person within the meaning of the Licensing Act 1872, in respect of the Green Lodge hotel, unlawfully suffered gaming—to wit, card playing for money—to be carried on upon her premises.

The facts were as follows:—

Margaret Hughes was, prior to and at the date of her death on the 1st April 1901, duly licensed to sell by retail intoxicating liquors at the Green Lodge hotel.

By her will she appointed the respondent her executrix, and her will was duly proved by the respondent on the 21st May 1901.

Special sessions for the transfer of licences were held on the 11th April 1901; but this date being within fourteen days of the death of Margaret

Hughes no application for the transfer of the licence was then made, and as the next day appointed for holding special sessions was the 6th June 1901, the respondent, as executrix, remained in possession and occupation of the hotel, and was carrying on the business there and managing the hotel on the 27th May 1901.

Upon that day several police officers visited the hotel, and found several persons, as they alleged, unlawfully gaming there.

Sect. 17 of the Licensing Act 1872 enacts that "if any licensed person suffers any gaming or any unlawful game to be carried on on his premises" he shall be liable to certain penalties therein mentioned, and sect. 74 of the Act provides that, unless such definition shall be inconsistent with the context, "licence" shall mean a licence for the sale of intoxicating liquors granted by justices in pursuance of the Alehouse Act 1828, including a certificate of justices granted under the Wine and Beerhouse Acts, and licences for the sale of sweets and a licence for the retail of spirits granted, pursuant to the Act, to a wholesale spirit dealer, and that a "licensed person" shall mean a person holding a licence as defined by the Act of 1872.

For the appellant it was contended that the respondent, as executrix of Margaret Hughes, in possession and occupation of the licensed premises, was a person "holding a licence" as defined by the Act of 1872—namely, the licence granted by justices to Margaret Hughes—and was therefore a "licensed person" within the meaning of the Act, and that to limit the meaning of the words "person holding a licence" to the individual to whom the licence was originally granted would be at variance with the intention of the Legislature, as expressed in the provisions of the Act made in relation to the maintenance of public order, and that such a meaning of the words "licensed person" was inconsistent with the context of sect. 17 of the Act of 1872 and the other sections relating to offences against public order, as the result would be that from the date of the death of a licensee, until the next appropriate special sessions, no person would be liable for offences against the provisions of the Act relating to the maintenance of public order.

For the respondent it was contended that she was not a licensed person within the meaning of the Act; that she did not hold any licence as defined by the Act; that no licence had been granted to her by justices in pursuance of the Alehouse Act 1828, or any other Act, and that therefore she could not be liable for any penalty under sect. 17 of the Licensing Act 1872. And, further, that if an executor of a deceased licensee became a "licensed person" within the meaning of sect. 17 after the death of a licensee, and before any application for the transfer of a licence at special sessions, there would have been no need for the last paragraph of sect. 3 of the Licensing Act 1872, which exempted such executors from the penalties to which unlicensed persons were liable under that section for selling, or exposing for sale, any intoxicating liquor, and that, although there might be an omission from the Act, the section, being penal, was to be construed strictly.

The justices were of opinion that the objection was valid, and dismissed the information.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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Montgomery (H. Lloyd with him) for the appellant.

Tobin for the respondent.

LORD ALVERSTONE, C.J.—In this case we have to put a construction upon some words in the Licensing Act 1872 which do not appear to have been considered from this particular point of view up to the present time—that is to say, we have to decide whether an executrix who is in occupation of a house, carrying on the business of selling the liquor on the premises, is subject to a penalty, or may be made subject to a penalty, for offences under sections which provide for the order of licensed premises, on the ground that she is a “licensed person,” meaning thereby a person holding a licence as defined by this Act. In my opinion the interpretation clause was put in with some object, and although it may not be conclusive, because such things may be put in from abundant caution, Mr. Tobin has not been able to suggest any case in which that interpretation clause would be wanted if his argument is correct. I think that the effect of sect. 3 is to say that the licence continues for a limited time to the executrix or the heir or assign provided that they come to the next special sessions, and that the effect of the interpretation clause is to say that a person who is entitled to act as a licensed person during that period is a person who is holding a licence. I am certainly very much impressed with the argument that, if this view is not correct, a certain number of offences will go without punishment; and in respect of a large number of other offences or several other offences there will not be the same means of punishment for them as is contemplated by this Act. I think that an executrix who is selling liquor by virtue of the possession of the licence, during the period up to the time when she must go and obtain the transfer or obtain a new licence, because that is the proper expression under sect. 14 of the Act of 1828, is a person holding a licence within the meaning of this Act, and that the magistrates ought to have convicted in this case.

DARLING, J.—I am of the same opinion. One of the strongest arguments in favour of the appellant is the argument set out in the case which convinced the magistrates apparently in favour of the respondent. By means of the words in sect. 3 of the Licensing Act, executors are exempted from the penalties if they do what grantees of a licence may do, though they themselves are not the grantees of the licence. They are not treated as unlicensed persons. If unlicensed persons did those things they might be liable for certain things. These executors are not treated as unlicensed persons. Why? Because I think they come within the words used by the Act, that they are licensed persons, although they are not grantees of the licence. It seems to me there are the two things. There are the grantees of the licence. There are for certain purposes interim licence-holders, and the executors for the time that they hold the licence before they go and get a licence for themselves come within those words. It seems to me most important to notice the very point made by Mr. Tobin, that the executor can go and get a licence for himself in relation to the premises. That he can only get as a matter of right,

under the statute that was read, for the rest of the period which was covered by the old licence granted to the deceased. It seems to me upon all this that the Legislature cannot be justly accused of having made this a *casus omisus*, because it seems to me to be provided for.

CHANNELL, J.—I think that the appeal should be allowed; but I do agree with Mr. Tobin's argument to a certain extent—namely, that I do not think the words of this sect. 3 are very apt. The proviso in the section begins, “no penalty shall be incurred by the executors of any licensed person for continuing to sell for a limited time on the licensed premises.” Those are the words; it does not say in so many words that the operation of the licence is not to be extended for a limited time, but I think that is the only meaning that really can be put upon it, and that the meaning in substance is that the licence is extended for a limited time after the death. The licence is, as Mr. Tobin says, a personal licence, but the operation of this proviso is to extend it for a limited time until the executors have an opportunity of applying at special sessions. If that is the operation, then, in the meanwhile, the executor acting under it must be considered to be a person holding a licence—at any rate, holding premises under the operation of that licence for a limited time. Therefore I think the magistrates were wrong.

Appeal allowed.

Solicitors: *Philpot and Morrell, for Reginald Potts, Chester; J. E. and H. Scott, for Thompson, Hughes, and Mathison, Birkenhead.*

Nov. 19 and 20, 1901.

(Before LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WISE (app.) v. DUNNING (resp.). (a)

Summary jurisdiction—Public meetings—Threatened breach of the peace—Conduct of holder of meeting—Binding over—Jurisdiction of justices.

Justices have jurisdiction to order the holder of public meetings upon the highway to enter into recognisances to keep the peace and be of good behaviour, where his language and conduct have been such that they have led to a breach of the peace on the part of other persons, and are likely, if continued, to lead to further breaches. And this is so where the holder himself has not been guilty of breaches of the peace personally, nor has directly incited others to commit such breaches.

Beatty v. Gillbanks (47 L. T. Rep. 194; 15 Cox C. C. 138; 9 Q. B. Div. 308) and Reg. v. Justices of Cork (15 Cox C. C. 78 and 149) considered.

CASE stated by the Liverpool stipendiary magistrate upon an information and complaint preferred by the respondent that the appellant had held meetings on sundry dates in the month of May 1901, on the King's highway and sundry other places within the city of Liverpool to which the public have access, and that breaches of the peace had taken place in consequence of the holding of those meetings, and that

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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the respondent had reason to believe that the appellant intended to hold similar meetings in the future, and that he had reason to believe that if such meetings were addressed by the appellant on the King's highway or in other places within the city to which the public had access serious breaches of the peace would follow, and the respondent prayed that the appellant might be summoned to show cause why he should not be ordered to find sufficient sureties to keep the peace towards all His Majesty's subjects and be of good behaviour during the next twelve months.

At the hearing of the information and complaint, the following facts were proved:—

The appellant, George Wise, addressed a meeting held in Islington-square, Liverpool, which square is a public place, a public thoroughfare, and part of the King's highway, on the 15th May 1901, and the following night addressed a similar meeting held in the same place.

The meeting so held and addressed by the appellant and the other meetings herein referred to were held by him with the view of prosecuting what is called a "crusade" in the interests of the Protestant religion.

Each of these meetings was attended by a number of persons of the Roman Catholic religion in addition to the Protestant supporters of the appellant.

The crowd of people present on the evening of the 16th May was so large that Carver-street, a public street running into the square, was completely blocked, and the main public streets on each side of the square were filled with the overflow of people from the meeting.

At the meeting held on the 16th May the appellant in the course of his speech put beads round his neck and waved a crucifix above his head. The gestures and language then used by him were such as were likely to insult and annoy the Roman Catholics, and were well calculated to provoke a breach of the peace by them, and did in fact result in a breach of the peace, as at the conclusion of the meeting a breach of the peace was created by the opponents of the appellant, who made a determined rush for him, and it was only by the intervention of the members of the police force that he got away in safety. The appellant did not himself commit any breach of the peace, nor did he incite his supporters to do so, but his language and gestures did in fact provoke other persons present to do so. At this meeting the supporters of the appellant said, "Let us charge them," but the appellant restrained them, saying "Stand still, stand still."

The appellant also held a meeting on Sunday morning, the 19th May 1901, at the corner of Boaler-street and Sheil-road, which are public thoroughfares and part of the King's highway in the city, and, just before addressing such meeting, the appellant remarked that he was about to "denounce" the infamous order of Jesuits and the Coronation oath.

At that meeting the appellant called Roman Catholics "rednecks," which is a name most insulting to them, and challenged them to get up and deny the truth of any of his remarks. The term "rednecks" was intended to annoy and insult the Roman Catholics and was well calculated to provoke a breach of the peace, and a breach of the peace did take place, as a number of stones were thrown and fights took place

amongst those attending the meeting, and the police had to interfere and separate them.

The meeting afterwards broke up, but prior to it doing so the appellant asked those present to support him at a meeting to be held at Islington-square the following Saturday at 8 p.m. On being requested to alter the hour to 7.30, he replied, "Yes, the sooner we get at them the better."

The appellant did not at the meeting commit any breach of the peace nor incite his supporters to do so, but by his language above mentioned he in fact provoked other persons present to do so. At this meeting the appellant asked his own supporters not to assault anyone.

At a meeting held and addressed by the appellant on the 22nd May 1901 in Mere-lane, which is a public thoroughfare and part of the King's highway in the city of Liverpool, the appellant, in referring to the meeting which was to be held on the following Saturday, the 25th May, said that as he had heard the Catholics were going to hold a meeting at the same place at 8 p.m., he thought his meeting should be at 7.30. He also said that he had received a letter informing him that the Catholics were going to bring sticks, upon which some of his supporters said they would bring sticks also. He also told his supporters that the police had refused to give him protection, and he looked to them to protect him.

In the *Liverpool Evening Express* newspaper of the 24th May 1901 the following advertisement, which was admitted by the defendant to have been inserted by him, appeared:

Protestantism and free speech. Do not allow the Romanists to triumph, but maintain your liberties. Support Mr. Geo. Wise on Saturday next, 7.30, at Islington-square.

In consequence of the disturbances which took place at the meetings above mentioned, an information and complaint was laid by the respondent similar to the information and complaint now in question in respect of the above meetings, and, on the hearing of such information and complaint on the 25th May 1901, an undertaking was given by the solicitor of the appellant on his behalf that he would not hold the meeting then advertised and above referred to.

The undertaking above referred to only referred to the meeting to take place in Islington-square, and a meeting was arranged by the appellant to be held the same evening in front of St. George's Hall, which is a place in the city of Liverpool to which the public have access, and notice of his intention to hold such meeting was given by the appellant to the Liverpool police about 6.30 the same evening, and a large crowd numbering 6000 people assembled in front of St. George's Hall, and when the appellant appeared on the scene a number of his opponents, who were waiting for him, made a rush for him, and a free fight ensued between his supporters and his opponents. A number of police who had been taken there in anticipation of a breach of the peace occurring were all called up to protect him and take him away, and this was done, and he was escorted from St. George's Hall to the Central Station. On the way to the station the majority of the crowd followed, and there were many ugly rushes by them to get at the appellant, and many of the police were assaulted and knocked down in the streets. The appellant did not himself

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commit any breach of the peace at this meeting, nor did he threaten to do so or incite any other person or persons to do so.

The appellant was the same person whose meetings and addresses in connection with his "crusade" have on several other occasions caused the police of the city of Liverpool to make special provisions to prevent a disturbance in the public streets of the city.

The appellant stated in court, on the hearing of a summons heard before the present information and complaint, that he intended to hold similar meetings to those above mentioned in the future, and the respondent deposed that, if such meetings were held, he (the respondent) had no doubt whatever it would lead to a breach of the peace.

It was contended that the information was null and void inasmuch as it did not allege that the appellant had been guilty of any offence, and that the magistrate had no jurisdiction to make any order against him; and, further, that such an order could only be made in respect of anticipated breaches of the peace against a person who has himself either been guilty of a breach of the peace or in regard to whom there is sufficient reason to believe that he will be guilty of a breach of the peace towards some particular person or persons and on the information of such person or persons; and that, inasmuch as in the present case there was no suggestion that the appellant had ever been guilty of a breach of the peace or had ever threatened or was likely to be so guilty or incite others to be so guilty, an order against the appellant was in excess of jurisdiction and erroneous in point of law.

The magistrate ordered the appellant to enter into a recognisance in the sum of 100*l.* with two sureties in 50*l.* each to keep the peace and be of good behaviour during the twelve months then next ensuing, and in default to be imprisoned for two months unless he entered into such recognisance.

F. E. Smith for the appellant.—The foundation of the jurisdiction to bind over is to be found in 34 Edw. 3, c. 1. I submit that the magistrate here had no authority to do what he has done. In *Reg. v. Justices of Londonderry* (28 L. Rep. Ir.) Mr Justice O'Brien, at p. 450, says: "The whole question to my mind is comprehended in the proposition, can a person be bound to good behaviour without being guilty of misbehaviour; or can the bad conduct of another person make that wrong which is otherwise innocent? I hold, if such a proposition requires to be stated, that without misconduct no person by the law of England can be subjected to restraint any more than to punishment." In *Beatty v. Gillbanks* (47 L. T. Rep. 194; 15 Cox C. C. 138; 9 Q. B. Div. 308) it was laid down by Field and Cave, JJ. that knowledge by persons peaceably assembling for a lawful object that their assembling will be forcibly opposed by other persons, under circumstances likely to lead to a breach of the peace on the part of such other persons, does not render such assembly unlawful. That, I submit, applies to this case. The whole of these disturbances were caused by the persons who tried to break up my client's meetings, which were quite lawful assemblies. He also referred to

O'Kelly v. Harvey, 14 L. Rep. Ir. 105;

Dicey on the Law of the Constitution, 3rd edit., chap. 7, and Appendix, note 4, p. 419.

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Pickford, K.C. (*Mansell* with him) for the respondent.—There was ample jurisdiction and justification for doing what the magistrate did here when the whole of the facts are considered. The conduct of the appellant was wrongful in using the language he did and in holding a meeting in the highway contrary to the local Liverpool Act. With regard to finding sureties for good behaviour, in the course of his judgment in *Reg. v. Justices of Cork* (15 Cox C. C. 78) May, C.J. says, at p. 83: "Upon an elementary matter of this nature it is, I think, abundantly sufficient to refer to Blackstone, who discusses the subject in the 4th book and chapter 18 of the old editions 'Preventive justice,' he there tells us, 'consists in obliging those persons whom there is probable ground to suspect of future misbehaviour to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen by finding pledges or securities for keeping the peace or for their good behaviour.' This requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. This caution is such as is intended merely for prevention without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen." The information discloses grounds for binding over, but, even if it does not, it does not matter, as further evidence can be given. In *Ex parte Davis* (24 L. T. Rep. 547) it was held that even where the justices had dismissed a summons for assault they were legally justified in requiring a recognisance to keep the peace. He referred to

Reg. v. Hughes, 40 L. T. Rep. 685; 14 Cox C. C. 284; 4 Q. B. Div. 614.

There is no right to hold a meeting in a public thoroughfare: (see the summing up of Charles, J. in *Reg. v. Graham and Burns*, 16 Cox C. C. 420). He also referred to

Reg. v. Justices of Cork, 15 Cox C. C. 149.

F. E. Smith in reply.

Lord ALVERSTONE, C.J.—This is an application by way of appeal from an order of the Liverpool stipendiary binding over Mr. Wise to be of good behaviour. There is also in the binding over some words against committing a breach of the peace, but the actual form is not material, because the words "to be of good behaviour" were also in the recognisance. The case has been extremely well argued. Everything that possibly could be said in favour of his view has been extremely well pressed upon us by Mr. Smith, and of course has also been dealt with by Mr. Pickford. But I am of opinion that there is no reason to doubt that the magistrate was perfectly justified in putting Mr. Wise under recognisances. Now, I do not think that it is really necessary to go at great length into the various authorities that have been cited, beyond saying this, that I am not able to find any difference of opinion as to the law which is to be applied in these cases. It seems to me the whole difficulty has arisen from the attempts to apply the law to the different sets of circumstances. I do not at all deny, and Mr. Smith, I think, made it plain, that different people may express very different opinions as to what ought to have been the application of the law in particular cases. For instance, Mr. Smith cited

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to us and called to our attention the opinion of a very learned lawyer and very great writer, Mr. Dicey, who expressed an opinion with reference to *Beatty v. Gillbanks* (47 L. T. Rep. 194; 15 Cox C. C. 138; 9 Q. B. Div. 308), and as I understood the passage it was that the view taken by the Irish courts was preferable to that taken by Field and Cave, J.J. It seems to me that if *Beatty v. Gillbanks* (*sup.*) is really examined, there is no law there laid down inconsistent with anything that has been stated by any of these very distinguished judges in Ireland, who have dealt with this matter, and who have had unusual opportunities for dealing with it. I think that for this purpose it is sufficient to cite the passage from Field, J.'s judgment in *Beatty v. Gillbanks* (*sup.*) which states the law, in my opinion, absolutely accurately. He says: "Now I entirely concede that everyone must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants, they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention." O'Brien, C.J. in *Reg. v. Justices of Londonderry* (28 L. Rep. Ir. 440) said, at p. 447, this: "No act on the part of any person was proved to show that it was reasonably probable that the conduct of the defendants would, on the day in question, have provoked a breach of the peace." Now, I think it is important just to emphasise that enunciation of the necessary test, because it has been pressed upon us by Mr. Smith that if the appellant, Mr. Wise, did not intend to act unlawfully himself or to induce other persons to act unlawfully, the fact that his words might have led people so to act would not be sufficient. Then as to the two cases of *Reg. v. Justices of Cork* (15 Cox C. C. 78, 149). I would refer to the passage in the judgment of May, C.J., which was read by Mr. Pickford, at pp. 83 and 84. I will not read the whole passage, although I think it is all-important, where he commences with the citation of Blackstone. He says: "This requisition of sureties must be understood rather as a caution against the repetition of the offence than any immediate pain or punishment. This caution is such as is intended merely for prevention without any crime actually committed by the party, but arising only from a probable suspicion that some crime is intended or likely to happen, and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground for apprehension." Then in the second case of *Reg. v. Justices of Cork*, (15 Cox C. C. 149) there is the judgment of a very learned Irish judge, Fitzgerald, J., in which he says, at p. 155, after referring to the authorities: "Without citing further authority we may assume that where it shall be made reasonably to appear to a justice of the peace that a person has incited others by acts or language to a violation of law and of right and that there is reasonable ground to believe that the delinquent is likely to persevere in that course, such justice has authority by law, in the execution of preventive justice, to provide for the public security by requiring the individual to give sureties for good behaviour, and in default commit him to prison." Now, I have referred to these cases not for the purpose of endeavouring to deduce from them any new rule of law, but to point out that in a number of

cases and before different judges the rule has been expressed substantially in the same way, only, of course, different language being used by the different men using it. All lay down what I may call the essential condition that there must be an act of the defendant, the natural consequence of which would be likely to produce an unlawful act, if it is not an unlawful act in the man himself. Now, I think this case could really be put higher, but I have dealt with the matter altogether, and with everything in favour of what Mr. Smith has said. Now, there is in this case, in my opinion, an all-important statute—that is, the local Act, the Liverpool Improvement Act 1842—which provides that any person who uses any threatening or abusive or insulting words or behaviour with intent to provoke a breach of the peace—which is not this case—or whereby a breach of the peace may be occasioned may be summoned before the local magistrates and may be fined. Mr. Smith ingeniously argued that that was to have a very limited scope, and was meant to prevent persons in the streets of Liverpool whose language might be less choice than it ought to be using it with impunity. I cannot think that was the scope of the legislation, although it may have been one of the evils which were aimed at. But we have here a distinct finding of fact and an allegation in the information that Mr. Wise had held a number of meetings in the public streets to such an extent that those highways were blocked by crowds of thousands of people, and that very serious contests and breaches of the peace had arisen; and we have, in addition, the further finding that the appellant himself used, with respect to a large body of people of a different religion to himself, language that the magistrate has said to be of a most insulting character, and to have challenged anyone of them to get up and deny his remarks. It seems to me that the magistrate was only discharging his duty in having regard to and making himself acquainted with the character of the population over whom he has to execute and administer justice, and, if it is known that there are in any particular town—as appears from this case and is well known—a large body of any particular religion, the fact that a man has used insulting language in the public street towards that body of persons, it is a circumstance that he must take into consideration when he is considering the natural consequences of the acts. Then, in addition to that and preparatory to a meeting, the appellant was proved to have stated that he had received a letter informing him that the Catholics were going to bring sticks, and then he added that he told his supporters that police had refused to give him protection and so he looked to them for protection. No reasonable man, looking at those facts, can have doubt that the police and the magistrate came to the right conclusion when they thought that the result of these continued meetings, with increasing crowds and insulting language being used to a larger body of persons who might be present, and with an invitation that he should be protected by his own supporters, went very far indeed to incite the people at any rate to use language and to so behave as to occasion a breach of the peace. I think it may be true that, if this case was to be considered with reference to any one of the threats or illegalities that it is suggested

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Mr. Wise had committed, further evidence might have been necessary, but, in my opinion, there was abundant evidence on this information to show that in the public street Mr. Wise had been guilty of language which had caused an obstruction, which was abusive, and which did tend to bring about a breach of the peace, and that he threatened and intended to be guilty of doing similar acts in another place. The fact that he had promised not to hold a meeting at one place, but had held it within half a mile or a quarter of a mile of the spot on the same day, shows, at any rate, that the magistrate was justified in taking precautions against him. But I further think that there was quite sufficient on the information to justify the magistrate in hearing this evidence, and any omission in the actual language of the information, although it alleges obstruction upon the highways, meetings upon the highway, and fear of a breach of the peace, would be amply cured by the evidence that was given. It is a case in which the magistrate heard the information and in which Mr. Wise was represented by a solicitor and elected to call no evidence, and, instead of being punished, he was properly bound over, in my opinion, in the recognisance that he was ordered to give, and I am entirely of opinion that the magistrate acted within his jurisdiction and perfectly rightly, and that the point of law raised in this case cannot be held to be good. The appeal must be dismissed.

DARLING, J.—I am of the same opinion. I think it necessary to summarise shortly what the facts were here which the magistrate had before him. We begin with the knowledge afforded by Mr. Wise himself that he called himself a "crusader" who was going to preach a Protestant crusade. In order to do that, he supplied himself with a crucifix which he waved about; he hung round his neck a lot of beads which obviously were designed to represent the rosaries used by Roman Catholics, and, got up in this way, he confessedly made use of a number of expressions most insulting to the faith of the Roman Catholic population among whom he went. There had been disturbance and riots caused by this conduct of his before, and the magistrate has found that the language which he used was provocative, and that this kind of language was likely to occur again. Large crowds had assembled in the streets, and the people only were prevented from creating a serious riot by the intervention of the police. Now, was that the natural consequence of all these doings? Was not that exactly what has happened over and over again, and what has given rise to every one of the cases that have been cited before us, both the Irish cases and *Beatty v. Gillbanks* (sup.)—namely, that they have arisen out of precisely this kind of conduct on the part of a person calling himself of one religion, and out-raging the religion of another. I do not care to use language of my own to say what kind of person the evidence shows Mr. Wise to have been. I am content to use the language of Butler when he says:

One of that band
Of errant saints, whom all men grant
To be the true Church militant;
A sect whose chief devotion lies
In odd, perverse antipathies.

Now, as I say, the natural consequence of this

conduct has been to create the riots that have given rise to these cases. Mr. Smith says the natural consequence ought to mean the legal consequence; but I do not think so at all. The natural consequences are illegal acts, and I think that those illegal acts are the natural product of the eloquence of this crusader, and that from these acts circumstances have arisen which justified the magistrate in binding him over to be of good behaviour. In one of the cases that have been cited—*Reg. v. Justices of Londonderry* (sup.)—in which the law is laid down, O'Brien, C.J. says: "Now, I wish to make the ground of my judgment clear, and carefully to guard against being misunderstood. I am perfectly satisfied that the magistrates did not make the order which is impugned, by reason of there having been or there being likely to be any obstruction of the highway, and that the true view of what took place is that the defendants were bound over in respect of an apprehended breach of the peace, and, in my opinion, there was no evidence to warrant that apprehension." It is clear that if there had been evidence to warrant that apprehension, the Chief Justice would have held the magistrates' decision in that case to be right. It is said that the case of *Beatty v. Gillbanks* (sup.), which was decided in the English Court of Queen's Bench, is in conflict with that decision of the Chief Justice of Ireland, who had authority for what he said. I am not sure that it is, and I am inclined to think that, having regard to the passage which my Lord read from the judgment of Field, J., the whole thing is a question of evidence upon the facts. However, I do not hesitate to say that, if there be a conflict between that case of *Reg. v. Justices of Londonderry* and *Beatty v. Gillbanks*, I prefer the law as laid down in *Reg. v. Justices of Londonderry*. I think that that is a right statement of the law, and, if it be, it is perfectly ample, even without the question of the local Act of Parliament to which my Lord has referred, to warrant the stipendiary magistrate in coming to the conclusion to which he did in this particular case. I therefore think that his order was right.

CHANNELL, J.—I entirely agree in the judgments which have been given, and I think it is not necessary to add anything but a very few words. I quite agree with Mr. Smith's proposition that the law does not, as a rule, regard an illegal act as being the natural consequence of any temptation which may be held out to commit it. For instance, a person who exposes his goods outside his shop is often said to tempt people to steal, but it could not be said that that is the natural consequence of it. The House of Lords has recently held, with reference even to leaving a blank space in a cheque, which can easily be filled up by adding to the amount, that it is not the natural consequence that it has led to somebody committing a forgery in writing the further amount in the cheque. Those propositions were, of course, quite correct, and really familiar, but I think that these cases show that the law does regard the infirmity of human temperament to such an extent as to consider that a breach of the peace, although an illegal act, is the natural consequence of insulting language or matters of that kind. Possibly it is an exception to the rule which Mr. Smith pointed out, but it is quite

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clearly made out by the cases. I therefore think the learned stipendiary was right, and that the appeal should be dismissed.

Judgment accordingly.

Solicitors: *Field, Roscoe, and Co., for Miller, Peel, Hughes, and Rutherford, Liverpool; F. Venn and Co., for Pickmere, Liverpool.*

Thursday, Nov. 21, 1901.

Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

SMITH (app.) v. WISDEN AND OTHERS (Justices of Sussex) AND ANOTHER (resps.). (a)

Adulteration of food—Sale "to prejudice of purchaser"—No evidence of inferiority of article sold—Addition of glucose to marmalade—Offence—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6.

To a person who asked for a pot of marmalade a grocer sold a pot of marmalade which was found to contain 13 per cent. of starch glucose. The glucose consisted of sugar, a gummy substance which had no sweetening property and water. There was no legal standard for the making of marmalade, and manufacturers used various recipes, and for many years glucose had been used by many, though not by all, manufacturers in the making of it. The glucose to the extent used was not injurious to health, and it prevented the marmalade from crystallising and had a tendency to prevent moulding and fermenting.

Held, that there was no evidence that the article supplied was inferior to the article demanded or was adulterated, and no evidence, therefore, that the sale was a sale to the prejudice of the purchaser within the meaning of sect. 6 of the Sale of Food and Drugs Act 1875.

CASE stated by the Court of Quarter Sessions for the western division of the county of Sussex on the hearing of an appeal at Horsham on the 12th April 1901.

The appellant, George Smith, appealed to the quarter sessions against a conviction of the court of summary jurisdiction held at Worthing whereby the appellant was convicted for selling to the prejudice of the purchaser, contrary to the provisions of sect. 6 of the Sale of Food and Drugs Act 1875, a pot of marmalade which was not of the nature, substance, and quality demanded, and was ordered to pay the sum of 1l. and 12s. costs.

The Court of Quarter Sessions confirmed the conviction with costs, and at the request of the appellant stated this case for the opinion of the court.

The appellant was a retail grocer carrying on his business at Worthing, and on the 7th Feb. 1901 an inspector under the Sale of Food and Drugs Act 1875, in answer to his application for a 2lb. pot of marmalade, was served on behalf of the appellant with a pot of marmalade which bore a red label, which so far as is important was as follows:—

Crosse and Blackwell's pure orange marmalade, manufactured entirely from Seville oranges and warranted pure.

No indication beyond the label was given to the purchaser as to the composition of the marmalade.

The purchase of the pot of marmalade was made in consequence of a circular issued by the Local Government Board, and received by the chief constable of West Sussex. This letter was as follows:

I am directed by the Local Government Board to inform the council they have had under consideration the statements which have been made relative to illness in different parts of the country alleged to be caused by the drinking of beer containing arsenic. The presence of arsenic is said to have been due to the brewing of the beer with glucose or other substitutes for sugar prepared with commercial sulphuric acid in which arsenic was accidentally present. Without expressing any opinion on this question, but with a view of pointing out a means of discovering whether any risk is likely to arise in the district from the use of beer containing injurious ingredients, the board direct me to draw attention to the powers which the council possess under the Sale of Food and Drugs Acts of purchasing and submitting samples of beer for analysis by the public analyst, and to recommend that samples should be taken forthwith. I am at the same time to state that glucose and other sugar substitutes are used not only in the brewing of beer, but also in the making of jams, syrups, sweets, and similar articles of food, and the board suggest for the consideration of the council whether it would not be well that samples of some or all of such articles which are on sale in the district should be purchased and submitted to the public analyst for analysis.

The conviction of the appellant by the justices at Worthing on the 6th March was for unlawfully selling to the prejudice of the purchaser a certain article of food—to wit, marmalade, which was adulterated with 13 per cent. of starch glucose, and was not of the nature, substance, and quality demanded by the purchaser, contrary to sect. 6 of the Sale of Food and Drugs Act 1875, and the appellant was convicted of the offence and fined as aforesaid.

The analyst, on the 15th Feb. 1901, certified that the sample of marmalade contained the parts as under, or the percentages of foreign ingredients as under—namely, starch glucose, 13 per cent.; and he added that the sample was free from arsenic, from salicylic acid, and fruit other than orange.

It was proved before the Court of Quarter Sessions that starch glucose is composed of 40 per cent. of dextrose, 40 per cent. of dextrine, and 20 per cent. of water; that dextrose is sugar to all intents and purposes; that dextrine is a gummy substance, and has not any sweetening property whatsoever, and is a substance largely used for the gumming of labels and other similar purposes; that glucose, though classed as a sugar for purposes of taxation, was not a sugar as understood by the general public.

It was proved that glucose had been used in the manufacture of marmalade for a period which commenced fifteen years before the date of this case by a large number of manufacturers, but was not so used by all and never had been used by all; that there was a general and common understanding that marmalade was a preserve composed of fruit boiled with cane or beet sugar, but that there was no legal standard for making of marmalade, and that manufacturers varied in the recipes they used; that the use of glucose to the extent contained in the analysed article was

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not injurious to health; and that the use of glucose prevented the marmalade from crystallising, and had a tendency to prevent mildewing and fermenting.

It was contended by the appellant: (1) That the sale was not to the prejudice of the purchaser within the meaning of sect. 6 of the Sale of Food and Drugs Act 1875; (2) that as there is no standard for making of marmalade the addition of starch glucose was not an offence under the Act; (3) that upon the facts proved there was no evidence to sustain the conviction.

The court found: (1) That in asking for orange marmalade the purchaser desired to buy a substance composed of oranges cooked or preserved with cane or beet sugar, and had not consented to be served with a preserve to which starch glucose was added; (2) that the sale of the article which contained 13 per cent. of starch glucose was a sale to the prejudice of the purchaser; and (3) was a sale of an article not of the nature, substance, and quality of the article demanded, and they affirmed the conviction and dismissed the appeal.

The question for the court was whether the Court of Quarter Sessions was right upon the facts proved before it in dismissing the appeal.

If the court should be of opinion that the judgment of the Court of Quarter Sessions was correct, then the order of that court dismissing the appeal with costs was to stand.

If the court should be of opinion that the judgment of the Court of Quarter Sessions was wrong, then the case was to be remitted to the court to enter judgment, allowing the appeal with costs.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) provides:

Sect. 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality, of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases—that is to say, (1) Where any matter or ingredient not injurious to health has been added to the food or drug, because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

Bousfield, K.C. (Morton Smith with him) for the appellant.—The case raises an entirely new point on the construction of sect. 6. It does not come within the section at all; but if it does—it comes within the exemption in the 1st sub-section. To come within the section, it must be a sale to the prejudice of the purchaser, and it must also be a sale of an article which is not of the nature, substance, and quality of the article demanded. It is not the mere selling of a different article, but the selling of an inferior and worse article that is aimed at in sect. 6. There must be a different article and a worse article, and the purchaser must be prejudiced by the sale. Here the purchaser could not be prejudiced by the sale, because he got an article which, upon the findings, was a better article than he asked for, as it was found that the use of the glucose prevented the marmalade from crystallising. [Lord ALVERSTONE, C.J. referred to *Hoyle v. Hitchman* (40 L. T. Rep. 252; 4 Q. B. Div. 233)]

and *Sandys v. Markham* (41 J. P. 52).] A case of this kind is not within the scope of the section at all, as there is here a thing made according to recipes as to which there is no definite standard either as to ingredient or as to proportion, and in such cases to support a conviction there must be introduced something injurious to health, as in the case of the arsenic in beer (*Goulder v. Hook, ante*, p. 237; 84 L. T. Rep. 719; (1901) 2 Q. B. 290). If the decision of the justices in the present case is correct, then in that case it would not have been necessary to go into the question as to the arsenic; it would have been sufficient for a conviction to prove the presence of glucose. The cases where convictions under sect. 6 have been obtained on mixed articles, are cases where there has been a fixed standard, such as the tincture of opium case (*White v. Bywater*, 19 Q. B. Div. 582) and the mercury ointment case (*Dickins v. Handerson, ante*, p. 133; 84 L. T. Rep. 204; (1901) 1 Q. B. 437), or where something injurious to health has been added, as in the cases as to arsenic in beer. Here there are express findings that the use of the glucose was not injurious to health and that there was no legal standard. The glucose was added to make it fit for consumption as an article of commerce, and therefore, even if it comes within sect. 6 at all, it comes under the exemption in sub-sect. 1. The court is not bound by the findings of the justices at the end of the case; these findings are really inferences from the facts which are previously found, and the court is entitled to draw inferences from the facts. The contention for the respondents would strike out of the section altogether the words “to the prejudice of the purchaser.”

Bosall for the respondents.—[Lord ALVERSTONE, C.J.—Where is there any evidence that the article sold was inferior?] That it was inferior appears from the finding of the justices that, in asking for orange marmalade, the purchaser desired to buy a substance composed of oranges cooked with cane or beet sugar, and had not consented to be served with a marmalade to which glucose was added. That is a finding of fact by the justices that the purchaser did not get the article he asked for. There is the previous finding as to the glucose that it is really not sugar, but that part of it is a gummy substance without any sweetening property whatever. There was other affirmative evidence as to the inferior quality, but, as the hearing lasted a long time and many witnesses were called on both sides, it was found impossible to set out the whole of the evidence in the case. For commercial purposes it may be convenient that glucose should be used, but the justices do not find that the jam is better for the consumer because there is glucose put in it. They find that it does not crystallise or ferment, which may be very important for the vendor. The real answer is to be found in sect. 8, because, if read in conjunction with sect. 6, it precisely meets this case. Under sect. 8 the vendor could have protected himself by giving to the purchaser a notice, by means of a label, that the article was mixed. It is said that this was a compound or mixed article for the making of which no fixed standard is known, and that therefore there ought not to be a conviction. In such a case the question is entirely one of fact for the justices (per Mellor and Lush, JJ. in *Webb v. Knight*, 36 L. T.

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Rep. 791; 2 Q. B. Div. 530); so, in *Goulder v. Rook* (*ubi sup.*), Lord Alverstone, C.J. says: "It is for the magistrates in each case to find whether in fact the article supplied is of the nature, substance, and quality of the article demanded." Here, after prolonged inquiry, they have so found. In the next place, the sale was to the prejudice of the purchaser. The article must be of an inferior quality (*Hoyle v. Hitchman, ubi sup.*), but the justices must be taken to have found that, as they have expressly found that the sale was to the prejudice of the purchaser, and they were entitled to use their own knowledge and experience on the matter:

Shortt v. Robinson, 63 J. P. 295;
Reg. v. Field, 64 L. J. 158, M. C.

Upon these findings of fact by the justices the conviction ought to be upheld.

Bousfield, K.C., was not called upon to reply.

LORD ALVERSTONE, C.J.—The real difficulty that I have had in this case has been as to whether we could deal with it without sending it back to the justices. I quite see the force of the argument properly and fairly put forward by counsel for the respondents, that upon these findings in this case we ought not to disturb the decision of the justices, but that we ought to consider that they have found facts which we cannot review. This court, of course, can only really deal with the question on there being no evidence on which the justices could properly come to the conclusion to which they came. I have had considerable doubt as to whether we should be justified in dealing with the case without sending it back to the justices, and I do not hesitate to say that the statements in the case as affording a foundation for the findings of the justices are, to my mind, wholly unsatisfactory; but still they have been found as facts upon some evidence, and I could not give the judgment I am about to give unless I had come to the conclusion that there was no evidence on which the justices could properly act in convicting the appellant. With regard to the question of what the purchaser asked for and meant to get, I think we are concluded by the findings of the justices upon it. I will only say that I should not have come to the same conclusion that a person, when he asked for "marmalade," thought he was going to get fruit and beet or cane sugar. I think there are many other things that might properly be put in good marmalade that a person asking for it would not know of, or would not form any opinion about. If that had been the question, I do not think we could have interfered with the decision of the justices upon it. But I think the justices, in order to support this conviction, must go further. There must be evidence that the article supplied was not of the nature, substance, and quality of the article demanded by the purchaser. That has received judicial comment more than once—and I do not think that any doubt has been thrown on it—by Lush, J., as in the case of *Hoyle v. Hitchman* (*ubi sup.*), decided as far back as the year 1879, upon the same words as those in sect. 6 of the present Act. It has to be taken in this connection that the differences between the article supplied and that demanded by the purchaser must be to the prejudice of the purchaser, and the article must be one which is not of the nature, substance, and quality of the article de-

manded. As Lush, L.J. (then Lush, J.), said in that case, "It cannot be confined to pecuniary prejudice, or prejudice arising from the consumption of unwholesome food. The prejudice is that which the ordinary customer suffers—namely, that which is suffered by anyone who pays for one thing and gets another of inferior quality. The official purchaser is to purchase by way of testing whether the prejudice is suffered by the ordinary customer, and he is prejudiced in the same manner. The words 'to the prejudice of the purchaser' are necessary, because if they had not been inserted, a person might have received a superior article to that which he demanded and paid for, and yet an offence would have been committed. The words are intended to show that the offence is not simply giving a different, but giving an inferior, thing to that demanded and paid for." I may say that that judgment was not the first in which Lush, J. considered the matter. It had been before him in the case of *Sandys v. Markham* (*ubi sup.*), and to my knowledge that has been referred to in more than one case as being a correct exposition of the law. In that view of the matter, what have the justices found here? I agree with counsel for the respondents that it is very difficult to get out in the special case, and that you cannot get out, all the evidence given; but it was proved that glucose had been used in the manufacture of marmalade for a period of fifteen years by a large number of manufacturers, though not by all. Therefore it is plain that the justices found, as a fact, that this was an alternative ingredient in marmalade. They say there was a general and common understanding that marmalade was composed of fruit boiled with cane or beet sugar, but that there was no legal standard for the making of marmalade, and that manufacturers varied in the recipes they used. So far we get a certain thing found—namely, that there is no standard, but that there is a frequent, though not common, use of glucose varying the recipe. Then the justices find this, that the use of glucose to the extent contained in the analysed article was not injurious to health, that it prevented the marmalade from crystallising, and had a tendency to prevent mildewing and fermenting. Looking at the matter fairly, and not endeavouring to construe this Act so that it may be a weapon of oppression or otherwise than a proper protection of the public, what does that amount to? It amounts to this, that the ingredient was an ingredient which, if the purchaser knew anything about it, tended to improve the article, and for this purpose it must be taken that the purchaser did not know anything about it, as it is not the case of a person purchasing who knew any particular recipe. The purchaser got an article given to him which, if it was different at all, was different in the sense that it was rather better. I perfectly agree that if we thought that the justices had come to the conclusion they did come to from general knowledge or general experience based upon their own knowledge of such things, we ought not to interfere. But I think the way the justices have stated this case shows that they must have desired to have the opinion of this court as to whether they were justified upon the facts stated in coming to the conclusion they did come to. I base my judgment—and this is why I have not sent the case back to the justices—on the ground that there was no evidence of any inferior

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quality in the article supplied, or of any adulteration in the ordinary sense of the word. The appeal must be allowed and the conviction quashed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion. I should like to add that this court may draw inferences of fact which ought to have been drawn by the justices from the facts stated and found by them, and in all probability when the case sets out certain findings of fact, and then says that the justices found so and so upon these facts, they are merely stating the inferences which they drew from the facts, and then they ask us whether they are right in drawing these inferences. Inasmuch as we may draw the inferences, I think we may draw the inference that in this case it was not proved that the article was sold to the prejudice of the purchaser in the sense of its being injurious. There is some statement that the article was better for some purposes by reason of having glucose in it, but there is no distinct statement that it was worse. There is simply a statement that it had a certain amount of gum in it which had a beneficial effect.

Appeal allowed.

Solicitors for the appellant, *Allen and Son.*

Solicitor for the respondents, *E. B. Wannop,* Chichester.

Nov. 21 and 22, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. MAYOR, &C., OF STEPNEY. (a)

Local government—Abolished office—Compensation to officer—London Government Act 1899 (62 & 63 Vict. c. 14), s. 30—Local Government Act 1888 (51 & 52 Vict. s. 41), s. 120.

A local authority when assessing under sect. 120 of the Local Government Act 1888 the just compensation to be paid to an officer whose office has been abolished are bound to exercise their own judgment and discretion.

J., a solicitor, was clerk to the vestry of M. E., and also practised at his profession.

The duties and powers of such vestry were taken over by the corporation of S. under the London Government Act 1899, and the office of clerk was abolished under sect. 30 of that Act.

J. applied to the corporation of S. for compensation, to be assessed under sect. 120 of the Local Government Act 1888.

The corporation applied to the Treasury for information as to the principle on which they compensated officers whose offices were abolished, when such officers did not devote all their time to the duties of their offices.

The Treasury replied that the practice was to calculate the compensation as if the officers did so devote all their time, and then to deduct 25 per cent.

The corporation, without inquiring into the particular case and without exercising their own discretion in the matter, assessed the compensation to be paid to J. on this principle.

Held, that a mandamus lay against the corporation to direct them to consider and assess the compensation justly payable to J.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

RULE nisi to show cause why a *mandamus* should not be directed to the mayor and corporation of Stepney ordering them to assess the compensation due to the prosecutor owing to the abolition of his office under the London Government Act 1899.

The prosecutor (Mr. Jutsum) was a solicitor who had filled since 1872 the office of clerk of the vestry of Mile End, an authority the powers and duties of which had been transferred to the defendants under the London Government Act 1899.

While filling such office he had also carried on the private practice of his profession.

On the 9th Jan. 1901 the office of vestry clerk of Mile End was abolished by the defendants under the powers conferred upon them by sect. 30 (1) of the London Government Act 1899.

The prosecutor thereupon preferred a claim to compensation under sect. 30 (2) of that Act and the different provisions of earlier Acts thereby incorporated in the Act.

The finance committee of the Stepney Corporation, to which the claim was referred, made inquiries at the Treasury as to the practice there as to assessing compensation.

In reply to these inquiries it was stated that the practice in the administration of sect. 120 of the Local Government Act 1888 and sect. 31 of the Local Government Act 1894 was to calculate the compensation of an officer, the whole of whose time had not been devoted to his office, as though his whole time had been so devoted, but to deduct one-fourth of the amount thus arrived at.

The finance committee reported this to the corporation, and also reported that they were advised that the corporation were bound by the practice of the Treasury.

The prosecutor contended that the corporation were not so bound, and that if they acted simply on such practice they would not be carrying out the statutory duty imposed upon them by sect. 120 of the Local Government Act 1888, which was to inquire into all the circumstances affecting each particular claim and assess the compensation with regard to these.

The corporation adopted the report of the finance committee, and the compensation was assessed according to the Treasury practice.

London Government Act 1899 (62 & 63 Vict. c. 14):

Sect. 30 (1). Where the powers and duties of any authority are transferred by or under this Act to any borough council, the existing officers of that authority shall be transferred to and become the officers of that council. . . . The council may abolish the office of any such officer whose office they may deem unnecessary; but any officer . . . whose office is abolished shall be entitled to compensation under this Act. (2) Sub-sections four and seven of section eighty-one of the Local Government Act 1894 shall apply to the existing officers affected by this Act as if references in those sub-sections to the district council were references to the borough council. . . .

Local Government Act 1894 (56 & 57 Vict. c. 73): Sect. 84 (4) refers to the tenure under which existing officers continuing in office under the new authority shall hold their offices . . . (7) makes sect. 120 of the Local Government Act 1888 applicable for the purpose of assessing compensation to existing officers.

Local Government Act 1888 (51 & 52 Vict. c. 41):

SECT. 120 (1). Every existing officer declared by this Act to be entitled to compensation, and every other existing officer, whether before mentioned in this Act or not, who by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office or by diminution or loss of fees or salary, shall be entitled to have compensation paid to him for such pecuniary loss by the county council, to whom the powers of the authority, whose officer he was, are transferred under this Act, regard being had to the conditions on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act or of anything done in pursuance of or in consequence of this Act and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstances of the case, and the compensation shall not exceed the amount which, under the Acts and rules relating to Her Majesty's Civil Service, is paid to a person on abolition of office.

Sub-sect. 2 provides for the delivery of a claim to the council by every person claiming compensation setting forth the facts as to his salary and office, together with a statutory declaration of the truth of such statement of facts.

Sub-sect. 3 directs the council to consider such statement and assess the just compensation.

Sub-sect. 4. If a claimant is aggrieved by the refusal of the county council to grant any compensation or by the amount of compensation assessed . . . the claimant . . . may within three months after the decision of the council appeal to the Treasury, who shall consider the case and determine whether any compensation and, if so, what amount ought to be granted to the claimant, and such determination shall be final.

Courthope-Munroe (*Leese* with him) showed cause.—In the first place, I submit that the council have no discretion in the matter. They are bound under sect. 120 (1) not to give more compensation than is given under the Acts and rules relating to Her Majesty's Civil Service, and here they have given the maximum the Treasury gives [Lord ALVERSTONE, C.J.—Can you refer me to the Acts or rules under which the amount of compensation is fixed by the Treasury?] No. We are not in a position to obtain such rules if they exist, and I know of no Act on the subject. We did all we could in the matter. We inquired of the Treasury, and we acted on the information supplied. In the second place, I submit that this is not a case for a *mandamus*. A *mandamus* is never issued when there is an alternative remedy equally adequate. Here sect. 4 provides an alternative remedy—an appeal to the Treasury. To issue a *mandamus* here would be futile, since, whatever way the council decide, the ultimate decision lies with the Treasury, and we know that they will decide the matter as we have decided it. Moreover, where an Act of Parliament provides a special remedy for a right given by it, the holder of such right has no other remedy. Here the remedy given is by appeal to the Treasury, and I submit that that is the only remedy the prosecutor has:

Peebles v. Oswaldtwistle Urban District Council,
76 L. T. Rep. 315; (1897) 1 Q. B. 384;
Re Nathan, 12 Q. B. Div. 461.

Boydell Houghton in support of the rule.—As to the first point, there is no evidence that there are any rules or Acts which affect the matter. The council thought they were bound by the practice of the Treasury and followed it. But they were in no way bound by it. In the second place, there is no adequate remedy under sub-sect. 4. Before we appeal under that section we are entitled to a decision under sub-sect. 1. Our point is that the council has refused jurisdiction; if so, a *mandamus* lies:

Reg. v. Marsham, 65 L. T. Rep. 778; (1892) 1 Q. B. 371;

Reg. v. St. Pancras Vestry, 63 L. T. Rep. 440; 24 Q. B. Div. 420.

LORD ALVERSTONE, C.J.—A great many points have been raised in argument on this rule which do not arise and which it is not necessary for us to consider, and we should be doing no more than repeating what I think is very clear law. It is now well established that if a tribunal, a body who are charged with the performance of a public duty, do not discharge such duty, a *mandamus* will lie to compel them to discharge it; or, if an inferior court does not entertain a case when it ought to entertain it, a *mandamus*, will lie to compel it to entertain it. I need not refer to the cases. Many have been mentioned. *Reg. v. Marsham (sup.)* is a case of the latter class; there are many cases with regard to the first class. It is equally clear that if an effective alternative remedy exists, the court has a discretion as to whether or not it will grant a *mandamus*; and, as a rule, it does not grant a *mandamus* where there is a sufficient alternative remedy. I had for a long time thought that Mr. Munroe had made good his point that under sub-sect. 4 of sect. 120 of the Local Government Act 1888 an appeal to the Treasury by a person aggrieved was a sufficient remedy; but on consideration we have come to the conclusion that it is better that the rule for a *mandamus* should be made absolute. The duty of the local authority is to have regard in fixing a compensation "to the condition on which his appointment was made, to the nature of his office or employment, to the duration of his service, to any additional emoluments which he acquires by virtue of this Act or of anything done in pursuance of or in consequence of this Act, and to the emoluments which he might have acquired if he had not refused to accept any office offered by any council or other body acting under this Act, and to all the other circumstances of the case." I read all this in order to indicate that it is intended that the local authority shall themselves exercise their discretion and assess the compensation, having regard to all these matters. The important matters here would be the conditions on which the prosecutor's appointment was made and the nature of his office or employment. Then there comes the additional condition that the amount "shall not exceed the amount which under the Acts and rules relating to Her Majesty's Civil Service is paid to a person on abolition of office." If there were evidence before us to show that there was a statute or that there were statutory rules or—I go further—if there were binding rules of the public service applicable to this case, then we could not here say that the local authority had not considered

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all these matters. But on the materials before us it is quite plain that whether there be such rules or not—as to which we know nothing—the local authority have not acted in accordance with any rule, but inquired merely as to the practice which is applied. The practice which appears to be applied, and I have no doubt properly applied, in most cases is that there is a deduction of 25 per cent. made in the case of officers whose whole time is not engaged by their official work from the compensation which would be given them if their whole time had been so engaged. I think it is quite impossible to say that this practice, apart from any Act or rule, would make such an arbitrary deduction a sufficient regard to all the circumstances of the case, or the conditions on which the officer's appointment was made, or the nature of his office or employment. Therefore, apart from a statutory rule, *prima facie* it would be the duty of the local authority to consider for themselves what the deduction should be. In some cases it seems to me it might be very much more than 25 per cent., and in some very much less. That being so, *prima facie* it was the duty of the Stepney Council, apart from definitive rules, to have regard to and consider the particular case. Then it is said, and very forcibly said, by Mr. Munroe that he is a person aggrieved and that he can appeal, and he likened that not unnaturally and very cogently to cases where a tribunal had gone wrong in law, or had taken some point which the Court of Appeal, or the constituted tribunal of appeal, would deal with. If it had been the case, I should think his argument quite unanswerable; but it seems to me that this remedy is really a remedy against an improper exercise of discretion by the lower tribunal as well as an improper refusal, and that the Treasury on appeal have the right of considering the case and determining whether the amount should be altered. It seems to me that under ordinary circumstances the local authority ought, in the first place, to exercise their discretion upon the circumstances of the man's particular case and assess the compensation with regard to that, and that it is not quite an adequate remedy to say that the Treasury can fulfil the same function and discharge the same duty, even though they have not had the assistance of the discretion of the local authority. I wish it to be distinctly understood that I am not suggesting that the Treasury will not be perfectly competent to review or deal with the matter if an appeal is brought to them under sub-sect. 4; but I do think that in this case it was intended by the statute that the local authority should exercise its discretion upon the particular case for compensation, and that it was that discretion so exercised which should be the subject of the appeal, and that the person who was to appeal was to be a person who was aggrieved by the exercise of the discretion. If there were any evidence before us that the borough council had themselves thought that 25 per cent. was the right deduction or had exercised a discretion in that matter, I certainly should not have been a party to making the rule absolute; but in this case, as they have acted upon something which I think is in no way binding on them and it is not suggested by Mr. Munroe that they really exercised their discretion, I think that they ought to be ordered to entertain

the case, having regard to the circumstances of the particular case, before any question of alternative remedy arises.

DARLING, J.—I am of the same opinion. I think that very much the most forcible answer made by Mr. Munroe to this application for a *mandamus* was that there was an equally adequate and equally convenient remedy provided by sub-sect. 4 of sect. 120 of the Local Government Act 1888. That section is: "If a claimant is aggrieved by the refusal of the county council to grant any compensation or by the amount of the compensation," and so on, then there shall be "an appeal to the Treasury, who shall consider the case and determine whether any compensation and, if so, what amount ought to be granted." If here the borough council had really gone into the case and exercised their own judgment upon it and had refused the prosecutor any compensation, or had granted him an amount with which he was dissatisfied, and in that case instead of going to the Treasury he had come to us and asked for a *mandamus*, I think that we ought to have refused it, and to have said: "No, you shall not have a *mandamus* because you have got, at all events, an equally convenient and adequate remedy. Go to the Treasury." But I do not think that the council really did consider the matter at all for themselves. They came to the conclusion that because the section as to compensation said that they might grant compensation which "shall not exceed the amount which under the Acts and rules relating to Her Majesty's Civil Service is paid to a person on abolition of office," all they had to do was to write to the Treasury and find out what they were in the habit of giving, and that then simply to say "That is your compensation" would be practically an automatic act. As a matter of fact it has not been proved that they acted upon any rule of the Treasury at all, nor has it been proved that there was a rule. They acted upon what the Treasury told them was their practice. I do not think either that they acted on any judgment of their own. They borrowed a measure from somebody else to measure what they were to dole out without applying their judgment to what they were to give at all. Therefore I think that they have not taken the first step here which would entitle Mr. Jutsum to appeal to the Treasury, and our *mandamus* simply means that they must take that first step. If they do take that first step and arrive at precisely the same result for reasons which they do not give, it seems to me that we cannot interfere with that decision.

CHANNELL, J.—I agree, but I am not quite certain that I do so for the reasons that have been given. In the first place, I think that the *mandamus* ought to go because the local authority have not in fact exercised their discretion upon this matter. They have by a mistake thought that they were bound by a practice as though it were a rule. If it had been a rule under the Act it would have been binding upon them. They thought that the rule of practice was a rule by which they were bound, and consequently they exercised no discretion. In my opinion, if they had said, "We quite know that we are not bound by this absolutely, but we think it right to follow the Treasury practice," and had so followed it, I

think they would have exercised their discretion and they would have been right; but they simply thought that they were bound when they were not bound. Consequently it is a case for a *mandamus* for them to exercise their discretion, unless there is some rule of this court under which we could not issue a *mandamus*. The one that has been suggested is that there is another adequate remedy. It is clearly settled that the court does not grant a prerogative *mandamus* when there is another remedy, if that other remedy is equally convenient and adequate. For a long time I was inclined to think that there was another remedy equally convenient and applicable to this case, and I now think there is another remedy. I do not entertain the least doubt myself that Mr. Jutsum might upon the present state of things appeal to the Treasury, and that he has another remedy. That is the point that I am not quite sure that we are all agreed upon. I think he has another remedy, but I do not think on the whole, after some consideration, that it is equally convenient, because I think that the local tribunal is the one that is best to investigate in the first instance the particular facts about this gentleman's employment. They will know much better than the Treasury can know, and it is preferable that they should investigate, in the first instance, the number of days or hours, whatever it may be, that he was employed in one and the number that he was employed in another. Although the applicant here can in the present state of things go to the Treasury and get them to decide finally the amount of the allowance which he ought to have—I think very likely he will have to go there, or someone will go there, in the end, and the Treasury will ultimately have to do it—yet I do not think that is an equally convenient remedy for the local authority, not having exercised their discretion, because if he goes now he will have to go without a preliminary investigation which might or might not be useful to him in going there. I do not myself think that the present case is one coming within the rule of which *Peebles v. Oswaldtwistle Urban District Council* (*sup.*) was one illustration—viz., that where an Act creates an obligation and enforces the performance in a specific manner as a general rule the performance cannot be enforced in any other manner. I do not think that rule applies to this case in question, where there are two rights and two different rights created by the statute—one a right to have compensation and another a different right to have adjudication upon the subject of that compensation. It is that latter one which is under consideration on this *mandamus*.

Rule made absolute.

Solicitors for the prosecutor, *Jutsum and Jones*.
Solicitor for the defendants, *Edward Betteley*.

Tuesday, Nov. 26, 1901.

(Before WRIGHT, J.)

WYATT v. LONDON COUNTY COUNCIL. (a)

Local government—Transference of duties of clerk of the peace—Reduction in fees—Existing officer—Compensation—“Not less salaries or remuneration”—Local Government Act 1888 (51 & 52 Vict., c. 41), ss. 115, 118, 119.

By sect. 119 (1) of the Local Government Act 1888: “The officers and servants of the quarter sessions, or general assessment sessions, or justices, or any committee of such sessions or justices . . . who held office at the passing of this Act, and who by virtue of this Act become officers and servants of a county council (in this Act referred to as existing officers), shall hold their offices upon the same tenure and upon the same terms and conditions as if this Act had not been passed, and while performing the same duties, shall not receive less salaries or remuneration . . . than they would have if this Act had not been passed. . . .”

The plaintiff, by virtue of sect. 118 (10) of that Act, being clerk of the peace of Surrey, continued to be clerk of the peace at the quarter sessions held for the county of London at Newington, and for the purpose of the business at those sessions he was deemed to be clerk of the peace for the county of London.

The Middlesex scale of fees, which by sect. 115 was that taken in the county of London by the clerk of the peace, was lower than the Surrey scale, and the Middlesex scale was further reduced by the standing joint committee of the London County Council and the quarter sessions.

Held, that the plaintiff was only entitled, as clerk of the peace for the county of London for Newington, to the fees payable under the reduced scale in Middlesex; but that, by virtue of sect. 119, he was entitled to receive not less remuneration, whether by salary or by fees, than that to which he was entitled at the passing of the Local Government Act 1888.

SPECIAL CASE stated in an action.

The plaintiff was, at the passing of the Local Government Act 1888 and still is, clerk of the peace for Surrey, and is the person referred to in sect. 118 (10) and (12) of that Act.

That section is as follows:

(10) If the person who at the appointed day is clerk of the peace for Surrey held office at the passing of this Act then, so long as he holds that office (a) he shall, besides continuing to be that clerk, continue to be clerk of the peace at any quarter sessions held for the county of London at Newington, and be for the purpose of all business transacted at those sessions deemed to be the clerk of the peace for the county of London, and as such shall have the same power of appointing and acting by a deputy as heretofore in his capacity as clerk of the peace for Surrey; and (b) such of the records of the county of Surrey as at the passing of this Act are in his custody at Newington, and if this Act had not passed would have remained in that custody, shall, subject to any order of the Court of Quarter Sessions, continue to be kept in his custody at Newington.

(12) In the case of any of the following persons who by virtue of this Act become clerk of the peace for the county of London, or salaried clerks of petty sessional divisions for the county of London, or who for the purpose of all business transacted at the quarter sessions

(a) Reported by W. de B. HERBERT, Esq., Barrister-at-Law.

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held for the county of London at Newington is to be deemed to be the clerk of the peace for the county of London, or who become clerk of the peace for East Sussex and clerk of the peace for West Sussex, or clerk of the peace for East Suffolk and clerk of the peace for West Suffolk, their services as such clerks after the appointed day in the county of London, or in the administrative counties of East Sussex and West Sussex or East Suffolk and West Suffolk respectively, shall be deemed to be a continuous service with their services as clerks of the peace and clerks of petty sessional divisions in the counties of Middlesex, Surrey, and Kent respectively, and clerk of the peace for Sussex and Suffolk respectively.

By the operation of the Local Government Act 1888 part of the county of Surrey, as constituted prior to the passing of that Act, was transferred to and now forms part of the county of London, and a new county created by that Act, and including also parts of Middlesex and Kent. Newington is situated within the part so transferred from Surrey to London.

The clerk of the peace for the county of Middlesex at the passing of the Act was Sir Richard Nicholson, and, under sect. 118 (8), he became and still is, the first clerk of the peace for the county of London.

Sect. 118 (8) is as follows:

The person who at the appointed day is clerk of the peace for Middlesex, if he held office at the passing of this Act, shall continue to be that clerk, and subject to the provisions of the Act, shall also be the first clerk of the peace for the county of London, and shall, notwithstanding anything in this Act, hold the office of clerk of the peace for each of the said counties by the same tenure, and have the same power of appointing and acting by a deputy as heretofore.

As clerk of the peace for Surrey the plaintiff was, at the time of passing of the Local Government Act 1888, entitled, under 7 Geo. 4, c. 64, ss. 22, 23, 24, 26, and 11 & 12 Vict., c. 43, s. 30, to demand, take, or receive certain fees in respect of criminal business, in accordance with an order, dated the 3rd July 1860, duly made by the justices of the peace for Surrey, at their quarter sessions at Newington, and sanctioned and approved by the Secretary of State. This order is afterwards referred to as Order A. Under that order the plaintiff was entitled to recover a sum of 1*l.* 1*l.* 6*d.* for the performance of all duties discharged by him in or in relation to every criminal prosecution at quarter sessions.

The plaintiff was also entitled to demand, take, and receive certain fees in the prosecution at the quarter sessions of incorrigible rogues. These fees, amounting to 10*s.* 8*d.* in each case, were payable by virtue of a table of fees made by the quarter sessions of the county of Surrey in the year 1839, ratified and confirmed by the judge of assize on the 5th Aug. 1839 in pursuance of 57 Geo. 3, c. 91. This table is afterwards referred to as table B.

The plaintiff was also entitled to certain fees on the prosecution of indictable offences tried summarily, by virtue of the orders of magistrates made under the Summary Jurisdiction Act 1879, s. 23. These fees amounted to 4*s.* in each case, and were fixed by order of the court of quarter sessions, and approved by the Secretary of State on the 12th Jan. 1882. This is afterwards referred to as table C.

As clerk of the peace for Middlesex, Sir Richard Nicholson was, at the time of the passing of the

Local Government Act 1888, entitled to certain fees in accordance with a table of fees duly made and approved. This table for the old county of Middlesex is afterwards referred to as table D.

Upon comparing the scale of fees set out in order A and table B, and table C with table D, it will be found that the fees mentioned in A and B and C differ in amount from D, but some of the duties performed by the clerk of the peace of Surrey were not performed by the clerk of the peace for Middlesex.

By sect. 115 (5) of the Local Government Act 1888 it is enacted as follows:

The fees payable to the clerk of the peace and clerks of the justices and other officers and authorities in Middlesex at the passing of this Act shall be the first fees which may be taken in the county of London by the clerk of the peace, the clerks of the justices, and other officers and authorities in the county of London, and may continue to be taken until they are abolished or altered in manner provided by law with respect to the abolition and alteration of such fees.

After the passing of the Local Government Act 1888 the fee of 1*l.* 1*l.* 6*d.* for each criminal prosecution at quarter sessions, and the fee of 10*s.* 8*d.* on the prosecution of incorrigible rogues, and the fee of 4*s.* in respect of indictable offences tried summarily, were paid to the plaintiff during a period of about two years; but in the year 1891 the standing joint committee of the London County Council and the quarter sessions in and for the county of London recommended a new table of fees to be demanded, taken, and received by the clerk of the peace for the county of London, and this table of fees was, on the 29th Feb. 1892, duly confirmed by the Secretary of State. This table of fees is referred to as E. The fees payable under E differ in amount from the fees payable both in Surrey and in Middlesex as set out in the order A and the tables marked B, C, and D.

Since the year 1891 no fees have been paid to the plaintiff in respect of criminal prosecutions at the quarter sessions held at Newington, although in each case the Court of Quarter Sessions has made an order, pursuant to 9 Geo. 4, c. 64, for the payment (*inter alia*) of a sum of 1*l.* 1*l.* 6*d.* in respect of the duties discharged by the clerk of the peace in relation to such prosecutions.

Since the year 1891 no fees have been paid to the plaintiff in respect of the prosecution of incorrigible rogues, although in each case the Court of Quarter Sessions has made an order for the payment of 10*s.* 8*d.* under 5 Geo. 4, c. 83, s. 9.

Since the year 1891 no fees have been paid to the plaintiff in respect of indictable offences tried summarily, although in each case an order for the payment of 4*s.* has been made by the magistrate under the Summary Jurisdiction Act 1879, s. 23.

The plaintiff contended (a) that he is not a clerk of the peace for the county of London, but is only deemed to be such for certain purposes for a part of London only and for a limited period, namely, for so long as he is clerk of the peace for Surrey and continues to perform the duties discharged by him at Newington before the Local Government Act 1888 was passed; (b) that there is but one clerk of the peace for the county of London, namely, Sir Richard Nicholson; (c) that the fees and emoluments to which the plaintiff was entitled at the passing of the Local Government Act 1888 as clerk of the peace for Surrey are

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part of the fruits of that office, and follow the office, and that in virtue of his office as such clerk of the peace for Surrey he is entitled to continue to receive the same fees in respect of criminal prosecutions and of the prosecutions of incorrigible rogues at the quarter sessions holden for the county of London at Newington, and in respect of indictable offences tried summarily, as he was entitled to receive when the sessions held at Newington were the quarter sessions for the county of Surrey; (d) that sect. 115 (5) of the Local Government Act 1888 does not apply to the plaintiff, since he is not a clerk of the peace for the county of London, but only for certain purposes deemed to be such, and the section distinctly refers to the clerk of the peace for London; (e) that the standing joint committee of the county of London and the Secretary of State have no jurisdiction to make and approve a new table of fees altering those payable to the plaintiff as clerk of the peace for Surrey, and that the table of fees approved by the Secretary of State on the 29th Feb. 1892 is inoperative as far as the plaintiff is concerned, and can only apply to the clerk of the peace for London; (f) that the plaintiff is entitled to the protection and benefits conferred upon existing officers by sects. 118, 119, and other provisions of the Local Government Act 1888; (g) that in the alternative the plaintiff is entitled, by virtue of sect. 67 of the Local Government Act 1888, to payment of the sums of *l.* 1*l.* 6*d.*, 10*s.* 8*d.*, and 4*s.* on each criminal prosecution, prosecution of incorrigible rogues, and indictable offences tried summarily, respectively under and by virtue of the orders of quarter sessions and magistrates hereinbefore mentioned.

The defendants contended: (a) That the plaintiff, upon the coming into operation of the Local Government Act 1888, was not entitled to demand, take, and receive fees to the amount and at the rates mentioned in order A, or the tables B or C; (b) that the plaintiff was, upon coming into operation of the Act, entitled to demand, receive, or take fees to the amount, and at the rates mentioned in table D; (c) that since the 29th Feb. 1892 the plaintiff was entitled to demand, receive, and take fees to the amount and at the rates mentioned in table E, and no other fees.

The questions for the court were: (1) Whether the contentions of the plaintiff, or any or which of them, are correct in law? (2) Whether the contention of the defendants, or any and which of them, are correct in law? (3) Whether the plaintiff is, under the circumstances set forth in the case, an existing officer; and, if so, whether he has, by virtue of the Local Government Act 1888, or anything done in pursuance or in consequence of the Act, suffered any direct pecuniary loss by the abolition of office or by diminution or loss of fees? (4) Whether the plaintiff is entitled to compensation for such pecuniary loss under sect. 120 of the Local Government Act 1888, or otherwise?

Macmerran, K.C. and *J. A. Barratt* for the plaintiff.

Cripps, K.C. and *English Harrison*, K.C. for the defendants.

WRIGHT, J.—Before 1888, quarter sessions were held for Surrey at Newington, and quarter sessions were held for Middlesex in Middlesex. By the Local Government Act 1888 the district for which

the Newington Quarter Sessions acted, or part of it, was merged in the new county of London, and quarter sessions for Newington became quarter sessions for the county of London, and the clerk of the peace for Newington Quarter Sessions would be naturally clerk of the peace for the county of London. But it was specially provided in that case that the person who had acted for the county of Surrey in Newington as clerk at the quarter sessions should, for the purpose of future business at those sessions in the county of London, continue to be the clerk of the peace for those sessions, and be deemed to be clerk of the peace for London at those sessions. It seems to me to be as clear as anything can be that Sir Richard Wyatt, acting as clerk of the peace for Surrey, was clerk of the peace for the county of London at those sessions. What fees did he become entitled to? I should say that becoming clerk of the peace for London until any alteration was made, he would continue to take the same fees as before. But by sect. 115 of the Act an alteration was made; it seems to enact, in terms wide enough to cover this purpose, that Middlesex fees shall become applicable to the whole of the county of London, and it seems to me Sir Richard Wyatt becomes a clerk of the peace for the county of London for Newington, and becomes entitled to the Middlesex scale of fees. The Middlesex scale of fees, which was lower than the old Surrey scale, has been properly reduced by the joint standing committee of the London County Council and quarter sessions; it is considerably lower than it used to be, and I have no doubt that the lower fees, which in the public interest the standing committee have fixed, are the only fees that can be taken as applicable to the Newington Quarter Sessions, and it is said those are the fees that Sir Richard Wyatt and his successors must take until they are altered. Now, the question is, if he is not protected by sects. 119 and 120. I have no doubt he is protected by one or other of these sections. The protection he would get by sect. 120 is much more easily worked out. The protection he would get under sect. 119 is more difficult, but it is more ample protection if it can be applied. It is a question of great difficulty by which of them he is covered. Sect. 119 provides that he shall hold his office "on the same tenure and upon the same terms and conditions as if this Act had not passed, and while performing the same duties shall receive not less salaries or remuneration and be entitled to not less pensions." The word "remuneration" is not very apt to describe fees and *prima facie* "salaries or remuneration," I agree with Mr. English Harrison, might more properly be construed as meaning salary or remuneration in the nature of salary, although not annual, or something of that kind. It is not unnatural to treat remuneration as including fees, especially when in sect. 120 you find fees are specifically mentioned. Another difficulty is the old quarter sessions could have altered those fees, and can it be contended that Sir Richard Wyatt should get compensation based on the assumption that the Surrey Quarter Sessions never did alter those fees, and never would alter them during his term of office? Then it is said with force that sect. 120 provides a special remedy, because Sir Richard Wyatt can go and get compensation for any diminution of his fees,

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to be assessed in case of necessity by the Treasury. Upon the other hand, I think it is too narrow an interpretation of the word "remuneration" to exclude fees. I think I must construe sect. 119 by itself for this purpose without reference to sect. 120, which possibly does not apply at all, and it is very difficult to say that fees are not remuneration in some circumstances. I do not see my way to say they are not. It would be gross injustice if Sir Richard Wyatt were required to receive less than he has been receiving, subject to, of course, considerations such as the consideration that the Surrey Quarter Sessions might have reduced the fees, and subject to considerations of a like kind where it would be unjust that he should receive the same. What makes me doubt that sect. 120 does apply? It is said—and I am not sure it is not rightly said—there is nothing in the Act that makes a clerk of the peace in such circumstances an officer entitled to compensation. There are certainly very direct provisions in the Act, but it is not within any of those cases so far as I know. Then the only other part of sect. 120 under which it might come in: "Every existing officer who by virtue of this Act, or anything done in pursuance of or in consequence of this Act, suffers any direct pecuniary loss by abolition of office, or by diminution or loss of fees or salary." I very much doubt whether the direct pecuniary loss by virtue of the Act, or anything done in pursuance of or in consequence of this Act, would extend to such a matter as this reduction of fees by the standing joint committee. The matter is done at their discretion, and it is done by virtue of the Act. I very much doubt whether that section would apply. If it does not apply, possibly that lends further probability to the construction I put on sect. 119, that it is clearly not the intention of this Act that anybody should be left out in the cold. It seems to me, therefore, that I must declare that Sir Richard Wyatt is entitled to receive not less remuneration whether by salary or by fees, than at the passing of the Act. There is very great difficulty on either construction, and I cannot help seeing that on the construction I have adopted Sir Richard Wyatt may receive more than he is entitled to, though perhaps that is a less evil than his getting less than he is entitled to.

Solicitors: *Gedge, Kirby, and Millett; W. A. Blazland.*

Oct. 25, 26, and Dec. 2, 1901.

(Before WALTON, J.)

BROOKS, JENKINS, AND CO. v. MAYOR, &C., OF TORQUAY AND THE RURAL DISTRICT COUNCIL OF NEWTON ABBOT. (a)

Local government—Local authority—Retainer of solicitor by resolution not under seal—Subsequent sealing of resolution—Sufficiency of retainer—Provisional order for extension of borough—Costs of local authority in opposing—Liability to pay—Borough Funds Act 1872 (35 & 36 Vict. c. 91), ss. 2, 4, 8—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 174, 297, 298—Local Government Act 1888 (51 & 52 Vict. c. 41), s. 62—Torquay (Extension) Order 1900 (63 & 64 Vict. c. clxxxiii.), arts. 17, 18.

The council of an urban district, by resolutions

(a) Reported by W. W. OMM, Esq., Barrister-at-Law.

not under seal, resolved to retain certain solicitors to act for them as their solicitors for the purpose of opposing the confirmation by Parliament of a provisional order made by the Local Government Board for the extension of a borough, by which order part of the urban district was to be added to the borough, and the remainder to a rural district. These resolutions were communicated to the solicitors, who acted on the retainers and incurred costs in opposing the confirmation of the order. After part of these costs had been incurred the council resolved that their seal should be affixed to the previous unsealed resolutions retaining the solicitors, and such resolutions were sealed and copies sent to the solicitors. No contract was signed by the solicitors.

The opposition to the order failed, and the order was confirmed by Parliament, and under it the urban council was to be abolished as from the commencement of the order.

In an action by the solicitors against the borough for their costs:

Held, (1) that the confirmation under seal of the earlier unsealed retainers, was a sufficient retainer of the solicitors to satisfy the requirements of sect. 174 of the Public Health Act 1875 and of the common law; (2) that the costs in question, being the costs of opposing the order, were expenses which were authorised by sects. 297 and 298 of the Public Health Act 1875, which were incorporated by the Local Government Act 1888, and were not subject to the requirements of the Borough Funds Act 1872, by virtue of the saving clause in sect. 8 of the latter Act, and that, therefore, subject to taxation and to the sanction of the Local Government Board under sect. 298, the urban council, if it had continued to exist, would have been liable for these costs; and (3) that the liability to pay these costs, being costs incurred by the urban council after the date of the provisional order was transferred, under art. 18, (2) (a) of the order, to the borough and rural district respectively in shares to be settled by agreement or by adjustment under sect. 62 of the Local Government Act 1888.

ACTION tried by Walton, J. without a jury.

The plaintiffs, who were solicitors, sued the defendants, the mayor, aldermen, and burgesses of the borough of Torquay and the rural district council of Newton Abbot, to recover a bill of costs for work done and professional services rendered by them.

The statement of claim alleged as follows:—

On the 17th May 1900 the Local Government Board, in consequence of a memorial which had been presented to them by the borough of Torquay asking for an extension of their borough by the inclusion within it of the whole or parts of the two adjoining districts, the urban districts of Cockington and St. Mary Church, and in pursuance of the powers given them by sect. 54 of the Local Government Act 1888, made a provisional order called the Torquay (Extension) Order 1900, to take effect subject to the passing of an Act of Parliament confirming the same.

The urban district council of Cockington on the 23rd May 1900 retained the plaintiffs to represent them as their solicitors and agents in opposing in Parliament the Bill to confirm the order, the effect of which if confirmed was to

dissolve the Cockington district and to put an end to the existence of the urban district council of Cockington on and from the 9th Nov. 1900.

The plaintiffs under the retainer paid money and rendered professional services in and about the Parliamentary opposition to the Bill for and at the request of the urban district council of Cockington, in respect of which the plaintiffs alleged that they became entitled to charge the Cockington council 1198*l.* 4*s.* 2*d.*

The order was confirmed by Parliament and became law on the 30th July 1900 (the Local Government Board's Provisional Orders Confirmation (No. 14) Act 1900, 63 & 64 Vict. c. clxxxiii.), and came into operation on the 9th Nov. 1900.

On the 8th Nov. 1900 the plaintiffs delivered to the Cockington council their bill of costs for the above sum.

On the 9th Nov. 1900 the urban district council of Cockington ceased to exist without having paid to the plaintiffs any part of their costs.

Part of the district of Cockington (called the added area) was added to the borough of Torquay, and the other part (called "the excluded part of Cockington") was added to the rural district of Newton Abbot.

The plaintiffs delivered their bill of costs to the defendants on the ground that the liability to pay the plaintiffs was a liability attaching to the Cockington council "in relation to any part of the added areas conjointly with any other area" within the meaning of art. 18, sub-sect. 2 (a) of the order, and was therefore transferred to the defendants.

The plaintiffs requested the defendants to pay their bill of costs, or such sum as might be certified on taxation and sanctioned by the Local Government Board in such proportions as might be agreed between the defendants, or awarded in an arbitration pursuant to sect. 62 of the Local Government Act 1888 and art. 18 (2) (a) of the order, and they requested the defendants to adjust their liability by agreement or arbitration pursuant to sect. 62 and art. 18 (2) (a) of the order. The plaintiffs claimed a declaration that the defendants are liable to pay to the plaintiffs in such proportions as may be agreed or awarded under sect. 62 of the Local Government Act 1888 the sum of 1198*l.* 4*s.* 2*d.*, or such other sum as may be certified on taxation and sanctioned by the local government board, for money paid, work done, and professional services rendered by them for the Cockington council as their solicitors and agents in respect of the Parliamentary opposition by the council to the confirmation by Parliament of the Torquay (Extension) Order 1900.

The defendants (*inter alia*) pleaded that the Cockington council had no power to retain the plaintiffs for the purpose, that the retainer was null and void, and, further, that the council did not comply with the provisions of the Borough Funds Act 1872; that the liability was not a liability attaching to the Cockington council "in relation to any part of the added areas conjointly with any other area" within art. 18 (2) (a); that the liability, if any, was one which ought to have been liquidated by Cockington before the commencement of the order, as being within the meaning of

art. 17 of the order a current debt and liability incurred by them.

The Local Government Board's Provisional Orders Confirmation (No. 14) Act 1900 (63 & 64 Vict. c. clxxxiii.), which came into operation on the 9th Nov. 1900, after providing for the dissolution of the Cockington district and the addition of part of it to the borough of Torquay and the remainder of it to the rural district of Newton Abbot, provided:

Art. 17 (1). The urban councils [that is, the urban councils of Cockington and Saint Mary Church] shall liquidate as far as practicable before the commencement of this order all current debts and liabilities incurred by them respectively. (2) The reasonable costs incurred by either of the urban councils before the date of this order in respect of the inquiry preliminary to the said order and otherwise in connection with the said order shall, if and so far as such costs may be sanctioned by the Local Government Board, be paid by the corporation [that is, of Torquay] out of the district fund and general district rate of the borough.

Art. 18 (2). Subject to the provisions of this order: (a) All property and liabilities which immediately before the commencement of this order are vested in or attach to either of the urban councils in relation exclusively to any part of the added areas shall be transferred to, vested in, and attach to the corporation as urban district council, and any property and liabilities vested in or attached to either of the urban councils in relation to any part of the added areas conjointly with any other area shall be a matter for adjustment under sect. 62 of the Act of 1888. (b) All property and liabilities which immediately before the commencement of this order are vested in or attach to the Cockington council or the Saint Mary Church council in relation exclusively to the excluded part of Cockington [that is, by art. 1 the parts of the Cockington district which are not by this order added to the existing borough of Torquay] or the excluded part of Saint Mary Church, as the case may be, shall be transferred to, vested in, and attach to the rural council [that is, by art. 1, the rural district council of Newton Abbot]. (3) The urban councils shall at the commencement of this order be abolished and cease to exist.

By the Borough Funds Act 1872 (35 & 36 Vict. c. 91), it is provided:

Sect. 2. When in the judgment of a governing body [which by sect. 1 includes the council of any municipal borough] in any district it is expedient for such governing body to promote or oppose any local and personal Bill or Bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund, borough rate, or other the public funds or rates under the control of such governing body to the payment of the costs and expenses attending the same; and when there are several funds or rates under the control of the governing body, such governing body shall determine out of which fund or funds, rate or rates, such expenses shall be payable, and in what proportions, &c.

Sect. 4. No expense in relation to promoting or opposing any Bill or Bills in Parliament shall be charged as aforesaid unless incurred in pursuance of a resolution of an absolute majority of the whole number of the governing body at a meeting of the governing body, after ten clear days' notice by public advertisement of such meeting, and of the purpose thereof in some local newspaper published or circulating in the district.

Sect. 8. Nothing in this Act shall extend or be construed to alter or affect any special provision which is or shall be contained in any other Act for the payment of the costs, charges, and expenses intended to be pro-

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vided for by this Act, or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exercisable by the inhabitants of any district under any general or special Act.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 174. With respect to contracts made by an urban authority under this Act, the following regulations shall be observed—namely, (1) Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority; (5) every contract entered into by an urban authority in conformity with the provisions of this section, and duly executed by the other parties thereto, shall be binding on the authority by whom the same is executed and their successors, and on all other parties thereto and their executors, administrators, successors, or assigns to all intents and purposes, &c.

Sect. 297. With respect to provisional orders authorised to be made by the Local Government Board under this Act, the following enactments shall be made: (3) The Local Government Board may submit to Parliament for confirmation any provisional order made by it in pursuance of this Act, but any such order shall be of no force whatever unless and until it is confirmed by Parliament.

Sect. 298. The reasonable costs of any local authority in respect of provisional orders made in pursuance of this Act, and of the inquiry preliminary thereto, as sanctioned by the Local Government Board, whether in promoting or opposing the same, shall be deemed to be expenses properly incurred for purposes of this Act by the local authority interested in or affected by such provisional orders, and such costs shall be paid accordingly; and if thought expedient by the Local Government Board, the local authority may contract a loan for the purpose of defraying such costs.

Sect. 62 of the Local Government Act 1888 (51 & 52 Vict. c. 41) gives power to councils and other authorities affected by the Act to make agreements for the purpose of adjusting any property or liabilities, and in default of any such agreement, then such adjustment can be made by an arbitrator appointed by the parties, or in case of difference as to the appointment, appointed by the Local Government Board.

Macmorran, K.C. and R. Macklin for the plaintiffs.

C. A. Russell, K.C. and Willoughby Williams for the defendants, the Mayor, &c., of Torquay.

Roskill for the defendants, the Rural District Council of Newton Abbot.

The arguments and cases cited appear sufficiently in the judgment.

Cur. adv. vult.

Dec. 2. — WALTON, J. (after stating the pleadings, read the following judgment:—) At the end of 1899 the borough of Torquay presented a memorial to the Local Government Board asking for the extension of their borough by the inclusion within it of the whole or part of the urban district of Cockington. The district council of Cockington resolved to oppose this memorial, and the plaintiffs were retained to act as solicitors and Parliamentary agents for them for the purposes of this opposition. A local inquiry was held, and on the 17th May 1900, a provisional order, called the Torquay order, was made by the Local Government Board. This order had no effect until confirmed by Parlia-

ment. Its effect if and when confirmed was to dissolve the Cockington district as from the 9th Nov. 1900, and to add part of Cockington to Torquay and the other part (called in the order the excluded part of Cockington), to the rural district of Newton Abbot. Cockington resolved to oppose in Parliament the Bill for the confirmation of the Torquay order, and the plaintiffs were instructed to act, and did act, for Cockington in and for the purposes of such opposition. In spite of this opposition the Bill was passed and received the Royal Assent on the 30th July 1900. The plaintiffs' bill of costs in respect of the Parliamentary opposition was delivered to Cockington on the 8th Nov. 1900, and a copy of it was delivered to the defendants on the 26th Nov. 1900. It was not practicable to get the plaintiffs' Parliamentary costs taxed before the 9th Nov. 1900, which was the date of the dissolution of the Cockington district. The present action was commenced on the 9th Jan. 1901, and the taxation has been postponed until this action has been disposed of. It is admitted by the plaintiffs that their claim is subject to taxation, and to the sanction of the Local Government Board under sect. 298 of the Public Health Act 1875. The plaintiffs' claim shortly is this, that Cockington was liable to them for these costs; that Cockington having been dissolved and divided between Torquay and Newton Abbot, the effect of the Torquay order as confirmed by Parliament, was to transfer their liability to Torquay and Newton Abbot in shares to be adjusted between them, either by agreement or in the manner provided by sect. 62 of the Local Government Act 1888. The first question which arises is whether Cockington was under any liability to the plaintiffs for the costs in question. It is said that there was no valid retainer of the plaintiffs under the seal of the urban district council. The facts as to the retainer are as follows: Resolutions of the district council of Cockington, beginning with a resolution of the 18th May 1900 were passed from time to time and communicated to the plaintiffs, by which they were retained and instructed to act as solicitors and Parliamentary agents for the district council in and about the matters in respect of which the present claim arises. If it were not necessary that they should be under seal, it is not contended that the retainers were not sufficient to support the claim. Apparently, on or at some time before the 6th Sept. 1900 it occurred to the clerk of the district council that the retainers should be under seal, and at his suggestion on the 6th Sept. 1900, a resolution was passed by the district council that the seal of the council should be, and it was, affixed to each of the resolutions constituting the retainers to which I have referred; and sealed copies of these resolutions were on the same day sent to the plaintiffs. The claim includes items for work done and disbursements made after the sealed retainers were received by the plaintiffs. Under these circumstances it is contended by the defendants that, as well by the common law as by virtue of sect. 174 of the Public Health Act 1875, the retainer of the plaintiffs was invalid and of no binding effect, because it was not under the seal of the district council, and that as to so much of the claim as relates to anything done before the 6th Sept. 1900, the district council of Cockington was under no

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liability, and, therefore, the defendants cannot be under any liability, to the plaintiffs. The plaintiffs do not admit that it was necessary that the retainers should be under seal, and further contend that the retainers sealed on the 6th Sept. 1900 were sufficient, on the ground (1) that they were given and sealed in consideration of the plaintiffs' undertaking to proceed with and finish the work, and that this constituted a new contract under seal with a sufficient new consideration; and (2) on the ground that the confirmation under seal of the original retainers was binding upon the district council without any new consideration. There is no doubt that the plaintiffs proceeded with the business and made such disbursements as were made after the 6th Sept. on the faith and in consideration of the confirmation under the seal of the council of the original retainers. But, apart altogether from this, I think that the confirmation by the council under their seal of the original retainers created an obligation binding upon the council without any new consideration. A promise under seal, whether made for a past consideration or without consideration, is binding. As against this it was contended for the defendants that it was *ultra vires* on the part of the district council to create such an obligation without consideration. It was, however, decided in the case of *Bournemouth Commissioners v. Watts* (51 L. T. Rep. 823; 14 Q. B. Div. 87) and the earlier cases there cited that where work had been done for a local authority under a contract which was invalid because it was not under seal it was not *ultra vires* for the local authority to pay for the work of which they had had the benefit. If, under such circumstances, it is not *ultra vires* for the local authority to pay, it cannot be *ultra vires* for them to bind themselves to pay by an instrument under seal. It was further contended by the defendants that by sect. 174 of the Public Health Act 1875 the contract must be in writing, and that, therefore, it must be not only sealed by the local authority, but also signed by the other party. It would, however, in my judgment be a strained and unreasonable construction of the section to hold that, where solicitors have acted upon a retainer under the seal of a local authority, they cannot recover their costs because the retainer was not accepted by them in writing. The object of sect. 174 plainly was that the terms of important contracts should be expressed in writing, and that local authorities should not bind themselves to such contracts (which are defined as contracts to an amount exceeding 50*l.*) without that degree of deliberation which is supposed to be ensured by the formalities required in the execution of a deed. It may be noted that it was, according to the old authorities, because this deliberation was ensured in the execution of an instrument under seal that a promise so made was held to be binding without consideration (see *Leake on Contracts*, 3rd edit., p. 124; *Plowden*, p. 308). It was further contended by Mr. Macmorran for the plaintiffs that in the present case it was uncertain at the date of the original retainers whether the costs would or would not amount to 50*l.*, and that, therefore, the case was not within sect. 174. I prefer, however, to decide this point in favour of the plaintiffs, on the ground that the confirmation under seal on the 6th Sept. 1900, of the earlier unsealed retainers was sufficient to satisfy

the requirements of sect. 174 of the Public Health Act 1875, and of the common law. The next objection taken by the defendants was that the costs could not be recovered because the requirements of the statute 35 & 36 Vict. c. 91 (the Borough Funds Act 1872), had not been complied with. By that Act power is given to certain local authorities under certain conditions to incur costs in promoting or opposing Bills in Parliament. It is admitted that these conditions were not in the present case fulfilled by the district council of Cockington. But, by sect. 8 of the Act, it is provided that: "Nothing in this Act shall extend or be construed to alter or affect any special provision which is or shall be contained in any other Act for the payment of the costs, charges, and expenses intended to be provided for by this Act, or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are, or shall be, vested in or exercisable by, the inhabitants of any district under any general or special Act." It was, in the first place, contended by Mr. Macmorran on behalf of the plaintiffs that the district council in opposing the Bill by which the district of Cockington was to be dissolved were exercising a right or power which they possessed independently of the Borough Funds Act 1872, a right of self-preservation necessarily vested in every such body, a right to resist an attack upon their existence. In support of this contention Mr. Macmorran relied on the judgment of Sir George Jessel, M.R. in *Attorney-General v. Mayor of Brecon* (40 L. T. Rep. 52; 10 Ch. Div. 204); and as against it Mr. Russell and Mr. Roskill, for the defendants, relied on *Magistrates and Council of Leith v. Commissioners for the Harbour and Docks of Leith* (81 L. T. Rep. 98; (1899) A. C. 508). If I had to decide this question I should have, at all events, considerable difficulty in accepting Mr. Macmorran's contention that the present case is not governed by the decision of the House of Lords in the Leith case. But Mr. Macmorran further contended that, even if this be so, the costs in question in the present case were costs properly incurred under sects. 297 and 298 of the Public Health Act 1875, which are incorporated in the Local Government Act 1888 by sect. 87 (2) of that Act; and, therefore, were within the saving clause (sect. 8) of that Act. Sect. 298 of the Public Health Act 1875 is as follows: "The reasonable costs of any local authority in respect of provisional orders made in pursuance of this Act and of the inquiry preliminary thereto, as sanctioned by the Local Government Board, whether in promoting or opposing the same, shall be deemed to be expenses properly incurred for purposes of this Act by the local authority interested in or affected by such provisional orders, and such costs shall be paid accordingly; and, if thought expedient by the Local Government Board, the local authority may contract a loan for the purpose of defraying such costs." A provisional order is by sect. 297 (3) of no force whatever until confirmed by Parliament. It is said for the defendants that sect. 298 applies to such costs as are incurred before the provisional order is made by the Local Government Board, but it is to be observed that sect. 298 applies to the costs both in respect of the inquiry preliminary to the provisional order and also in respect of the provisional order itself,

and whether in promoting or opposing the same. I think that the costs in question were clearly costs incurred in respect of the opposition of the provisional order. I come to the conclusion, therefore, that the costs in question were authorised by sect. 298 of the Public Health Act 1875, and are not subject to the requirements of the Borough Funds Act 1872. The result of my judgment upon these points is that, subject to taxation and to the sanction of the Local Government Board (under sect. 298 of the Public Health Act 1875, the district council of Cockington, if it had continued to exist, would have been liable to the plaintiffs for the costs in question in this action. But the district council of Cockington has been dissolved, and the question remains, and this is the only other question to be dealt with in this action, whether this liability of Cockington has been transferred to the defendants. This depends on the effect of art. 18, sub-sect. 2, of the Torquay Order as confirmed by Parliament. [His Lordship then read art. 18, sub-sect. 2, of the Provisional Order, and proceeded.] The application of this sub-section to the present case was recently (on the 10th Oct. 1900) considered by Buckley, J. sitting as Vacation judge, in the case of *Ex parte Mayor of Torquay and Cockington Urban District Council* (unreported), on an application which was made by the borough of Torquay against the Cockington urban district council, before Cockington was dissolved, for a *mandamus* to compel the urban district council of Cockington, to make and levy a rate for the purpose of liquidating as far as practicable all current debts and liabilities incurred by them before the date of the commencement of the Torquay Extension Order 1900, that is, for the purpose of paying the costs now in question. The application was dismissed by Buckley, J., who in the judgment delivered by him on the 10th Oct. 1900, said: "The urban district of Cockington had of course certain liabilities, and it is said that there remain liabilities which in substance are these: the Parliamentary costs incurred by the urban district of Cockington in opposing before Parliament the Bill which confirmed the provisional order of the 17th May. It has been argued before me by counsel who appeared for the urban district council of Cockington, that those Parliamentary costs are costs which are to be borne by the corporation of Torquay, and are not a liability of Cockington. The question whether that is so depends upon the true construction of art. 17 of the provisional order. In sub-sect. 2 of that article I think the words "before the date of this order" govern the whole of the words "in respect of the inquiry preliminary to the said order, and otherwise in connection with the said order." I arrive at that conclusion upon these grounds. The use of the word "otherwise" shows that the costs previously mentioned are contemplated as being in connection with the order, the costs subsequently mentioned are "otherwise" in connection with the order, so that there is one class of costs here dealt with, and I see no reason why the whole of that class of costs should not be governed by the words as to time, which precede both of them, namely, "before the date of this order." I think that the intention of that sub-section was that all the costs down to the date when the order was

passed on the 17th May should be borne by the corporation of Torquay and not by Cockington. The intention was not to provide at all with respect to subsequent costs. On that point, therefore, I am against the urban district of Cockington, because the Parliamentary costs of opposing the Bill by which the provisional order was confirmed, were of course incurred after the date of the order, that is to say, after the 17th May, and were therefore not within art. 17 (2). Those I think are liabilities of the urban district council of Cockington. Under those circumstances the corporation of Torquay ask me to grant a *mandamus* compelling Cockington to levy a rate for the discharge of those costs, and they say, and truly, that under art. 18 (3) the urban council of Cockington will cease to exist on the 9th Nov. next, and the contention is that unless a rate is levied immediately there will be no urban district of Cockington, and they can levy no rate, and therefore this liability would be left to rest upon Torquay under another section of the order. It appears to me that is not the result of it. Art. 18 of the order in sub-sect. 2 contains this, "Subject to the provisions of this order"—that is, amongst other things, subject to art. 17 (1), that the urban district council shall liquidate as far as practicable all its liabilities—"all properties and liabilities . . . shall be a matter for adjustment under sect. 62 of the Act of 1888." This particular liability for the Parliamentary costs will be one vested in or attached to the urban district council of Cockington in relation to that part of that district which is added to Torquay conjointly with the other area which is added to the district of Newton Abbot, and this clause therefore provides that that shall be a matter for adjustment under sect. 62 of the Act of 1888. Turning to sect. 62 of the Act of 1888, I find that any council or other authorities affected by that Act may make agreements for the purpose of adjusting their liabilities, and then by sub-sect. 2, in default of an agreement as to any matter requiring adjustment, if no other mode of making the adjustment is provided by the Act the adjustment may be made or determined by an arbitrator appointed by the parties, or in case of difference as to the appointment, appointed by the Local Government Board. It seems to me that under the provisions of art. 18 (2) of the provisional order and sect. 62 of the Act of 1888, the question as to how far these Parliamentary costs and other liabilities, if there be any, under the Act, of the urban district council of Cockington ought to be borne as between Torquay and Newton Abbot, can be adjusted between those parties by agreement, or, if necessary, by arbitration. . . . For all these reasons it seems to me that the application for a *mandamus* has failed, and I must refuse it." I entirely agree with the view so expressed by Buckley, J. By art. 17 of the provisional order it is provided [His Lordship read the article, and proceeded:] It seems clear that the costs in question could not practically be paid before the commencement of the order (the 9th Nov. 1900), because they could not be taxed, nor could the sanction of the Local Government Board be obtained before that date. Sub-sect. 2 of art. 17, as held by Buckley, J., refers only to costs incurred before the date of the order, which was the 17th May 1900, and therefore does not apply

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to the costs now in question. The liability in question was a liability which attached to the urban council of Cockington in relation to the whole of Cockington, and therefore (in the language of art. 18, sub-sect. 2) attached to Cockington in relation to the added area (added to Torquay) conjointly with another area—that is, the excluded part of Cockington which was added to the rural district of Newton Abbot. The liability is therefore a matter for adjustment under sect. 62 of the Local Government Act 1888. When adjusted that share of the liability adjusted to the added area becomes a liability attaching to that area exclusively, and is transferred by art. 18, sub-sect. 2, to Torquay; and that share of the liability adjusted to the excluded part of Cockington, becomes a liability attaching to Cockington in relation exclusively to the excluded part of Cockington, and is transferred by art. 18 (2) (b) to the defendants, the rural district council of Newton Abbot. The result therefore is that in my judgment a declaration must be made in the terms of the 1st paragraph of the claim in the statement of claim.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Brooks, Jenkins, and Co.*

Solicitors for the defendants (the mayor, &c., of Torquay), *Batten, Proffitt, and Scott, for A. W. Cowdell, Torquay.*

Solicitors for the defendants (the rural district council of Newton Abbot), *Milner and Bickford.*

Nov. 8 and Dec. 16, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

KIRKHOUSE v. BLAKEMAY. (a)

Registration of voters—Claimant's wife a pauper lunatic—Parochial relief—"Medical and surgical assistance"—Medical Relief Disqualification Removal Act 1885 (48 & 49 Vict. c. 46) s. 4.

The relief given to a pauper lunatic in a public asylum at the expense of the poor rate is parochial relief, and whether it is "medical and surgical assistance" within sect. 4 of the Medical Relief Disqualification Removal Act 1885 is in every case a question of fact for the revising barrister to decide. In deciding such question the length of time during which the lunatic has received relief and the fact that no payment has been made by the lunatic's relatives in respect of such relief are material.

A. was in every respect qualified for registration as a voter save that his wife was a pauper lunatic who had been supported at the expense of the poor rate in the county asylum of G. for several years. Previous to her becoming lunatic she had lived with and been supported by A., and if she recovered she would again live with and be supported by him.

Held, that it was a question of fact whether the relief given to A.'s wife was "medical or surgical assistance" within sect. 4 of the Medical Relief Disqualification Removal Act 1885, and there was evidence on which the revising barrister could find that it was not such assistance.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

CASE stated by the revising barrister for the city of Gloucester.

The appellant, William Kirkhouse, claimed to have his name inserted in the occupiers' list (division 1) for the parish of Gloucester.

He was qualified in all respects to be placed on the said list except for the fact that his wife had been during the whole of the qualifying period maintained out of the poor rate of the parish as a pauper patient of the Gloucester County Lunatic Asylum. She was removed to the asylum in Sept. 1899 under a justice's order. The certificate was signed by a medical officer of the Gloucester Union.

Nine shillings a week was paid to the county authority by the overseers of Gloucester out of the poor rate for her maintenance, and it must be taken that nothing had been contributed by the claimant towards her maintenance.

It was contended on behalf of the claimant that the maintenance of the wife in the asylum was medical assistance within the meaning of the Medical Relief Disqualification Removal Act 1885 (48 & 49 Vict. c. 46), and that he was not thereby deprived of his right to be registered as a Parliamentary voter or as a burgess.

The revising barrister thought that the permanent maintenance of a lunatic or imbecile, which was this case, was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and that such maintenance was not medical assistance within the meaning of the statute. He thought it analogous to the maintenance of a disabled or crippled pauper in the workhouse, and that such medical assistance, if any, as was rendered to the patient was an incident additional to the maintenance.

Three other persons—viz., Joseph Herbert, Richard Povey, and William James Walker—claimed to be inserted in the same list. The circumstances were identical with those in Kirkhouse's case, except the dates of the removal orders.

The wife of Joseph Herbert was removed on the 13th May 1901, and she had ever since remained in the asylum. The wife of Richard Povey was removed on the 11th Oct. 1900, and she had ever since remained in the asylum. The wife of William James Walker was removed on the 29th Dec. 1898, and she had ever since remained in the asylum.

The revising barrister rejected the claims of William Kirkhouse and of the three other persons to be inserted in the occupiers' list, division 1.

Kirkhouse appealed on behalf of himself and the other three persons.

Henry Terrell, K.O. (Percival Hughes with him).—I submit that the revising barrister's decision was wrong on two grounds. In the first place, I contend that, though this woman was supported out of the poor rates, nevertheless the relief she received, if it could be called relief, was not parochial relief at all. Parochial relief means relief in the nature of alms. Here the woman did not receive alms. When she became lunatic she was in no need of alms; her husband supported her. She was removed to the asylum, not because she was poor, but because she was mad. It was done in the public interest, just as a patient suffering from an infectious disease may be removed to a hospital for infectious diseases. She

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did not apply for relief. In the public interest she was removed. Assuming you are against me on that point, then I say the relief given was "medical and surgical assistance" within the Medical Relief Disqualification Removal Act 1885, s. 4. As to that, the revising barrister has made a distinction between permanent lunacy and a passing attack of madness. But surely the length of the period during which relief is given cannot change its nature? There is nothing in the Act distinguishing between temporary and permanent medical relief.

The respondent did not appear.

Cur. adv. vult.

Dec. 16.—CHANNELL, J. read the following judgment:—This was an appeal on a case stated by the revising barrister for the city of Gloucester, and the question we have to consider is whether the barrister was right in disallowing the vote of the voter on the ground of his having received "parochial relief or other alms which by the law of Parliament disqualify." The voter's wife had been maintained for a period of about two years in the county lunatic asylum, at the expense of the union, and he had not paid anything towards her maintenance and support. It was contended on behalf of the voter that this was medical relief within the meaning of the Medical Relief Disqualification Removal Act 1885 (48 & 49 Vict. c. 46). The revising barrister stated that he thought that the permanent maintenance of a lunatic or imbecile, which was this case, was distinguishable from the medical treatment of a patient under a temporary attack of mental disease, and that such maintenance was not medical assistance within the meaning of the said statute. He thought it analogous to the maintenance of a disabled or crippled pauper in the workhouse, and that such medical assistance, if any, as was rendered to the patient was an incident additional to the maintenance. We think that this is a finding of fact, and that there was evidence to support it, and that we cannot and ought not to disturb it. It seems to us that in all cases in which relief is given which is more or less of the nature both of medical relief and ordinary relief a question of fact arises for the decision of the revising barrister. Where in consequence of illness (and insanity is undoubtedly illness) a voter or a member of his family whom he is bound to support is given medical relief it is not the less medical relief within the statute because a certain amount of ordinary sustenance is given as well as medicine. And so where a pauper in a workhouse is removed to the infirmary in consequence of his illness, he would whilst in the infirmary still be receiving relief other than medical relief within the meaning of the statute. It would be a question of fact for the revising barrister in all such cases what the real character of the relief was and which kind was merely incidental to the other. Where a member of a voter's family is attacked with insanity and is in consequence removed to an asylum at the expense of the union, we should have no doubt, and the revising barrister in this case seems to have had no doubt, that the case was, in the first instance, one of medical relief. But where the insane person (being a person for whose support the voter is liable) remains permanently in the asylum and no payment is made by the voter, we think a

question of fact arises as to whether the relief has not become ordinary relief as distinguished from medical. Where any payment is made, even although it is not as great as the cost to the union of the maintenance of the lunatic in the asylum, the inference might fairly be drawn that there is no ordinary relief, but this is for the barrister. Where the maintenance has continued for a long time without any payment whatever, we cannot say that the barrister is wrong in coming to the conclusion that the voter is in receipt of relief other than medical relief. There appear to be no authorities in this country bearing on this question, but the view we have expressed appears to be that taken by the courts in Ireland: (see *Holland v. Porter*, Lawson's Notes of Registration Cases, 1898, 220, and *Crossan v. Holland*, Lawson's Notes, 1899, 304). This appeal must be dismissed, but as there was no appearance for the respondent there will be no costs.

Appeal dismissed.

Solicitors for the appellant, Ayrton, Briscoe, and Barclay.

Monday, Dec. 16, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MAYOR AND CORPORATION OF WESTMINSTER v. LONDON COUNTY COUNCIL. (a)

Metropolis—"Wooden structures"—*Licence to erect*—*Jurisdiction of borough corporations*—*London County Council*—*London Building Act 1894* (57 & 58 Vict. c. cxxiii.), s. 84—*London Government Act 1899* (62 & 63 Vict. c. 14), s. 5, sched. 2, part 1.

Stands and platforms constructed entirely of wood save as to the nails holding the planks together were erected within the city of Westminster.

The corporation of Westminster claimed that as by sect. 5 and sched. 2, part 1, of the London Government Act 1899 the power to license wooden structures given to the London County Council was transferred to them, they were the proper authority to license the erection of these structures, and to take proceedings in default of obtaining such licence:

Held, that sect. 84 of the London Building Act 1894 applied to all wooden structures, whether permanent or temporary, not coming within the general provisions of part 6 of that Act; that it therefore applied to these structures; and that consequently the power to license their erection was transferred by sect. 5 and sched. 2, part 1, of the London Government Act 1899 to the corporation.

APPLICATION of the mayor, aldermen, and councillors of the city of Westminster under sect. 29 of the London Government Act 1899, by way of special case agreed upon by them and the London County Council.

The case was (so far as material) as follows:—

By sect. 29 of the London Government Act 1899 it is enacted that

If any question arises or is about to arise as to whether any power, duty, or liability is or is not transferred by or under this Act to the council of any metro-

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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politan borough, or any property is or is not vested in any such council, that question, without prejudice to any other mode of trying it, may, on the application of the council, be submitted for decision to the High Court in such summary manner as, subject to any Rules of Court, may be directed by the court, and the court, after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question.

Questions had arisen between the London County Council and the mayor, aldermen, and councillors of the city of Westminster as to whether the powers, duties, and liabilities of the county council with respect to the approval or licensing, erection, setting up, and control of certain structures within the city of Westminster were or were not transferred by or under the London Government Act 1899 from the said county council to the council of the city of Westminster. The circumstances under which such questions had arisen were stated in the subsequent paragraphs of the case.

By sect. 1 of the London Government Act 1899 it was enacted that the whole of the administrative county of London, exclusive of the city of London, should be divided into metropolitan boroughs (in the Act subsequently referred to as boroughs) and by that section it was also declared lawful for Her late Majesty, by Order in Council subject to and in accordance with the Act, to form each of the areas mentioned in the 1st schedule to the Act into a separate borough, subject to such alteration of area as might be required to give effect to the Act, and to such adjustment of boundaries as might appear to Her late Majesty in Council expedient for simplification or convenience of administration, and to establish and incorporate a council for each of the boroughs so formed.

By sched. 1 of the said Act it was declared that one of the areas to be constituted a separate borough was

The area of the ancient parliamentary borough of Westminster, comprising the parishes of St. Margaret and St. John, Westminster, the parish of St. George, Hanover-square, the parish of St. James, Westminster, the parish of St. Martin-in-the-Fields, and the district of the Strand Board of Works, and including the close of the collegiate church of St. Peter, Westminster, and the liberty of the Rolls.

By the Borough of Westminster Order in Council 1900, dated the 15th May 1900, and made under and in pursuance of the provisions of the London Government Act 1899, there was constituted a metropolitan borough of Westminster, and provisions were made therein for determining the area of the borough so constituted, and by the same Order in Council a council was established for the said borough.

By Royal charter dated the 29th Oct. 1900 there was granted and confirmed to the said metropolitan borough of Westminster the title of city, and it was declared that from the date therein mentioned the said borough should be called and styled the city of Westminster, and that the council established for the said borough should be styled the mayor, aldermen, and councillors of the city of Westminster.

By sect. 5 (1) of the London Government Act 1899 it was enacted that

As from the appointed day the powers and duties of the London County Council under the enactments

mentioned in part 1 of the 2nd schedule to this Act shall, subject to the conditions mentioned in that schedule, be transferred to each borough council as respects their borough.

The 9th Nov. 1900 was appointed as the day for the coming into force of this section by an order of the Lord President of the Privy Council, dated the 18th Oct. 1900, and made under the powers of sect. 33 of the London Government Act 1899.

Sched. 2, part 1, of the said Act, so far as directly material, runs as follows:

Part 1.—Minor powers and duties to be transferred from county council:

Powers and duties transferred.	Conditions of transfer.
Power under sect. 84 of the London Building Act 1894 to licence the setting up of wooden structures and power to take proceedings for default in obtaining or observing the conditions of a licence under that section.	

Sect. 84 of the London Building Act 1894 is one of a group of five sections included in part 7 of that Act, under the title "Special and Temporary Buildings and Wooden Structures." Those sections are in the following terms:

Sect. 82 (1). Where a builder is desirous of erecting an iron building, or structure, or any other building, or structure to which the general provisions of part 6 of this Act are inapplicable, or, in the opinion of the council, inappropriate, having regard to the special purpose for which the building or structure is designed and actually used, he shall make an application to the council, accompanied by a plan of the proposed building, with such particulars as to the construction thereof as may be required by the council. (2) The council, if satisfied with such plan and particulars, shall signify their approval of the same in writing, and thereupon the building may be constructed according to such plan and particulars, but the council shall not authorise any building of the warehouse class to be erected of greater cubical extent than 250,000 cubic feet, except in accordance with the foregoing provisions of this Act. (3) The council may for the purpose of regulating the procedure in relation to such applications issue such general rules as they think fit as to the time and manner of making applications and as to the plans to be presented, the expenses to be incurred, and any other matter or thing connected therewith. (4) All expenses incurred in and about the obtaining the approval of the council shall be paid by the builder to the superintending architect, or to such other person as the council may appoint, and in default of payment may be recovered in a summary manner. (5) A copy of any plans and particulars approved by the council shall be furnished to the district surveyor within whose district the building to which such plans and particulars relate is situate, and it shall be his duty to ascertain that the same is built in accordance with the said plans and particulars.

Sect. 83. Where an application is made to the council by any person stating his desire to erect in any place an iron or other building or structure of a temporary character, to which the general provisions of part 6 of this Act are inapplicable, the council may, if they approve of the plan and particulars of the building or structure, limit the period during which it shall be allowed to remain in that place, and may make their approval subject to such conditions as to the removal of the building or structure or otherwise as they think fit, and if, at the expiration of that period, the building or

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structure be not removed in accordance with those conditions the council may serve a notice on the occupier or owner of such building or structure requiring him to remove it within a reasonable time specified in the notice, and if the occupier or owner fail to remove such building or structure within the time named the council may, notwithstanding the imposition and recovery of any penalty, cause complaint thereof to be made before a petty sessional court, who shall thereupon issue a summons requiring such occupier or owner to appear to answer such complaint, and, if the said complaint is proved to the satisfaction of the court, the court may make an order in writing authorising the council to enter upon the land upon which such building is situated, and to remove or take down the same and do whatever may be necessary for such purpose, and also to remove the materials of which the same is composed to a convenient place and (unless the expenses of the council be paid to them within fourteen days after such removal) sell the same as they think proper.

Sect. 84 (1). No person shall set up in any place any wooden structure (unless it be exempt from the operation of this part of this Act) except hoardings enclosing vacant land, and not exceeding in any part 12ft. in height, without having first obtained for that purpose a licence from the council, and the licence may contain such conditions with respect to the structure and the time for which it is to be permitted to continue in the said place as the council think expedient. (2) Provided that a licence shall not be required in the case of any wooden structure of a movable or temporary character erected by a builder for his use during the construction, alteration, or repair of any building, unless the same is not taken down or removed immediately after such construction, alteration or repair. Provided that this section shall not extend to or apply within the city (i.e. the city of London) or to any hoarding duly licensed by the local authority under any statutory powers in that behalf.

Sect. 85. This part of this Act shall not apply in the case of a pile, stack, or store of timber not being a structure affixed or fastened to the ground.

Sect. 86. Structures or erections erected or set up upon the premises of any railway company and used for the purposes of or in connection with the traffic of such railway company shall be exempt from the operation of this part of this Act.

Certain other provisions of the London Building Act 1894 which are or may be material, are as follows:

Sect. 138. Subject to the provisions of this Act and to the exemptions in this Act mentioned, every building or structure and every work done to, in, or upon any building or structure and all matters relating to the width and direction of streets, the general line of buildings in streets, the provision of open spaces about buildings, and the height of buildings, shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate.

Sect. 200 (3). Every person who . . . (e) sets up, erects, or adapts any building or structure to which Part 7 of this Act applies without having obtained any licence required by that part of this Act, or makes default in observing any of the conditions contained in such licence, shall be liable to a penalty not exceeding 20l. a day during every day of the continuance of the noncompliance with the order of the court in reference to the matters aforesaid.

Sched. 3.—Fees payable to district surveyors. Part 1. . . . On wooden and temporary structures.—On inspection of any wooden structure, or on inspection of any structure or erection put up on any public occasion, the same amount as for a new building calculated on the area of the structure or erection without reference to the area of any building to which it may be attached, or in or on which it may be put up.

By the London Building Act 1898 which is to be read as one Act with the London Building Act 1894 it is enacted as follows:

Sect. 6, sub-sect. (3) (e), of the 200th section of the principal Act shall hereafter be read and construed and take effect as though the word "retains" had been inserted therein immediately after the word "erects," and the words "approval or" had been inserted therein immediately before the word "licence" wherever such word occurs therein.

Sect. 7. Every person who does any of the things specified in para. (a), (d), and (e) of sub-sect. (3) of sect. 200 of the principal Act as amended by this Act shall be liable, on conviction, to a penalty not exceeding 40s. for every such offence, and the court before whom an information is laid by the council in respect thereof may, in addition to imposing such penalty, make an order in writing directing such person to demolish the building or structure complained of, or any part thereof, or to comply with the condition contained in any consent, licence, or approval granted by the council for the setting up, erection, adaptation, alteration, or retention of such building or structure, and such order of the court shall be deemed to be the order of the court within the meaning and for the purposes of the 3rd sub-section of the 200th section of the principal Act, and the imposition of any penalty under the provisions of the present section shall be without prejudice to any proceedings under the 3rd sub-section of the 200th section of the principal Act for the daily penalty therein mentioned, or under any other provisions of the principal Act or otherwise, but that no person shall be liable to more than one penalty (other than daily penalties) for the same offence.

In order to enable spectators to view the funeral procession of Her late Majesty Queen Victoria on 2nd Feb. 1901, and the procession of His present Majesty to open Parliament in State on the 14th Feb. 1901, a number of stands or structures were erected within the city of Westminster along the line of route of the procession. These stands or structures were constructed of wood, except the nails and some of the other fastenings, and the cloth or other hangings placed upon them. They were of a temporary character and had all been removed.

Questions had arisen between the London County Council and the council of the city of Westminster as to which of the councils was the proper authority under the London Building Act 1894 (1) to control, approve, or license such structures; (2) to take proceedings against the persons who have without licence, permission, or approval erected such structures; (3) and, further, as to whether structures were or were not subject to the supervision or inspection of the district surveyor under the Act.

The council of the city of Westminster contended that the structures in question were wooden structures within sect. 84 of the London Building Act 1894, and did not fall within the provisions of sects. 82 or 83 of that Act, and that by the effect of sect. 5 (1) of the London Government Act 1899 all powers and duties of the county council and its officers and of the district surveyors with respect to such structures in the city of Westminster were transferred to the council of the said city on the 9th Nov. 1900, and that the county council had now no authority either to license such structures within the said city or to take proceedings for default in obtaining or observing the conditions of any licence granted with respect to such structures, and that

the supervision and inspection of such structures by the district surveyor had been transferred by the Local Government Act 1899 to the council of the said city and its officers.

The London County Council contended that the structures in question were structures of a temporary character, falling within the operation of sects. 82 and 83 of the London Building Act 1894, and that, notwithstanding the provisions of sect. 5 of the London Government Act 1899, they still had authority to approve the plans and particulars of such structures and to take proceedings in respect of such structures if erected or maintained without or contrary to the terms of their approval, and that such structures remain subject to the inspection and supervision of the district surveyor.

The questions submitted for the decision of the High Court were the questions stated above.

Manisty, K.C. (Craies with him) for the Corporation of Westminster. The meaning of sects. 82 to 86 of the London Building Act 1894 can best be ascertained by looking at the enactments they superseded. Now sect. 82 supersedes sect. 56 of the Metropolitan Building Act 1855, with this difference for present purposes that after the word "building" has been inserted "or structure." Sect. 83 supersedes sect. 12 of the Metropolitan Management Act 1882, with the same difference. Sect. 84 supersedes sect. 13 of the same Act. Now sect. 13 referred to "movable and temporary" wooden structures. The structures now in question would clearly come within that section. In sect. 84, however, the words "movable or temporary" are left out. Surely the effect of this cannot be to narrow the section, and make it inapplicable to those structures to which it originally solely applied? Our contention is that the leaving out of these words does not narrow the operation of the section, but enlarges it so as to make it include not merely "movable or temporary" wooden structures, but all wooden structures. If these structures are within the section, then the power to license and to take proceedings with regard to them are transferred to the corporation by sect. 5 of the London Government Act 1899. Counsel further argued that the district surveyors had no power to inspect or supervise wooden structures, and were not entitled to fees for so doing, but the court declined to decide this point. He also referred to

Verner v. McDonell, 76 L. T. Rep. 152; (1897) 1 Q. B. 421.

Horace Ivory, K.C. (Daddy with him) for the London County Council.—If the contention of the corporation of Westminster that structures such as these now in question are within sect. 84 is correct, many difficulties will arise in the administration of the Act. It seems clear that there is nothing in the London Government Act 1899 interfering with the right of the district surveyors to inspect such structures, and claim fees. Passing that over, another difficulty will constantly arise as to who is to license when—as is often the case—the structure is partly or mostly of iron, and not as it happens to be in the present instance wholly of wood save as to the nails used. A third difficulty as to jurisdiction will be as to the question whether the structure is dangerous or not. Under sects. 102 to 104 of the London Building Act jurisdiction over all

dangerous structures is given to the county council, and so we may have the county council proceeding against a structure erected under the licence of the corporation. [Lord ALVERSTONE, C.J.—My difficulty is to imagine what sect. 84 applies to if it does not apply to structures like these.] I submit it applies to wooden structures erected in connection with a house—such as a bicycle shed—which are not temporary structures in the ordinary sense. I contend that sect. 82 applies to all permanent buildings, and sect. 83 to all temporary buildings, while sect. 84 applies only to structures of wood which are neither temporary nor permanent in the ordinary sense. [CHANNELL, J.—It seems to me that sects. 82 and 83 apply to structures which come within the general provisions of part 6 of the Act. These are therefore left to the county council. Sect. 84 refers to those not coming within part 6, and so these are left to the local authority.] Counsel referred to

Whitechapel Board of Works v. Crow, 84 L. T. Rep. 595.

Lord ALVERSTONE, C.J.—The broad question raised in this case is whether the London County Council or the corporation of Westminster is the proper authority to lay down the conditions of construction and to sanction the construction of wooden structures which it is proposed to erect, or which may have to be erected at the public functions taking place within the area of the borough of Westminster. Now, it is impossible to attempt to deal with every case that may arise, or to decide upon any particular state of facts which may be involved in the construction of some special structure. The question has been raised with regard to a number of constructions made wholly of wood, except in so far as nails were used in their construction, and all I wish to guard against is being supposed to say that we do lay down or are about to lay down any general rule which must govern some special case which may involve other considerations. In my opinion the main question should be decided in favour of the city of Westminster. The history of the matter has been very clearly stated by both the learned counsel who appeared before us. Before the passing of the London Government Act of 1899 there had been a series of enactments which put buildings and structures under certain supervision, and by sect. 56 of the Act of 1855 there was a provision enacted which represents sect. 82 of the London Building Act. By sect. 12 of the Act of 1882 there was a provision enacted which represented sect. 83 of the London Building Act. Sect. 13 of the Act of 1882 was a section which superseded sect. 56, and which dealt with, or was intended to deal with, temporary or moveable wooden structures, and no doubt some question similar to that which we have now got to decide might have arisen under those three sections taken from the two Acts of Parliament. When the London Building Act of 1894 was passed, the section of the Act of 1855 was replaced by sect. 82, and sect. 12 of the Act of 1882 was replaced by sect. 83. I think the latter was substantially the same section. Sect. 84, which replaced sect. 13 of the Act of 1882, was modified to a certain extent by the removal of the words which related to moveable or temporary wooden structures, and applying sect. 84 to wooden struc-

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tures except hoardings. I may say in passing that it is quite clear to my mind that we could not accept the arguments pressed upon us that sect. 84 was meant to refer to permanent wooden structures, not only because of the proviso which might have remained *per incuriam*, but because of the operative and enacting words which give a right to impose a particular condition as to the length of time that the structure shall remain up. The first question, therefore, that we have to consider is what is the class of structures that fall within sects. 82 and 83, as distinguished from sect. 84, because by the subsequent Act the powers of sect. 84 have been transferred to the Westminster borough. I think, as far as I can express an opinion sufficiently for the purposes of this case, without attempting, as I have said, to deal with any particular state of circumstances which may arise, that sects. 82 and 83 are intended to apply to buildings or structures which from either their construction or their intended use would ordinarily have been supposed to come under the provisions of part 6 of the Act, but, either because of their mode of construction, or because of their use, it was thought by the London County Council that the general provisions of part 6 of the Act are inapplicable, and then the provisions and powers of sects. 82 and 83 would apply. Sect. 84 seems to me, as it now stands, to be a section giving control over wooden structures to which no general provisions or substituted provisions of a general character would be applicable. Therefore it was intended to give a special power to make conditions both as to the terms upon which, and to lay down the conditions under, and the time for which, certain structures should be erected. Then we come to the Act of 1899—The London Government Act. As I have already said, by the combined operation of sect. 5, if I remember aright, and the schedule, the powers of sect. 84 of the London Building Act to license the setting up of wooden structures, and the power to take proceedings for default in obtaining or observing the conditions for licensing under that section, are transferred to the borough of Westminster. I was very anxious to learn whether Mr. Avory could assist us as to what would be transferred to the borough of Westminster if his argument was right. The only case that he was able to suggest to us was (if I may use a somewhat abnormal phrase) permanent temporary structures, or, in other words, some wooden structures intended to remain, but added on to some other structure. It does not seem to me that this is a satisfactory explanation of the legislation. I think that the Local Government Act recognised that matters that ought to be dealt with by a central body, and could be the subject of substituted regulations in place of the general provisions of part 6 should be laid down by the central body, the London County Council, but that local matters, as for instance the erection of wooden structures for a limited time, to which no general or substituted regulation could be intended to apply, should be transferred under sect. 84 to the borough of Westminster. Therefore, upon the question which arises as to which of the two authorities are to fix the conditions, and impose the limit of time for temporary wooden structures, which are to be erected for the purpose of enabling persons to see public

ceremonies, in my opinion the contention of the borough of Westminster is right. Now, there remains only the question of the possible supervision or duty of supervising on the part of the district surveyors. Speaking for myself, although I think, for the reasons that Mr. Avory has pointed out, difficulties may arise, and the construction we are putting upon the section will not remove this difficulty, I do not think we ought to decide the question for two reasons. In the first place it seems to me that it may, to a certain extent depend on the very conditions that the Westminster corporation think fit to impose. Secondly, we could not deal with that question without deciding what are the rights, duties, and obligations of district surveyors under the Act. They are not represented before us, and their case has not been argued. I think it would be unwise of us to attempt to lay down rules on such a point without knowing the particular circumstances under which the duty arises. We therefore propose not to answer the third question which has been put to us, as it is not necessary for our main decision, nor in fact could it be a judgment—it could only be an expression of opinion. On the broad question which has been submitted to us, and on which our direction is asked, I think that the contention made on behalf of the borough of Westminster is the right one, and that they are the authority to exercise the powers of sect. 84, with regard to these particular structures.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Lord ALVERSTONE, C.J.—As this application is under a power to come and ask the court for instructions, I do not think there ought to be costs in any way. *Judgment for the applicants.*

Solicitors for the mayor and corporation of Westminster, *Caprons, Hitchins, Brabant, and Hitchins.*

Solicitor for the London County Council, *W. A. Blaizland.*

CROWN CASES RESERVED.

Saturday, Dec. 14, 1901.

(Before Lord ALVERSTONE, C.J., LAWRENCE, WRIGHT, BRUCE, and DARLING, JJ.)

REX v. LINES. (a)

Game—Night poaching—Misdemeanour—Indictment—Conviction after two previous convictions—Offending a third time—Offences must be identical—Night Poaching Act 1828 (9 Geo. 4, c. 69), ss. 1, 9.

The offence made an indictable misdemeanour by sect. 1 of the Night Poaching Act 1828 (9 Geo. 4, c. 69) is offending for a third time under that section, which makes unlawfully entering upon land by night with instruments for taking or destroying game an offence punishable on summary conviction. Previous convictions for the more serious offence, made indictable by sect. 9 of the Act, of night poaching as one of an armed gang are not within the section. L. was indicted under sect. 1 for offending a third time

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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against that section. Two previous convictions were set out in the indictment, but one was a conviction under sect. 9, for poaching by night as one of an armed gang.

Held, that the indictment was bad, there being alleged only one offence against sect. 1.

THIS case, stated by the deputy-chairman of the Bedfordshire Quarter Sessions, so far as is material, was as follows:—

The prisoner was indicted at the quarter sessions for the misdemeanour created by the Night Poaching Act 1828 (9 Geo. 4, c. 69), s. 1, which enacts that a person who a third time commits the offence of by night unlawfully taking or destroying game or rabbits, or of by night entering on land with any gun, net, engine, or other instrument for the purpose of taking or destroying game, shall be guilty of a misdemeanour. The indictment set out as the two previous offences committed by the prisoner (1) a conviction for that he by night, together with three other persons armed with bludgeons, unlawfully entered certain lands for the purpose of taking and destroying game; (2) a conviction for unlawfully by night entering certain lands with a gun for the purpose of taking and destroying game. It was objected on behalf of the prisoner that the indictment was bad, because the offence made a misdemeanour by sect. 1 of the statute was a third conviction for the offences punishable on summary conviction under sect. 1—i.e., unlawfully entering land by night with instruments for taking or destroying game—whereas the conviction set out in the first count of the indictment was a conviction for the offence indictable under sect. 9 of night poaching as one of an armed gang. The deputy-chairman overruled the objection, and the prisoner was convicted.

Lord Coleridge, K.O. (with him Stimson) for the prosecution.—The offence made an indictable misdemeanour is a third conviction for night poaching, whether it is for the simple night poaching punishable on summary conviction, or for the night poaching aggravated by the fact that it is night poaching as one of an armed gang, which is indictable under sect. 9. Consequently the indictment is good, because it does allege three convictions for night poaching.

Lord ALVERSTONE, C.J.—The point in this case is whether the previous convictions alleged in the indictment are both convictions which constitute the offence created by sect. 1 of the statute in the case of a person who shall "so offend a third time." It has been pressed upon us by the prosecution that the first count of the indictment is an offence under sect. 1 only aggravated by the prisoner having been of a party armed with bludgeons. It is true that under sect. 9, which deals with the offence of night poaching by armed persons, part of the offence is entering upon land for the purpose of taking game. But the weapons mentioned in that section are not weapons intended for taking game, and the offence is entering upon land for the purpose of taking game so armed as to be likely to commit acts of violence. The words "so offend" in sect. 1 refer to offences under that section, and the instruments mentioned in that section are instruments for taking game. It seems, therefore, that in this case there were

not the previous convictions necessary to constitute the offence for which the prisoner was indicted.

LAWRANCE, WRIGHT, BRUCE, and DARLING, JJ. concurred. *Conviction quashed.*

Solicitors: Austin and Austin, for Wm. Austin, Luton.

The prisoner was not represented.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Nov. 5 and Dec. 18, 1901.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN, SHAND, DAVEY, ROBERTSON, and LINDLEY, and Sir H. DE VILLIERS.)

Re D. F. MARAIS. (a)

PETITION FOR SPECIAL LEAVE TO APPEAL FROM AN ORDER OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Martial law—State of war—Jurisdiction of civil courts.

Where a state of war actually prevails the civil courts, though they may be sitting in their ordinary course, have no jurisdiction over the action of the military authorities.

Elphinstone v. Bedreeshund (1 Knapp P. C. 316) followed.

THIS was a petition for special leave to appeal from an order of the Supreme Court of the Cape of Good Hope made on the 12th Sept. 1901.

The petition stated that the petitioner, David François Marais, was a British subject residing at the town of the Paarl, Cape Colony. He was a notary public of the Supreme Court, an enrolled agent of the court of the resident magistrate for the town, and a licensed auctioneer there. The town is about thirty-five miles from Cape Town.

On the 15th Aug. 1901 he was arrested in his office by the chief constable, who stated that he was acting under instructions from the military authorities. He asked to see the warrant, but was informed by the chief constable that he had none. He was lodged in the town gaol and there detained.

On the night of the 18th Aug. Lieutenant McCausland came to the gaol and ordered the petitioner and other inhabitants under arrest to be ready in ten minutes to go with him. They were all then removed under a mounted military escort to Lady Grey Bridge station, and thence conveyed by rail to Beaufort West, a distance of 300 miles, where they were lodged in the gaol, and were detained there in custody.

On the 21st Aug. Mr. Marais and the other prisoners addressed a letter to the military commandant of the district asking that Mr. Marais might be accorded an interview with him, and pointing out that some of them had been detained seven days and others nine days without any charge having been made against them. They received a written reply in these words:

I will receive no deputation.—A. G. BOYLE, Capt. Area and Military Commandant.

(a. Reported by O. E. MALDEN, Esq., Barrister-at-Law.

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The petitioner was not allowed to communicate with his own lawyers, but he instructed Messrs. Van der Byl and Van der Horst, attorneys of Cape Town, to take proceedings on his behalf.

On the 2nd Sept. they gave notice of their intention to present a petition to the Supreme Court, and on the 6th Sept. Mr. Marais presented the petition, alleging that his arrest and imprisonment had been effected by military force without a warrant or cause assigned, and were consequently illegal, and asking to be liberated.

The petition was heard on the 6th Sept. by Buchanan and Jones, JJ., when an affidavit was put in from Major-General Wynne, C.B. commanding the Cape Colony district, stating that he had made inquiries and found that there was a *prima facie* case against the petitioner and the other prisoners, and that there were military reasons why they should be kept in custody. He added that the prisoners would be formally charged as soon as possible, and either acquitted or detained in custody in accordance with the verdict arrived at after inquiry by the military court, but, that, owing to military exigencies, he was not prepared at that time to state what charges would be preferred. The matter was, however, engaging his most serious attention and consideration. The judges made the following order:

That the gaoler at Beaufort West do return to this court on the 12th inst. the authority on which he detains the petitioner, and that notices of these proceedings be served on the Attorney-General.

On the 12th Sept. the matter was brought before Buchanan, J. An affidavit was put in on behalf of the Attorney-General that the petitioner had been arrested and imprisoned by virtue of a warrant in these terms:

Authority is hereby given to arrest and lodge in gaol the following persons: Carl Thom, David Thom, A. B. de Villiers, D. F. Marais, jun.—Signed, J. E. SKILLEY, Staff Officer, for Commandant. Paarl, 15.8.1901.

The gaoler at Beaufort West in an affidavit stated that on the 19th Aug. a sergeant and four privates brought the petitioner and others to the gaol, the sergeant stating that he had brought them from Lady Grey Bridge with instructions to lodge them in the gaol.

On the 8th Sept. the gaoler received the warrant annexed, setting forth the charge—namely, "Contravening Martial Law Regulation, par. 14, sect. 11, of 1.5.1901."

The petitioner and his companions were taken before the commandant on the 9th Sept. and remanded or recommitted to gaol without inquiry.

The martial law regulation referred to was not put in evidence before the commandant, but was as follows:

Notice is hereby given that from and after April 22, 1901, all subjects of His Majesty and all persons residing in Cape Colony who shall in districts thereof in which martial law prevails (1) be actively in arms against His Majesty, or (2) directly incite others to take up arms, (3) or actively aid or assist the enemy, or (4) commit any overt act by which the safety of His Majesty's forces or subjects are endangered, shall immediately on arrest be tried by a military court convened by authority of the Commander-in-Chief, and shall on conviction be liable to the severest penalties, including death, penal servitude, imprisonment, and fine. Any person reasonably suspected of such offences is liable to be

arrested without warrant or sent out of the district to be hereafter dealt with by a military court.

On the 12th Sept. Buchanan, J. refused the petitioner's application, holding that martial law had been proclaimed in the districts both of the Paarl and Beaufort West, that the court ought not to go into the necessity for that proclamation nor accept any responsibility for the acts of the military authorities in pursuance of it, that the petitioner was held in custody by an officer acting under the military authorities, and that the court could not exercise jurisdiction over the petitioner as long as martial law lasted, though if he had not been received from the Paarl the court might have gone into the necessity for the proclamation of martial law in that district.

The petitioner now submitted that he had committed no crime; that, if he had, he should have been arrested and tried according to law; that the civil courts were open for his trial: and that his arrest, deportation, and confinement were illegal, and that he was entitled to his immediate discharge. He therefore prayed that, in view of the extreme sentence which might be passed at any time upon him by a military court, and that the matter was not one within the competence of the Supreme Court to grant leave to appeal, special leave to appeal from the order of that court should be accorded to him.

Haldane, K.C. and *Mackarness* appeared for the petitioner, and argued that the whole question turned upon this point: What was the position of a man who had been arrested and detained for trial before the military authorities when there was a civil court competent to try the alleged offence sitting in the district? If the civil courts are sitting and are able to carry on their business a state of war does not exist. "Martial law" is the use of an armed force by the Crown to preserve peace and order in a district. Even if a state of war did exist, a civil court would be the proper tribunal for trying the alleged offence if it was sitting. "Military law" is quite distinct from "martial law." It is recognised by statute in the Mutiny Act, and concerns soldiers only, and has nothing to do with civilians. [The Lord CHANCELLOR referred to *Sutton v. Johnstone* (1 T. E. 493; affirmed in the House of Lords, 1 Bro. P. C. 76).] That was a case of military law: (see also the opinion of the law officers, Campbell, A.-G. and Rolfe, S.-G., in the case of the Canadian Rebellion in 1838, set out in *Forsyth's Cases and Opinions on Constitutional Law*, p. 198). In this case the ordinary course of law could have been maintained, as there was a civil court sitting in the district competent to try the case, and there was no necessity for bringing the petitioner before a military tribunal. He had a right to be tried by the civil court. The Crown has no power to proclaim martial law except in cases of necessity, and where the regular courts are open there is no such necessity: (see the American case *Ex parte Milligan*, 4 Wallace Sup. Ct. U. S. Rep. 2; per Cockburn, C.J. in *Reg v. Nelson*, Cockburn's Report, p. 69; per Blackburn, J. in *Reg v. Eyre*, Finlason's Report, p. 571). The matter is of great importance to the liberty of the subject, and leave to appeal should be granted.

At the conclusion of the arguments the Lord Chancellor said that their Lordships had decided

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to advise His Majesty to refuse leave to appeal, and would give their reasons at a later date.

Dec. 18.—The reasons for their Lordships' judgments were delivered by

The LORD CHANCELLOR (Halsbury) as follows:—This was a petition by D. F. Marais for special leave to appeal against a decision of the courts in Cape Colony which had refused to release him from an arrest effected by the military forces of the Crown on the 15th Aug. last. It appeared sufficiently from the petitioner's own petition as well as from the documents accompanying it that the district in which he was arrested and the district to which he was removed (of which removal he also complained), was a district which had been proclaimed under martial law. The petitioner applied to the Supreme Court complaining of his arrest and imprisonment, and on the 12th Sept. last the matter of the petitioner's arrest was brought before Buchanan, J., and that learned judge, after hearing the matter, made the following order: "In the Supreme Court of the Colony of the Cape of Good Hope.—Cape Town, Thursday, 12th September 1901.—In the Matter of the Petition of David François Marais.—Having heard Mr. Currey, with him Mr. S. Solomon for the petitioner, Mr. Searle, K.C. for the General Officer commanding lines of communication, Cape Town, and the Honourable the Attorney-General Sir James Rose Innes, K.C.M.G., with him Mr. Ward, for the Colonial Government, upon petitioner's application for his immediate liberation and discharge, and having read the order granted on the 6th inst. calling upon the gaoler at Beaufort West to return to this court the authority on which he detains the petitioner: Having also read the further affidavits filed and having heard the return, made by the Attorney-General verbally, that the gaoler who has the custody of the petitioner holds him as an officer acting under the authority and control of the military authorities in the district in which the martial law prevails: It is ordered that the said application be and the same is hereby refused. By order of the court.—J. H. GATELY, Acting Registrar." From the petitioner's affidavit it appears that the ground of his arrest was stated in an affidavit by Major-General Wynne, that in the opinion of the military authorities there were military reasons that the petitioner should be removed and kept in custody. All the persons arrested were, as appeared by the warrant under which they were arrested, charged with contravening what were called "Martial Law Regulations" which regulations are set out in the petitioner's affidavit as follows:—"No. 14.—Rebellion, Dealings with Enemy, &c.—Notice is hereby given that from and after the 22nd April 1901 all subjects of His Majesty and all persons residing in Cape Colony who shall in districts thereof in which martial law prevails: (1) Be actively in arms against His Majesty; or (2) directly incite others to take up arms against His Majesty; or (3) actively aid or assist the enemy; or (4) commit any overt act by which the safety of His Majesty's forces or subjects are endangered, shall immediately on arrest be tried by a military court convened by authority of the General Commanding-in-Chief His Majesty's Forces in South Africa, and shall on conviction be liable to the severest penalties. These penalties

include death, penal servitude, imprisonment and fine." "Any person reasonably suspected of such offence is liable to be arrested without warrant, or sent out of the district, to be hereafter dealt with by a military court." Under these circumstances their Lordships were appealed to to give special leave to appeal, and Mr. Haldane on behalf of the petitioner was fully heard on the 5th Nov. last. The only ground susceptible of argument urged by the learned counsel was that whereas some of the courts were open it was impossible to apply the ordinary rule that where actual war is raging the civil courts have no jurisdiction to deal with military action, but where acts of war are in question the military tribunals alone are competent to deal with such questions. The question was as fully argued before their Lordships by the learned counsel as it could have been argued if leave to appeal had been given, and their Lordships did not think it right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear. They are of opinion that, where actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals; and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit. Martial law had been proclaimed over the district in which the petitioner was arrested, and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830. In *Elphinstone v. Bedreschund* (1 Knapp P. C. 316) the Supreme Court at Bombay had given a large sum as damages against the appellant for the seizure of certain treasure at Poonah. During the time of the seizure no actual hostilities were carried on in the immediate neighbourhood of Poonah, but the great battle of Kirkee had been fought, and Poonah had been taken possession of by the British forces. The treasure was seized on the 17th July 1818. At Poonah some courts had been open from the previous February, and it was argued and held by the Bombay Courts that it must be held to be a time of peace, and that the military authorities were responsible in damages for seizure of the treasure. To this the Attorney-General, Sir James Scarlett, replied that a military commander may allow the usual courts of justice that existed in the country before the invasion to continue their jurisdiction upon such subjects as may not be reserved for the consideration of the commander, but this does not deprive the commander of his power or free the country from military government. Lord Tenterden in giving judgment said: "We think the proper character of the transaction was that of hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject," and the judgment was accordingly reversed. The truth is that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the action of the military authorities. Doubtless cases of difficulty arise when the fact

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of a state of rebellion or insurrection is not clearly established. It may often be a question whether a mere riot or disturbance, neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary, but once let the fact of actual war be established and there is an universal consensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities. The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure. For these reasons their Lordships advised His Majesty to refuse leave to appeal.

Solicitors for the petitioner, *Charles Russell and Co.*

Wednesday, July 24, 1901.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury) Lords HOBHOUSE, MACNAGHTEN, DAVEY, ROBERTSON, and LINDLEY.)

Ex parte ALDRED. (a)

PETITION FOR LEAVE TO APPEAL FROM THE COURT OF GENERAL GAOL DELIVERY IN THE ISLE OF MAN.

Practice—Criminal case—Evidence for jury—Leave to appeal.

In a criminal case where there is evidence for the jury in support of a conviction the Judicial Committee will not give leave to appeal.

THIS was a petition for leave to appeal from a conviction and sentence of the Court of General Gaol Delivery in the Isle of Man dated the 14th Nov. 1900.

The petitioner was an auditor of Dumbell's Banking Company, and was convicted of having been a party to the issue of false balance-sheets by that company, which had stopped payment in February 1900. The petition alleged that there had been misdirection by the judge at the trial, and that there was no evidence to support the charge, or that the petitioner had acted with any fraudulent intention. He was found "guilty in a minor degree" and recommended to mercy.

Muir Mackenzie appeared for the petitioner.

C. Mathews and Carrington, for the Government of the Isle of Man, were not called upon to address their Lordships.

At the conclusion of the argument for the petitioner their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury) as follows:—Their Lordships are of opinion that whatever may be said about this matter, and there are some observations, undoubtedly, which commend themselves to their minds, there is nothing here which can justify any court in setting aside the conviction. There is no fact established sufficient to countervail the solemn determination of the judge and the jury here. It would be impossible to set aside this conviction upon such grounds as have been brought forward. There appears as have been evidence for the jury. Whether or

not their Lordships would have formed the same opinion and found the same verdict is not the question. If they would not, that is not enough to set aside the verdict of the jury which has been arrived at; and their Lordships must, therefore, decline to advise His Majesty to grant leave to appeal.

Solicitors for the petitioner, *Jacques and Co.*

Solicitors for the Government of the Isle of Man, *Light and Galbraith.*

Wednesday, Feb. 12, 1902.

(Present: The Right Hons. the LORD CHANCELLOR (Halsbury), Lords ASHBOURNE, MACNAGHTEN, SHAND, DAVEY, and LINDLEY.)

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ON APPEAL FROM THE COURT OF GENERAL GAOL DELIVERY OF THE ISLE OF MAN.

Criminal law—Fraudulent misappropriation of funds—Evidence.

The appellant, a director of a banking company, opened a "trust account" irregularly, and without the consent of the board, and had from time to time considerable overdrafts on the account. The bank stopped payment, and at that time a large sum was due from the appellant on such overdrafts, but he was solvent at the time such overdrafts were made.

Held, that under the circumstances there was no evidence of fraudulent misappropriation of the funds of the bank.

Judgment of the court below reversed.

THIS was an appeal from a conviction by the Court of General Gaol Delivery holden at Douglas in the Isle of Man on the 19th Nov. 1900, when the appellant was convicted by a jury for that he, being a director of a certain public company, namely Dumbell's Banking Company Limited, unlawfully and fraudulently did take and apply to his own use and benefit certain property, to wit, money of and belonging to the said Dumbell's Banking Company Limited.

The trial was commenced upon the 15th Nov. 1900 when, together with one John Shimmon, he was arraigned upon and pleaded "not guilty" to an indictment containing twenty-six counts, and on the 19th Nov. 1900 both the appellant and John Shimmon were convicted upon ten counts of the indictment and were acquitted upon the remaining counts, and both the appellant and John Shimmon were severally sentenced to terms of five years penal servitude.

The material facts proved during the trial were as follows:—

The appellant was a director of Dumbell's Banking Company Limited, and so acted from 1884 to the 2nd Feb. 1900, when the bank ceased to carry on business, and from time to time during the whole of this period he attended the board meetings, and from year to year received his director's fees. During the whole of the period between these dates one Alexander Bruce, who died on the 12th July 1900, some four months before the commencement of the trial, was general manager, and John Shimmon was manager of Dumbell's Banking Company Limited.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The various sums of money which the appellant was convicted of having fraudulently taken and applied to his own use and benefit were respectively the amounts of ten cheques drawn by the appellant upon an account opened at the Ramsey branch, and styled in the books of the bank "Charles Banks Nelson Trust Account." The aggregate amount of these ten cheques was 15,034*l.* 7*s.* 8*d.*

In addition to the ten cheques referred to as above, there were put in evidence by the prosecution during the course of the trial twenty-nine other cheques, drawn by the appellant upon the same account, amounting in their aggregate to 7287*l.* 10*s.* 11*d.*

There were payments made from time to time between the 18th April 1887 and the 23rd March 1888 to the credit of the account such payments amounting in their aggregate to 9555*l.* 2*s.* 11*d.*

The interest charged on the account calculated down to the 2nd Feb. 1900, when the bank ceased to carry on business, amounted to 8581*l.* 2*s.* 10*d.*, which, being added to the sum of 22,321*l.* 18*s.* 7*d.*, the amount of the cheques drawn out, made a total of 30,903*l.* 1*s.* 5*d.*, and, after giving credit for the sum of 9555*l.* 2*s.* 11*d.* paid into the account, left a debit balance of 21,347*l.* 18*s.* 6*d.* on the account. For the first half-year after such account was opened interest and commission was charged upon the debit balance of the account at the rate of 6 per cent. and from that to Dec. 1893 at 5 per cent. calculated with half-yearly rests.

From Jan. 1894 to June 1899 simple interest only at 5 per cent. was charged upon the account.

There was no payment to the credit of the account after the 23rd March 1888 nor was there any drawing operation upon it after the 16th Dec. 1892 after which date it lay for all operative purposes a dormant account, the interest being added to it as has been said at half-yearly intervals until and including the 30th June 1899.

It was proved at the trial and admitted by the appellant in the course of his examination as a witness called on his own behalf that the account was opened to pay for losses in a speculation in the shares of a brewery company called Samuel Allsopp and Sons Limited, such speculation being carried out on the joint account of the appellant, Alexander Bruce, general manager, and John Shimmon manager of the bank, and it was admitted by the appellant in the course of his examination that the account was operated upon solely for and in relation to this speculative venture in which the bank had no interest of any kind. It was further admitted by the appellant in the course of his evidence that no security was at any time deposited with the bank in relation to this overdrawn account and it was proved by John Shimmon in the course of his examination when called as a witness on his own behalf that there was no entry in relation to this account in the minute book of the banking company where it would have been his duty to have entered it had the account ever been called to the attention of the board of directors.

According to the statement of the appellant made in the course of giving evidence for himself this speculation was undertaken at the suggestion of Alexander Bruce and the management of the whole matter was left to Alexander Bruce. He stated that he (the appellant) knew nothing about the details but that Alexander Bruce would tell

him what moneys were wanted, whereupon he (the appellant) would sign the cheques which were debited to the account, and that the payments into the account were all made by Alexander Bruce.

The articles of association of Dumbell's Banking Company Limited which were put in evidence at the trial contain the following provisions with respect to advances to directors and officers of the company:

Art. 6 provides that

The company shall not make any advance or allow any credit to a director or officer of the company on his own personal security except with the consent in writing of the board. This is declared to be a fundamental rule of the company.

Art. 89, sub-sect. 9, provides that

... No director shall vote upon any motion respecting the loan or advance of money or otherwise giving credit to himself, his partner, father, brother, son, or son-in-law, or respecting any such loan or advance, or giving credit on any security or discounting any bill, promissory note, or other security offered by himself or by his partner or by any such relation as aforesaid.

During the whole period covered by the account there were three directors other than the appellant who formed the board of the bank, and meetings of the board were regularly held and the appellant from time to time attended such meetings, but this so-called "Trust Account" was never brought to the knowledge of the board of directors or to that of any one of the directors other than the appellant himself individually.

Besides the overdraft on the account the appellant, between 1887 and 1900, had other large overdrafts upon other accounts upon which he was liable to the bank, all of which remained unsecured until August 1899, when he gave a charge upon his property to secure his overdrafts. The charge against the appellant and John Shimmon was made under sect. 218 of a statute of the Isle of Man Legislature, which is as follows:

Whosoever being a director, member, or public officer of any body corporate or public company shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to any of the punishments which the court may award as hereinbefore last mentioned.

The appellant was represented by counsel on his trial, and no submission was made at the close of the case for the Crown, that there was no case to go to the jury, or that the case should be withdrawn from the jury, and the main if not the only contention raised by the appellant's counsel in his address to the jury, was that there was no evidence, and certainly no sufficient evidence, of any fraudulent intention in the appellant's mind at the date of the different operations upon the account to bring the appellant within the section of the statute, and in support of this contention it was strongly urged that the appellant was solvent, or believed himself to be solvent, between 1887 and 1893.

His Honour Deemster Shee, in summing up the case to the jury, directed them that it was for them to say whether the moneys were taken out of the said account under such circumstances

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as to amount to a fraudulent taking, and left the question of intention to the jury to decide.

No objection was taken by the appellant's counsel to the summing up of the learned Deemster, either in the course of it or at its close, nor was he asked to add in any way to his direction.

The hearing of the evidence, the addresses of counsel, and the summing-up of Deemster Shee, K.C., were concluded at 4.50 p.m. on Saturday, the 17th Nov., when the jury retired to consider their verdict. After an absence of nearly six hours the jury returned at twenty minutes to 11 p.m., and the foreman informed the court that they were divided, and unable to come to a verdict; and that they seemed to have come to a deadlock. The foreman said: "If we put our difficulty before the court it might enable your Honour to give us your assistance," to which Deemster Shee replied that he would be glad to assist the jury, whereupon the foreman further stated, "We differ on what in this case constitutes fraud within the meaning of the law. Some of the jurors are of opinion the defendants were solvent at the time of incurring the liabilities, and therefore not guilty of fraud." Deemster Shee thereupon said, "Is that the only difficulty you have?" and the foreman replied, "I think so practically."

Whereupon the Deemster gave the following ruling:

Well, solvency alone would not be sufficient evidence they were not guilty. It might be a matter for you to consider, but, in my opinion, solvency alone would not be evidence they were not guilty of fraud. It is an element for you to consider where there was fraud. You have to consider the whole of the circumstances in the case; the date of the account; the fact that there were other overdrafts of the defendants; the size of the overdrafts; the way in which they were kept; and the account the prisoners have given of how they embarked in these transactions. All the circumstances in the case have to be taken into your consideration. To say simply because one of the defendants was solvent that therefore he could not be guilty of fraud would not be right. You must consider about the circumstances; and considering the importance of the case I should advise his Excellency to ask you to retire to consider your verdict again.

At 11.50 p.m. the jury were again sent for, and asked whether they had agreed upon a verdict, and upon the foreman stating that they had not, but that they seemed to be nearly arriving at a decision, Deemster Shee warned them that if they had not decided upon a verdict before midnight they might have to be locked up over Sunday. The jury again retired; and as they had not returned before 12.10 a.m. the court adjourned, and the jury were ordered to be locked up until the following Monday.

On Monday, the 19th Nov. 1900, the foreman announced the verdict of the jury: "Guilty on the Nelson trust account only," with a recommendation to mercy, and upon this verdict the court sentenced appellant to a term of five years' penal servitude. At the same time the appellant was sentenced to a term of three years' penal servitude upon conviction on another indictment, the said terms to run concurrently.

On the 14th Nov. the appellant had been convicted on another indictment, charging him with having been a party to the issue of false balance-sheets. He presented a petition for leave to appeal against both convictions, but their Lordships, on the 13th March 1901, gave leave to

appeal against the conviction for fraudulent misappropriation only.

Lawson Walton, K.C. and *Muir Mackenzie* appeared for the appellant.

The *Attorney-General for the Isle of Man* (Ring, K.C.) and *C. W. Mathews* for the Crown.

At the conclusion of the arguments their Lordships' judgment was delivered by

The LORD CHANCELLOR (Halsbury) as follows:

—This was a charge against the defendant of having fraudulently appropriated to his own use money of the Dumbells Banking Company. Their Lordships are of opinion that there was no sufficient legal evidence against the defendant of that offence, and under those circumstances their Lordships will recommend that this part of the conviction, the only one on which leave to appeal has been given, should be set aside. It is impossible not to notice that the mode in which the question has been propounded from time to time, both by counsel and, one regrets to say, also by the learned Deemster himself who presided, confuses what is the nature of the charge made, with the general charge of irregularity in the conduct of the proceedings of the bank. That is not the criminal charge which was preferred by the indictment, and ought to have been found by the jury. The charge was of fraudulently appropriating money of the bank. The facts sufficiently show that for a period of some years, beginning at all events as early as 1887, and going down to 1893, the person convicted was in the habit of drawing partly upon his own private account, and partly on an account which was called a trust account, but still in his name, and that from time to time that account was operated upon in the ordinary and natural way in which the account of a customer of a bank is treated. Money was paid in and money was paid out, at one time a very large overdraft, and at another time that overdraft reduced to an amount of something like 300*l.* or 400*l.*, down to the period of two or three years after the trust account had first begun. Then it is suggested that after a period of six years altogether has elapsed it is possible to pick out some of the earlier drafts that have been made under the circumstances, and treat a particular draft as having been itself an offence—that is to say, a misappropriation of the money of the bank to the use and purposes of the person who drew it. The real truth is that if what is suggested as the offence had been committed, every cheque was itself a theft. I use the phrase compendiously, because, although it is not stealing in the language of the statute, the elements of stealing must exist in it, and in order to determine whether this offence has been committed in the sense which the law requires in order to sustain the conviction, one must see whether it is true to say that every one of those cheques so drawn, and the money obtained by reason thereof, was a theft. Their Lordships are of opinion that there was no legal evidence of any such proposition. It may have been extremely irregular, and may have been wrong, and was wrong under the circumstances of this bank to allow the account to have been entered into at all. The board ought to have been consulted, and the board ought to have given its consent in writing that such an account should be entered into, or at all

events that overdrafts should have been allowed on it; but that each of these transactions which is made the subject of indictment was practically a stealing of the money obtained by the cheque, there appears to be no evidence whatever, and their Lordships are unable to see that the question was ever properly before the jury at all. It was a natural and proper inquiry by the jury which they made of the learned Deemster, whether or not they ought to have some guidance as to what was a fraud within the meaning of the law, because, as they explained, they were anxious to learn. Some of them thought there could be no fraud at the time, because the person was solvent who was drawing these cheques, to which inquiry no answer apparently was given by the learned Deemster in the language which the jury required, but he goes on to say that it is not conclusive that the defendant was not guilty because he was solvent—an entire inversion, their Lordships regret to observe, of what ought to have been told the jury at the time. Strictly, and as a matter of verbal accuracy, indeed it is not conclusive that the person was not guilty; but the question which the jurymen obviously desired to have answered was whether or not, given the circumstances of this case, the man being perfectly solvent at the time, and having ample assets to answer the cheque which he was drawing, they ought to infer from the nature of the transaction that it was a taking or misappropriation within the meaning of the statute. Upon that it is impossible to say the jury received any guidance whatever. In the result their Lordships are of opinion that there may have been ample evidence that the account was improperly obtained, and it may have been in one sense fraudulently obtained, but there is no evidence justifying the charge that this money was appropriated to the use of the person who drew the cheque in fraud of the right of the bank to have the money, and therefore that the offence contemplated by the statute was committed, or at all events there was no evidence of its being committed so as to justify the verdict of "guilty." For these reasons their Lordships will humbly advise His Majesty that the conviction of the 19th Nov. 1900 should be set aside. There will be no order as to costs against the Crown.

Solicitors: for the appellant, *Hores, Pattison, and Bathurst*; for the respondent, *Light and Galbraith*.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 14 and 15, 1902.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

CLERKENWELL VESTRY v. EDMONDSON AND
SON. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

*Metropolis—Management Acts—“New street”—
Sewer—Expenses of sewerage—Liability of
frontagers—Metropolis Management Amendment
Act 1862 (25 & 26 Vict. c. 102), ss. 52, 53.*

The boundary line between the parish of C., in the

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

county of London, and the parish of H., in the county of Middlesex, ran along the centre of an old highway. Before the Metropolis Management Act 1855 came into operation in 1856, buildings had been erected along nearly the whole of the H. side of the road, but on the C. side of the road there were only seven or eight scattered buildings. Afterwards buildings were erected along the whole of the C. side of the road, and the vestry of C. constructed a sewer on that side of the road for the drainage of those buildings. The vestry apportioned the expenses of making the sewer among the frontagers on the C. side of the road, contending that this side of the road was a “new street” within the meaning of the Metropolis Management Amendment Act 1862.

Upon a summons against a frontager to enforce payment, the justices found as a fact that, taken as a whole, the road was sufficiently built upon before 1856 to be a “street,” and that, therefore, the C. side of the road was not a “new street.”

Held (affirming the decision of the Queen's Bench Division), that the justices could properly consider the road as a whole, and find that the whole was a “street” in 1856, and were therefore right in holding that the C. side of the road was not a “new street.”

THIS was an appeal by the Clerkenwell Vestry from the judgment of the Divisional Court (Lord Alverstone, C.J. and Kennedy, J.) upon a case stated by justices.

A complaint was preferred by the Clerkenwell Vestry against Edmondson and Son, that the vestry, during the years 1897 and 1898, in accordance with the provisions in that behalf of the Metropolis Management Acts, executed or caused to be executed certain works, namely, the construction of a sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, with the necessary man-holes and inspection chambers, and other incidental charges and expenses under the Acts, in or in part of a new street known as Colney Hatch-lane, for or in respect of certain premises in the street of which the respondents were the owners; and that the appellants had thereby incurred expenses of which the amounts apportioned in respect of the respondents' premises were 130l. 6s. 8d. and 7l. 2s. 1d. respectively, and that the respondents had not paid these sums.

Colney Hatch-lane is an old highway forming the boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey, in the county of Middlesex.

The actual boundary is nearly in the centre of the lane, but the greater part of the surface is within the parish of Clerkenwell.

Before the year 1856, when the first of the Metropolis Management Acts (18 & 19 Vict. c. 120) came into operation, buildings had been erected along the Hornsey, or Middlesex, side of the lane along nearly the whole of its length, but on the Clerkenwell, or London, side of the lane there were at that time only seven or eight buildings at various points.

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CLERKENWELL VESTRY v. EDMONDSON AND SON.

[CT. OF APP.]

Since the year 1856, and more particularly within the last few years, the remainder of the Clerkenwell, or London, side of the lane has been laid out for building, and the greater part of the frontage to the lane is now covered with buildings.

In or about the year 1887 the Hornsey Local Board laid a sewer on their side of the lane for the drainage of the houses in their district. By agreement between that board and the appellants two of the houses on the Clerkenwell side were drained into that sewer until the sewer mentioned in the complaint was constructed; and, by agreement between the board and the owners of two other houses on the Clerkenwell side, those owners connected their drains with the Hornsey sewer. The sums paid by those owners to the Hornsey Local Board under the agreements were repaid to them by the appellants when their drains were connected with the sewer mentioned in the complaint. On the Clerkenwell side of the lane there was no sewer of any kind save a surface water sewer which had been laid for the drainage of the road itself, partly by the owners of adjoining land and partly by the appellants, and for a short distance an old brick sewer running obliquely across the lane and taking the drainage of three or four houses on that side. The old houses at the south end of the lane on the Clerkenwell side were drained into a sewer behind these houses running into another parish.

The part of the parish of Clerkenwell which comprises the eastern side of the Colney Hatch-lane is wholly detached from the rest of the parish, and is entirely surrounded by the county of Middlesex. For this reason it was found to be impracticable to provide an outlet into the metropolitan main drainage system from this part of the parish.

By the Metropolitan Board of Works (Various Powers) Act 1887 (50 & 51 Vict. c. cvi.), s. 44, the Metropolitan Board of Works (now the London County Council) were enabled, by agreement with the local authorities of certain adjoining districts, or any part of them, to cause any sewer or sewers constructed or to be constructed by that board in the detached portion of Clerkenwell to communicate with the sewers of one or more of such authorities, and an agreement for this purpose was made in the year 1896 by the London County Council with the Friern Barnet Urban District Council, and an outlet for the sewage of this detached part of Clerkenwell into a sewer of the county council and then into the Friern Barnet sewers was provided in pursuance of the agreement, in the year 1897. As soon as such outlet was provided, the appellants laid the sewer mentioned in the complaint for the drainage of the houses and buildings which then were or might thereafter be erected on the Clerkenwell, or London, side of the lane, and that sewer was completed in the year 1898.

The total cost of the sewer and the works appertaining thereto was 1106*l.*, of which the appellants charged to sewer rates the sum of 103*l.* and apportioned the balance among the owners of the premises on the Clerkenwell side of the lane according to their respective frontages.

The amounts apportioned in respect of the respondents' premises were 130*l.* and 7*l.*

The respondents having refused to pay these sums, a complaint was preferred under sects. 52 and 53 of the Metropolis Management Amendment Act 1862.

It was contended before the justices on behalf of the appellants that so much of Colney Hatch-lane as is within the parish of Clerkenwell was a "new street," within the meaning of the Metropolis Management Acts; that it became a new street by reason of the erection of buildings fronting it as above mentioned; that, in order to determine whether it had become a new street, no regard could be had to the portion of the lane in the parish of Hornsey or to the buildings on the Hornsey side, these being in a different parish, district, and county, and subject to entirely different statutes.

It was contended on behalf of the respondents that Colney Hatch-lane, taken as a whole, had become a street, in the ordinary sense of the term, by reason of the buildings erected along it before the year 1856, and was an old street when the Metropolis Management Act 1855 came into operation; that no part of that street could become a new street subsequently by reason of the erection of additional buildings along it, and that the portion of the lane which is in Clerkenwell could not be dealt with by itself without regard to the portion which is in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it was a "new street" within the meaning of the Metropolis Management Acts.

The justices found that Colney Hatch-lane taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act 1855 came into operation, and they were of opinion that that portion of the lane which is in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a "new street," and for these reasons they dismissed the summonses.

The question for the opinion of the court was whether that portion of Colney Hatch-lane which is in Clerkenwell could be dealt with by itself without regard to the portion which is in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it is a "new street."

The Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) provides:

Sect. 52. Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board in and for the drainage of any new street, or of any house or houses erected since the first day of January one thousand eight hundred and fifty-six, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street, respectively, and the said expenses shall be apportioned by the vestry or district board in such proportions as they may deem just, and the amount charged upon or payable in respect of each house or premises shall be payable before the works shall be commenced, during their progress, or after their completion, as the vestry or district board shall in each case determine, either in one sum or by instalments, within such period, not exceeding twenty years, as the vestry or district board shall direct; and any such sum or instalments shall be recoverable from the present or any future owner of the

said house or premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board.

Sect. 53. Where any sewer shall be constructed by any vestry or district board in a street in which previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersection of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in and of the land bounding and abutting on such street respectively; and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rates levied in their parish or district; and the amount so charged by the vestry or district board upon or in respect of each house or premises shall be payable, either before the works shall be commenced, during their progress, or after their completion, as the vestry or board shall in each case determine, either in one sum or by instalments within such period, not exceeding twenty years, as the vestry or board shall direct; and any such sum or instalment shall be recoverable from the present or any future owner of such house or premises either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board; provided that no street or property in respect of which sewers rates have been levied for five years prior to the first day of January, one thousand eight hundred and fifty-six, shall be subject to be charged under the provision contained in this section.

Sect. 112. In the construction of the recited Acts and this Act . . . the expression "new street" shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not, previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having the control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street, and also all streets partly formed or laid out.

The Divisional Court (Lord Alverstone, C.J. and Kennedy, J.) held that the justices were right and dismissed the appeal (*ante*, p. 27; 83 L. T. Rep. 501).

The Clerkenwell Vestry appealed.

Macmorran, K.C. and *C. F. Pritchard* for the appellants.—The decision of the Divisional Court was wrong. The justices ought to have held that the portion of the lane in question, within the district of the appellants, was a "new street" within the meaning of the Metropolis Management Act 1862. They were wrong in holding that the part of the lane in Clerkenwell could not be considered by itself without reference to that part which was in Hornsey. The whole of a highway is not necessarily to be treated as being one street for the purposes of the Metropolis Management Acts. The definition of a "street" in the Metropolis Management Act 1855 includes "a part of any such highway"; and the definition of a "new street" in sect. 112 of the Metropolis Management Act 1862 includes "a part of any such street." Therefore a part of any highway or street may be separately treated as a "new street" without any reference to the rest of the highway or street. The part of this highway which is in Clerkenwell ought to be separately treated; it is

situate in a different county and is governed by entirely different statutes. If it is treated as a separate street, it is clear upon the facts that the Clerkenwell part of the road became a "street" by the erection of buildings along it, after the Metropolis Management Act 1855 came into operation, and is therefore a "new street." There are many cases which show that the part of a road which becomes a street in the ordinary meaning of the term by the erection of buildings along it may be separately treated as a "new street":

Property Exchange (No. 1) Limited v. Wandsworth Board of Works, *ante*, p. 229; 84 L. T. Rep. 689;
White v. Fulham Vestry, 74 L. T. Rep. 425;
Richards v. Kessick, 59 L. T. Rep. 318.

This sewer was constructed solely for the benefit of the houses built on the Clerkenwell side, which was the only part of the road over which the Clerkenwell Vestry had jurisdiction, and therefore the cost would properly be made to fall upon the owners of those houses.

Alexander Glen, for the respondents, was not called upon to argue.

COLLINS, M.R.—I am of opinion that this appeal must be dismissed. The question in this case arises with regard to an old highway which formed the boundary between the parishes of Clerkenwell and Hornsey. This highway was the boundary between the two parishes, and the actual boundary line ran along nearly the centre of the road, but the greater part of the surface of the road was in the parish of Clerkenwell. The local authority under the Metropolis Management Acts desired to treat this old highway as a "new street," which would enable them to claim payment from the frontagers of the expenses of making a sewer. If the highway was not a "new street," the local authority could not claim payment of those expenses from the frontagers, but they would have to be paid out of the rates. The local authority say that in the circumstances that part of this highway which is within the parish of Clerkenwell may be deemed to be a "new street" within the meaning of the Metropolis Management Acts. The justices have found as a fact that, before the Metropolis Management Act 1855 came into operation, the old highway had become a street by reason of the number of houses which had been erected on the Hornsey side of the road, and they found that, therefore, at the time when it was sought to charge the frontagers the street was not a "new street," but an old street. That appears to me to be a question of fact. It has been laid down in many cases that the question whether a road is a street or not is a question of fact, and not a question of law, and that it has to be decided by the tribunal which has to deal with the question. Now, in the present case no difficulty arises as to the area of the old highway, because no addition has been made to it and it remains the same as it was before. Houses, however, were built upon the Hornsey side of the road in such numbers as to make the whole of the old highway a street long before the sewer in question was made. That being a question of fact, it seems to me that the whole matter is concluded. The whole argument on behalf of the appellants rested upon a confusion between the facts as to what was the area of the highway and the rights of the parties because it was a highway. It was argued that, because the legal rights

of the different parties were different, we ought therefore to consider that fact in determining whether this was a "new street" or not, and that, because the Metropolis Management Acts applied to one side of the highway and the Public Health Act to the other side, and the rights of the parties were different, therefore the two sides of the road ought to be treated differently. It seems to me that the legal rights of the parties on either side of the road have nothing whatever to do with the question whether the highway is all a street or not. The justices have found against the appellants upon a question of fact. They have found that the old highway was all a street wherever it was situated. For these reasons I think that the decision of the Divisional Court was right. The learned judges treated the case as one which had been decided as a question of fact, and I think that they were right. This appeal therefore fails, and must be dismissed.

ROMER, L.J.—I am of the same opinion. I think that there is great force in the observation of Kennedy, J. that it is not desirable to create any unnecessary artificiality in the understanding of a "street" and "new street." In this case it seems to me that Colney Hatch-lane was and is one street, and that it was and is an old street, and that it ought not, for the purposes of the appellants, to be treated as two streets, one old and the other new. I agree, therefore, that the appeal must be dismissed.

MATHEW, L.J.—I am of the same opinion. The argument for the appellant invited us to come to the conclusion that an old street might be a "new street" within the meaning of the Metropolis Management Acts. I do not find any indication of that in the Acts. Sect. 52 of the Metropolis Management Amendment Act 1862 applies in terms to a "new street," and then there is a definition of "new street" in sect. 112 of that Act, which is as follows: "The expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street . . . and also all streets partly formed or laid out." Here the road was an old street before the first Act of 1855 came into operation. It is said that it became a "new street" because new houses were built along one side of it, but it was clearly an old street, and that has been found as a fact by the justices. The cases which have been cited as to a part of a street being a "new street" were all cases in which a new piece had been added to an old street. In this case the whole of the highway had become an old street. I think that this appeal fails and must be dismissed. *Appeal dismissed.*

Solicitors: for the appellants, *Boulton, Sons, and Sandeman*; for the respondents, *Tatham and Hardy*.

Thursday, Jan. 30, 1902.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

WEST HAM UNION v. LONDON COUNTY COUNCIL (a).

APPEAL FROM THE KING'S BENCH DIVISION.

Poor law—Pauper—Settlement—Addition to parish of part of adjoining parish—Identity of parish not destroyed—Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61)—Poor Law Act 1879 (42 & 43 Vict. c. 54).

By an order of the Local Government Board made under the Divided Parishes and Poor Law Amendment Act 1876 and the Poor Law Act 1879 a part of a parish was taken away from it and added to another parish.

Held (affirming the decision of the King's Bench Division), that the identity of the parish to which the addition was thus made was not destroyed by the addition; and that therefore a settlement which had been acquired by a pauper in the parish before the addition to its boundaries continued to exist.

THIS was an appeal by the West Ham Union from a decision of the King's Bench Division (Darling and Channell, JJ.) upon a special case stated by the Court of Quarter Sessions for the County of London.

Elizabeth Heritage (hereinafter referred to as the pauper lunatic) was born in Stephenson-street, Canning Town, in the parish of West Ham in the West Ham Union, on or about the 11th Feb. 1852, and resided at Nos. 3 and 5, Widdicombe-terrace (afterwards and now known as Nos. 40 and 42, Barking-road), in the said parish, for about seventeen years until the month of Aug. 1888.

The pauper lunatic resided at the address aforesaid in such manner and under such circumstances during the whole of the period of seventeen years and in each of such years as to render her irremovable from the parish in which such residence took place.

By an order of the Local Government Board, dated the 24th Aug. 1886 and made under the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61) as amended and extended by the Poor Law Act 1879 (42 & 43 Vict. c. 54), it was ordered that a certain part of the parish of Wanstead should cease to be part of that parish and should be amalgamated with the parish of West Ham. A copy of the order, which took effect on the 24th March 1887, was annexed to and was to be taken as part of the special case.

The address at which the pauper lunatic so resided as aforesaid was situate in the parish of West Ham as constituted previously to the date of the order, and not in any part of the parish of Wanstead.

The pauper lunatic left the parish of West Ham in Aug. 1888, and did not thereafter acquire a settlement in any parish.

The pauper lunatic was afterwards found in the hamlet of Ratcliffe, in the Stepney Union in the county of London, and was sent therefrom to the Claybury Lunatic Asylum, which belonged to the London County Council.

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

[CT. OF APP.]

WEST HAM UNION v. LONDON COUNTY COUNCIL.

[CT. OF APP.]

By an order of two of Her Majesty's justices of the peace acting in and for the county of London, dated the 14th Feb. 1900, the pauper lunatic was, under sect. 290 of the Lunacy Act 1890 (53 & 54 Vict. c. 5), adjudged to be chargeable to the county of London.

On the 15th May 1900 the London County Council procured from two of Her Majesty's justices of the peace acting in and for the county of London an order of that date whereby (amongst other things) the pauper lunatic was adjudged to be settled in the West Ham Union. A copy of the order was annexed to and was to be taken as a part of the special case.

The West Ham Union appealed from the order of the 15th May 1900.

The London Quarter Sessions allowed the appeal on the ground that the old parish of West Ham had been destroyed by reason of the amalgamation with it of part of the old parish of Wanstead; but they stated a case for the opinion of the King's Bench Division.

The King's Bench Division (Darling and Channell, JJ.) were of opinion that the order of the Local Government Board had not the effect of destroying the parish of West Ham, and that the settlement of the pauper therefore remained unaffected. They therefore reversed the order of the Quarter Sessions.

The case is reported *ante*, p. 164; 84 L. T. Rep. 471; (1901) 1 K. B. 720.

The West Ham Union appealed.

Avory, K.C. (J. C. Earle with him) for the West Ham Union.—The result of the alteration of the old parish of West Ham by the addition of part of the parish of Wanstead is that the old parish in which the pauper had a settlement has ceased to exist, and the pauper's settlement has therefore also ceased to exist. There is a long series of decisions showing that the effect of altering a parish by division is to destroy the identity of the parish existing previously to the division, with the result of destroying also any settlements that had existed in that parish before it was divided:

R. v. Tipton, 3 Q. B. 215;

R. v. Hunnington, 5 Q. B. 278;

Stourbridge Union v. Droitwich Union, 25 L. T. Rep. 411; L. Rep. 6 Q. B. 769.

Those cases have all been considered and followed by the Court of Appeal:

St. Saviour's Union v. Dorking Union, 78 L. T. Rep. 29; (1898) 1 Q. B. 594.

It is true that here the parish has not been divided, but has been increased by the addition of a piece taken from another parish. But the principle of those decisions is applicable to the present case. It is unfair to make the ratepayers of the piece which used to form part of the parish of Wanstead responsible for the support of paupers who had a settlement in the old parish of West Ham. The present parish of West Ham ought not to be held to be identical with the old parish merely because it goes under the same name. The addition to the old parish was made under statutory authority, and the result is distinguishable from a case in which by natural causes there has come about an accretion or a diminution as regards the boundaries of a parish, such as may often happen in the case of a parish bounded on one side by the sea.

Macmorran, K.C. and *Dalry* for the London County Council.—The decisions referred to only apply to cases where a parish has been destroyed. It cannot be fairly said that the old parish of West Ham has been destroyed, merely because its boundaries have been slightly enlarged. By sect. 27 of 31 & 32 Vict. c. 122, in the case of all seaside parishes the foreshore was declared to be annexed to and included within the boundaries of the parishes; but it could hardly be contended that all those seaside parishes were destroyed by that Act. That every alteration of the boundaries of a parish does not destroy a settlement in the parish is clear:

R. v. St. Martin's, New Sarum, 9 Q. B. 241.

There two parishes were united, and it was held that the settlement of a pauper in one of them continued to exist as a settlement in the united parish.

Avory, K.C. in reply.—The union of the two parishes in the case last cited took place under a local Act. The judgment proceeded on the ground that the intention of the Legislature was that the liability of the two parishes to maintain their paupers should not be destroyed. Moreover, it was an equitable thing that each of the parishes should share the expenses of maintaining the other's paupers. Here it would be manifestly inequitable that the few inhabitants of the small bit of Wanstead should be responsible for maintaining the paupers of the large parish of West Ham. Under sect. 8 of the Divided Parishes and Poor Law Amendment Act 1876, the Local Government Board could have made an adjustment between the parishes of their debts and liabilities. Since none was made, it would be only fair that the liability to support the pauper should be treated as gone.

Collins, M.R.—The question raised in this case is whether a pauper who had acquired by birth a settlement in the parish of West Ham has lost her settlement in consequence of the addition to that parish of a small portion of the parish of Wanstead. The Divisional Court, reversing the decision of the Quarter Sessions and restoring the decision of the justices, held that the pauper did not lose her settlement by that addition to the parish. On behalf of the West Ham Union it is contended that the decision of the Divisional Court is wrong because it is said to be inconsistent with a long line of cases, the last of which was *St. Saviour's Union v. Dorking Union* (*ubi sup.*). In those cases it has been held that where a parish in which a pauper had a settlement has been divided into separate parishes, so that the old undivided parish has ceased to exist as a parish, then, as the entity in which the pauper had a settlement has ceased to exist, the settlement of the pauper also ceases to exist. There have been several decisions of that kind, and the principle on which the earlier ones were decided was not altogether approved of by the judges in the later ones. But the law had been laid down in that way so often that the authority of the earlier cases was followed in *St. Saviour's Union v. Dorking Union* (*ubi sup.*). Now, it was contended that that principle applies to the present case; but, in my opinion, the Divisional Court was right in holding that long line of cases to which I have referred to be distinguishable from the present case. It is to be observed that here

there has not been any destruction of the identity of the old parish of West Ham by reason of its having been divided and having had substituted for it a number of constituent parts which have themselves been erected into parishes. All that has happened to the parish is that there has been an accretion to it from the parish of Wanstead. The legislation under which that accretion was acquired does not seem to me to point to anything at all analogous to the subdivision of one parish into a number of minor and separate parishes. What was done here was done under sect. 1 of the Divided Parishes and Poor Law Amendment Act 1876 (39 & 40 Vict. c. 61). That section provides that where any parish shall be divided so as to have its parts or any of them isolated in some other parish or parishes or otherwise detached, the Local Government Board may, after inquiry, &c., make an order "either for constituting separate parishes out of the divided parish or for amalgamating some of the parts thereof with the parish or parishes in which the same may be locally included or to which they may be annexed as shall appear to such board to be most convenient, and providing where requisite for a change of the county of the parish or part of a parish." This necessitated no division of the parish in the sense in which a parish was divided in the line of cases that has been referred to. All that was done was simply to cut a bit off one parish and put it on to another. The identity of the old parish of West Ham still remained, notwithstanding the addition to it. And the parish of Wanstead still remained the parish of Wanstead, notwithstanding that a certain bit of it was cut off. The present case is therefore outside that line of cases in which it was held that if the identity of a parish was destroyed, a settlement in that parish was also destroyed. But, further than that, there seems to me to be authority for so holding. One of the cases cited was *E. v. St. Martin's, New Sarum* (*ubi sup.*). In that case two entire parishes were amalgamated together, and it was held that a settlement which had previously been acquired in one of the parishes still remained in existence as a settlement in the united parish. That decision seems, at all events, to displace the second argument that was addressed to us on behalf of the West Ham Union. It was said that to hold in the present case that the pauper's settlement still remained would have the unfair result of making the inhabitants of the piece which formerly was part of the parish of Wanstead liable to support paupers who had a settlement in West Ham. Precisely the same result was brought about by what took place in *E. v. St. Martin's, New Sarum* (*ubi sup.*). There each of the parishes, as part of the new entire amalgamated parish, became responsible for the paupers of the other parish. Mr. Avory, in answer to that, said that the result may have been brought about by the consent of the parishes. I do not know whether we are to assume that what has happened in the present case was done without the consent of the parishes, but it certainly was done by virtue of an Act of Parliament. The fact that certain paupers in the one area would be partly maintained by the other area was not a bar to holding that the amalgamation could not be treated as destroying a settlement in either of the two parishes. The present case seems to me to be outside the line of

authorities which established the rule that on the division of a parish a settlement which had existed in the undivided parish is destroyed. There is therefore nothing to prevent us from saying, what seems to me to be in accordance with common sense, that the mere accretion, whether it was caused by Act of Parliament or by some natural cause, of a small portion on to the larger parish whose identity is not permitted to be destroyed by the Legislature did not destroy the original parish of West Ham, and the pauper's settlement therefore remains as it was. For these reasons I think that the appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. The case of *E. v. Tipton* (*ubi sup.*) and the cases in which it has been followed cannot be disregarded by the court, but I think I may say that those cases are not in themselves wholly satisfactory, and that the ground upon which they were decided ought not to be extended so as to be applied to another case when the facts are substantially different. It was contended that logically the present case ought to be decided in the same way as *E. v. Tipton* (*ubi sup.*). But even if a *prima facie* logical deduction from *E. v. Tipton* were to lead to such a decision, yet, as was pointed out by the Lord Chancellor in the case in the House of Lords (*a*), it is often misleading, in dealing with questions of English law, to be guided solely by what may *prima facie* seem to be considerations of logic, and it would not follow that the present case ought to be decided as *E. v. Tipton* was decided. But on looking at the real ground of the decision in that case, it seems to me to be this, that owing to the original parish having been divided into several distinct parishes and so destroyed, the settlement in that parish had also been destroyed. That ground of decision is inapplicable to the present case. Upon the facts stated, I have come to the conclusion that the parish of West Ham has not been destroyed, but that it continues to exist as a parish notwithstanding that what was formerly a portion of another parish has been added to it. That being so, I see no sufficient reason for saying that the present parish of West Ham is not the settlement parish of the pauper lunatic, Elizabeth Heritage. I think, therefore, that the appeal should be dismissed.

MATHEW, L.J.—I agree with what Lord Lindley said in the case of *St. Saviour's Union v. Dorking Union* (*ubi sup.*), that a very narrow construction had been put on the statute of 13 & 14 Car. 2, c. 12, by the judges who decided *E. v. Tipton* (*ubi sup.*) and the cases which followed that decision. They appear to have decided in that case that the parish in question had ceased to exist, and with the parish the settlements in the parish disappeared also. That very narrow construction of the statute was adopted and followed with falter-

(a) In *Quinn v. Leatham* (*ante*, p. 310; 85 L. T. Rep. 289; (1901) A. C. 495), Lord Halebury, L.C. said he wished to make two observations of a general character. One was as follows: "A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

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ing steps by court after court. As the law now stands under the cases that have been referred to, if a parish be divided into two parishes, each different from the original parish and described by a different name, a settlement in the original parish disappears with the parish. It must be borne in mind that the order which has been made by the Local Government Board in this and many other cases was made apparently with the intention of preventing the application of the decision in those cases. The order is made for the maintaining of the old parish with the addition to it of the small slip taken from the other parish. The effect of the argument which has been addressed to us by Mr. Avory would be that both the parish of West Ham and the parish of Wanstead disappeared by reason of the order. To my mind it is clear that the order was framed in such a way as to prevent the possibility of any such result. I therefore agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the union, *Hillearys*.

Solicitor for the London County Council,
W. A. Blaizland.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Nov. 22 and Dec. 16, 1901.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WAKEFIELD CORPORATION (apps.) v. COOKE AND OTHERS (resps.). (a)

Local Government—Private street works—Summary jurisdiction of justices—Decision that road is highway repairable by inhabitants at large—No estoppel—Wakefield Corporation Act 1887 (50 & 51 Vict. c. lxxi.), ss. 29, 30, 31—Private Street Works Act 1892 (55 & 56 Vict. c. 57), ss. 6, 7, 8.

The decision of justices on an objection taken under sect. 30 of the Wakefield Corporation Act 1892 (which is identical with sect. 7 of the Private Street Works Act 1892), that the street in which the works are proposed to be executed is a highway repairable by the inhabitants at large, is not a judgment in rem and will not estop the local authority from subsequently claiming the amount of an apportionment in respect of the same street under proceedings subsequently taken.

Effect and scope of sects. 29, 30, and 31 of the Wakefield Corporation Act 1887 (corresponding to sects. 6, 7, and 8 of the Private Street Works Act 1892) considered.

Reg. v. Hutchins (44 L. T. Rep. 364; 6 Q. B. Div. 300) followed.

CASE stated by justices.

At a meeting of the general works committee of the corporation of Wakefield, held on the 26th Nov., the following resolution was passed:

That in pursuance of sect. 29 of the Wakefield Corporation Act 1887 the corporation do the following private street works in the private street known as Sludge-lane in this city, extending from Eastmoor-road for a distance of 350 yards, namely, sewer, level, metal

flag, kerb, channel, and make good such street; and further, that the city surveyor be directed to prepare as respects such street, and in accordance with the provisions of the said Act—(a) a specification of the private street works above referred to with plans and sections; (b) an estimate of the probable expenses of the works; and (c) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the said Act.

This resolution having been duly approved of at a meeting of the council, the city surveyor on the 11th Jan. 1901 laid before a meeting of the general works committee the specification, plans, and sections, estimate and provisional apportionment which he had been directed to prepare. The committee passed a resolution recommending the council to pass a resolution approving of such specification, plans and sections, estimate and provisional apportionment, and to order that such resolution be published and copies thereof served in the manner required by the Wakefield Corporation Act 1887.

On the 12th Feb. 1901 the corporation resolved that the specification of the private street works required to be carried out in that portion of the private street known as Sludge-lane, extending from the Eastmoor-road for a distance of 350 yards, together with the plans and sections of such works, the estimate of the probable expenses, and the provisional apportionment of the estimated expenses among the premises liable to be charged therewith, which had been prepared by the city surveyor, were approved as required by the Wakefield Corporation Act 1887; and, further, that this resolution was to be published and copies of it served in the manner required by that Act.

This resolution was duly published and copies of it served on the owners of the premises shown as liable to be charged in the provisional apportionment as required by the Act.

Alfred Green, George Stabley, Elizabeth Oradock, Robert Cockell, J. B. Cooke, G. T. Kenworthy, O. B. L. Fernandes, and G. B. Firth, the owners of premises shown in the provisional apportionment as liable to be charged with part of the expenses of the works to be carried out in the street, by separate notices served upon the corporation on the 16th March 1901, objected to the proposals of the corporation on the grounds (a) that Sludge-lane was not and did not form part of a street within the meaning of the Wakefield Corporation Act 1887; and (b) that Sludge-lane was a highway repairable by the inhabitants of the city of Wakefield at large.

The county council of the West Riding of Yorkshire, the owners of certain other premises shown in the provisional apportionment, by notice served on the corporation on the same day, objected to the proposals of the corporation on similar grounds, with the following additional ground, that the street was a highway repairable by the inhabitants at large, and was so found to be by the justices of the city of Wakefield at a court of summary jurisdiction held at Wakefield on the 6th Jan. 1898.

The month during which owners of premises shown in the provisional apportionment as liable with any part of the expenses of executing the works could by written notice object to the proposals of the corporation expired on the 23rd March 1901.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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Messrs. Claude Leatham and Co., as solicitors and agents for the acting executors and trustees of the will of Thomas Nichols, one of the owners shown in the provisional apportionment as liable to be charged with some part of the expenses of the works proposed to be carried out in Sludge-lane, by notice served on the corporation on the 20th April 1901 objected to the proposals of the corporation on similar grounds.

On the 10th July 1901 the corporation, in pursuance of sect. 31 of the Act, applied to a court of summary jurisdiction in and for the city of Wakefield to appoint a time and place for determining the matter of all the objections, and the 25th July 1901 at the Town Hall at Wakefield was appointed for the purposes. At the hearing it was admitted that all the resolutions, plans, and notices had been passed, prepared, published, and given by the corporation in accordance with the provisions of the Act, but the objectors objected that the matter was *res judicata*, and a certified copy of an order of three justices of the city of Wakefield dated the 6th Jan. 1898, which had not been appealed against and remained in full force and effect, was put in.

The order was as follows:

In the city of Wakefield, before the court of summary jurisdiction sitting at the Town Hall in the said city, Jan. 6, 1898.—Whereas the mayor, aldermen, and citizens of the city of Wakefield in exercise of the powers vested in them by virtue of the Wakefield Corporation Act 1887 at a meeting duly held and convened on March 9, 1897, passed a resolution of which the following is a copy: "That the specification of the private street works required to be carried out in the private street commonly known as Sludge-lane in this city, together with the plans and sections of such works, the estimate of the probable expenses of such works, and the provisional appropriation of the estimated expenses among the premises liable to be charged therewith which had been prepared by the city surveyor in accordance with instructions given to him now laid before this meeting, be approved as required by the Wakefield Corporation Act 1887; and, further, that this resolution was duly published, and copies of such resolution were duly served on the owners of the premises shown as liable to be charged in the said provisional apportionment, and whereas in accordance with the provisions of the said Act the following owners—namely, Frederick Simpson, J. B. Cooke, George Stubbley, Thomas Nichols, Robert Cookell, Alfred Green, G. F. Firth, the county council of the West Riding of Yorkshire, and the executors of the late Benjamin Watson—objected to the proposals of the corporation on (*inter alia*) the following ground: 'That Sludge-lane is a highway repairable by the inhabitants of the city of Wakefield at large; and whereas as further required by the said Act the corporation . . . made application to two of Her Majesty's justices of the peace acting in and for the city of Wakefield . . . to appoint a time and place for hearing the matter of the said objections . . . and whereas . . . two of Her Majesty's justices of the peace acting in and for the said city . . . did appoint . . . Monday, December 20, 1897 . . . for hearing and determining the matter of the said objections, from which day the hearing and determining of the matter of the said objections as aforesaid hath been adjourned to this day, and whereas we, the undersigned, sitting as a court of summary jurisdiction in pursuance of sect. 31 of the Wakefield Corporation Act 1887, to hear and determine the matter of all such objections as aforesaid, do hereby determine that the following objection—namely, that Sludge-lane is a highway repairable by the inhabitants of the city of Wakefield at large—made by or on behalf of the said Frederick Simpson, J. B. Cooke, George Stubbley, Thomas

Nichols, Robert Cookell, Alfred Green, G. F. Firth, the county council of the West Riding of Yorkshire, and the executors of the late Benjamin Watson, is a good and valid objection.'

It was admitted as a fact by all the parties that the resolutions, plans, notices, and objections referred to in the application of the 10th July 1901 related not only to so much of Sludge-lane as was the subject-matter of the proceedings of the 6th Jan. 1898, but also to an additional length of eighty yards in a straight line and continuous therewith.

The same objectors were present or represented at the hearing on the 25th July 1901 as were present or represented at the hearing on the 6th Jan. 1898, except Frederick Simpson and Thomas Nichols. Elizabeth Craddock, who objected on the 25th July 1901, was not an objector on the 6th Jan. 1898, although then owning property the subject-matter of the proceedings. The property belonging to Frederick Simpson on the 6th Jan. 1898 was included in the proceedings of the 25th July 1901 as belonging to George Stubbley, by Stubbley having purchased the property from Frederick Simpson in the meantime. Thomas Nichols had died between the 6th Jan. 1898 and the 25th July 1901, and his executors, as owners of the property included in the proceedings of the 6th Jan. 1898, were represented at the hearing on the 25th July 1901. The property belonging on the 6th Jan. 1898 to the executors of Benjamin Watson had been acquired from them by G. T. Kenworthy and C. B. L. Fernandes, and was included in the proceedings of the 25th July 1901, at which they appeared. It was admitted that C. B. L. Fernandes was also present at the hearing on the 6th Jan. 1898, and that he expressed his willingness to be bound by the proceedings on that occasion.

It was contended on behalf of the objectors that as the court of summary jurisdiction had on the 6th Jan. 1898 found as a fact that Sludge-lane was a highway repairable by the inhabitants at large, and had so determined, and that as the subject-matter, namely, as to whether Sludge-lane was a highway repairable by the inhabitants at large, and the parties, namely, the corporation on the one hand and the owners of the property abutting on the road in question on the other, were the same, the matter was *res judicata*, and the corporation were estopped in the present proceedings by the determination of the court on the 6th Jan. 1898.

It was contended for the corporation, on the authority of *Reg. v. Hutchins* (44 L. T. Rep. 364; 6 Q. B. Div. 300), that the court of the 6th Jan. 1898 had no power to try the question whether Sludge-lane was a highway repairable by the inhabitants at large, and that the subject-matter was not the same by reason of the corporation having taken a greater length of road than on the previous occasion, and that the parties were not the same, since some of the property had changed hands since the 6th Jan. 1898, and one owner objected who did not object then. The corporation further urged that since the 6th Jan. 1898 they had discovered and intended to adduce in evidence certain additional facts relevant to the objection that Sludge-lane was a highway repairable by the inhabitants at large.

The justices decided that the matter was *res judicata*, and declined to hear any evidence or go

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into the merits of the objection, but stated this case for the opinion of the court.

The sections of the Wakefield Corporation Act 1887 (50 & 51 Vict. c. lxxi.) relevant to the question in the case are the following, which are practically identical with sects. 6, 7, and 8 of the Private Street Works Act 1892 (55 & 56 Vict. c. 57):

Sect. 29 (1). Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, kerbed, channelled, made good, and lighted to the satisfaction of the corporation, the corporation may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works), that is to say, to sewer, level, pave, metal, flag, kerb, channel, or make good, or to provide proper means for lighting such street or part of a street, and the expenses incurred by the corporation in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street. (2) The surveyor shall prepare as respects such street or part of a street (a) a specification of the private street works referred to in the resolution, with plans and sections (if applicable); (b) an estimate of the probable expenses of the works; (c) a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act. Such specifications, plans, sections, estimates, and provisional apportionments shall comprise the particulars prescribed in part 1 of the 2nd schedule to this Act and shall be submitted to the corporation, who may by resolution approve the same respectively with or without modification or addition as they think fit. (3) The resolution approving the specifications, plans, and sections (if any), estimates, and provisional apportionments shall be published in the manner prescribed in part 2 of the 2nd schedule of this Act, and copies thereof shall be served on the owners of the premises shown as liable to be charged in the provisional apportionment. During one month from the date of the first publication the approved specifications, plans, and sections (if any), estimates, and provisional apportionments (or copies thereof certified by the surveyor), shall be kept deposited at the corporation offices, and shall be open to inspection at all reasonable times.

Sect. 30. During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may by written notice served on the corporation object to the proposals of the corporation on any of the following grounds (that is to say) (a) that an alleged street or part of a street is not and does not form part of a street within the meaning of this Act; (b) that a street or part of a street is (in whole or in part) a highway repairable by the inhabitants at large.

Sect. 31. (1) The corporation at any time after the expiration of the said month may apply to a court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned, and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors, and at the time and place so appointed any such court may proceed to hear and determine the matter of all such objections in the same manner as nearly as may be and with the same powers and subject to the same provisions with respect to stating a case as if the corporation were proceeding summarily against the objectors to enforce payment of a sum of money summarily recoverable. The court may quash in whole or in part or may amend the resolution, plans, sections, estimates and provisional apportionments, or any of them, on the application either of any

objector or of the corporation. The court may if it thinks fit adjourn the hearing and direct any further notices to be given. (2) No objection which could be made under this Act shall be otherwise made or allowed in any court proceeding or manner whatsoever. (3) The costs of any proceedings before a court of summary jurisdiction in relation to objections under this Act shall be in the discretion of the court, and the court shall have power if it thinks fit to direct that the whole or any part of such costs ordered to be paid by an objector or objectors shall be paid in the first instance by the corporation and charged as part of the expenses of the works on the premises of the objector or objectors in such proportion as may appear just.

Macmorran, K.C. (Senior with him).—The only question the justices were entitled to decide in 1898 was whether the resolution brought before them was valid or not. They decided that it was not valid on the ground that Sludge-lane was a highway repairable by the inhabitants at large. This ground of their decision was a mere finding of fact, and was in no sense a judgment at all, or at any rate a judgment *in rem*, settling finally the status of Sludge-lane. The justices had no jurisdiction to decide that question. Therefore the decision as to the resolution in 1898 in no respect made the matter now in question *res judicata* (*Reg. v. Hutchins, sup.*) But even if the justices had jurisdiction to decide the matter, their decision would only be binding between the same parties, and so far as the subject-matter of the proceedings was the same. Here the parties are different, and the subject-matter is not the same portion of Sludge-lane, but the same portion and a further part of that lane.

Danckwerts, K.C. (Alexander Glen with him) for some of the objectors.—*Reg. v. Hutchins (sup.)* was a decision upon the procedure established by sect. 150 of the Public Health Act 1875. In that section no express power is given to the justices to decide whether a road is or is not a highway repairable by the inhabitants at large. All they are entitled to do is to decide whether or not the expenses sued for are recoverable. But under sects. 29 to 31 of the Wakefield Corporation Act 1887 jurisdiction is expressly given to the justices to decide that question. It is made an objection which may be expressly set up, and which the justices may expressly decide, and in sect. 31 (2) their decision is to be final. It is not an incidental question, but the question decided by the justices. Their decision, then, is final as to the status of the road, and estops the reopening of the question in any way. He referred to

Reg. v. Inhabitants of Hartington, 4 E. & B. 780;

Reg. v. Inhabitants of Haughton, 1 E. & B. 501;

Reg. v. Blakemore, 2 Den. C. C. 410.

Compton for other objectors.

Macmorran, K.C. in reply.—Neither the Wakefield Corporation Act 1887 nor the Private Streets Act 1892 altered or was intended to alter the law as laid down in *Reg. v. Hutchins (sup.)*. The object of both was to enable objections to be taken by persons liable before the works were executed and the expenses incurred. He referred to

Tricknam Urban Council v. Munton, 81 L. T. Rep. 136; (1899) 2 Ch. 603.

Dec. 16.—Lord ALVERSTONE, C.J. read the following judgment of the court:—This is an appeal from a decision of the justices of the city of Wakefield deciding that certain proceed-

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ings under the Wakefield Corporation Act 1887, for providing for the expense of paving, metalling, and channelling a certain street of the city were invalid on the ground that in similar proceedings taken in the year 1898 it had been decided by the justices having jurisdiction in the matter that the street to which the proceedings relate was a highway repairable by the inhabitants at large. The matter arises under sects. 29 to 31 of the Wakefield Corporation Act 1887, which contain provisions analogous to those in sect. 150 of the Public Health Act 1875, and practically identical with sects. 6 to 8 of the Private Street Works Act 1892. The point raised for our decision is whether a finding of the magistrate taken under sect. 30 of the Act of 1887 to the effect that a street is a highway repairable by the inhabitants at large is conclusive in any subsequent proceedings for apportionment, whoever may be the parties to the subsequent proceedings. In the case of *Reg. v. Hutchins (sup.)* it was decided by the Court of Appeal that an adjudication by justices upon a summons to recover the amount of an apportionment made under sect. 150 of the Public Health Act 1875, that a street was a highway repairable by the inhabitants at large, did not prevent the local authority from subsequently claiming the amount of apportionment in respect of the same street under proceedings subsequently taken. It was, however, contended before us that the provisions of sect. 31 of the Act of 1887 and the corresponding provisions of sect. 8 of the Private Street Works Act 1892 had altered the law in this respect, that proceedings under these sections were of the nature of proceedings *in rem*, that they affected the status of the street, or that at least they were conclusive and final as between the corporation and the person who either themselves or their predecessors in title had been parties to the earlier proceedings. This contention was based upon the following among other grounds: that under sub-sect. (b) of sect. 30 the owner of premises shown in a provisional apportionment liable to be charged would object upon, among other grounds, that the street in question was a highway repairable by the inhabitants at large, and that under sub-sect. 1 of sect. 31 a court of summary jurisdiction was to appoint a time for determining the matter of all objections, and might proceed to hear and determine the matter of all such objections in the same manner as if the corporation were proceeding summarily against the objectors to enforce payment; and, further, that by sub-sect. 2 of the same section, by which it was provided that "no objection which could be made under this shall be otherwise made or allowed in any suit, proceeding, or manner whatsoever." It was also argued that these provisions show that any objection which could be raised by objectors was to be determined once and for all, not only as regards the apportionment then under consideration, but for the purposes of any future proceedings under the same section. The consequences of such a view are very far-reaching. For example, although some only of the owners liable to be charged may have taken objections, the finding would be held binding upon other owners or persons entitled to object who were no parties to the proceedings. If the justices had power to determine finally and as against all parties that a street was a highway repairable by the inhabitants at large, they must have power to determine that it was not, and in

that case a serious injury might be inflicted, because other owners might be in a position to produce quite different evidence from that on which the decision proceeded. Still, the consequences of giving effect to this contention would not be sufficient to prevent us from so holding if the language of the section fairly read leads to that conclusion. But, in our opinion, the provisions were enacted with an entirely different object, and not, as was suggested, with the view of altering the law as laid down in the case of *Reg. v. Hutchins (sup.)*. We think that the objects of sects. 30 and 31 were to enable objectors to raise objections to the apportionment before any expense had been incurred, and also to enable preliminary points to be determined at an early stage, which could not be raised upon a summons to recover the apportioned amount. Under sect. 150 of the Public Health Act 1875, the urban authority were compelled, before they could take proceedings to recover the amount, to execute the work. The section in question—sect. 30 of the Act of 1887—allows owners to raise questions as to the character of the proposed works, the propriety of the estimate, the sufficiency of the plans, and other matters which, if they are to be raised at all, it is convenient that they should be raised before the works are executed. We think that the real jurisdiction given to the justices is that contained in the concluding words of sub-sect. (1) of sect. 31, to "quash in whole or part or may amend the resolutions, plans, sections, estimates, and provisional apportionments," and that the earlier words, "appoint a time for determining the matter of all objections," and the words "and shall proceed to hear and determine the matter of all such objections," are only intended to enable the justices to determine the questions which, as provided by sect. 30, may be raised by the persons entitled to object. This determination enables the justices to quash or amend or confirm the resolutions, plans, estimates, and provisional apportionments. In this view the reasoning of the Court of Appeal in *Reg. v. Hutchins* applies to this case, and we think that the objection taken on behalf of the objectors, that there has been a previous determination that the street in question was a highway repairable by the inhabitants of the city at large, was no bar to proceedings taken in this case. It is unnecessary to consider the points which were raised on behalf of the appellants.

Appeal allowed.

Solicitors for the appellants, *Sharpe, Parker, and Co.*, for *C. J. Hudson*, Town Clerk, Wakefield.

Solicitors for the first objectors, *Seaton F. Taylor*, for *J. B. Cooke*, Wakefield.

Solicitors for the second objectors, *Radford and Frankland*, for *C. W. L. Fernandes*, Wakefield.

K.B.] *Re* ARBIT. RURAL DIST. COUNCIL OF ST. THOMAS & HEAVITREE URB. DIST. COUNCIL. [K.B.]

Thursday, Jan. 30, 1902.

(Before WRIGHT, J.)

Re AN ARBITRATION BETWEEN THE RURAL DISTRICT COUNCIL OF ST. THOMAS AND THE HEAVITREE URBAN DISTRICT COUNCIL. (a)

Local government—Severance of part of district—Constitution of new district—Adjustment of liabilities—Adjustment and agreement as to existing accounts—Right to claim subsequent adjustment for loss by severance—Local Government Act 1888 (51 & 52 Vict. c. 41), s. 57, sub-s. 1 (c).—Local Government Act 1894 (56 & 57 Vict. c. 73), ss. 54, 68, sub-s. 1.

By an order made by a county council under sect. 57 of the Local Government Act 1888, a part of a rural district was severed from the district and constituted a new urban district, and all necessary adjustments were to be made in accordance with the provisions of sect. 68 of the Local Government Act 1894. An adjustment of accounts was then made and an agreement entered into between the councils providing for the payment of certain sums in respect of matters therein specified, and these sums were paid. Subsequently, the rural council, finding that the severance was a pecuniary loss to them, requested the urban council to come to an agreement as to the amount to be paid for such loss, but the councils were unable to agree and an arbitrator was appointed to determine the question of adjustment of the financial loss sustained by the rural district by the severance of the urban district, in so far as such loss was not determined by the prior agreement. No claim for such loss was included in the prior agreement:

Held, that the adjustment claimed by the rural council was an adjustment within the meaning of sect. 68 of the Local Government Act 1894, although the severed portion had been formed into an urban district of itself and had not been transferred to an existing district; and further that the claim to have such adjustment was not barred by the prior agreement between the councils.

AWARD of an arbitrator stated in the form of a special case.

By the County of Devon (Heavitree) Confirmation Order 1896, being an order under the seal of the Local Government Board confirming, subject to certain modifications and alterations therein appearing, an order of the County Council of Devon, it was ordered that as and from the 24th June 1896 the parish of Heavitree, which formed part of the St. Thomas' Rural District Council, should be severed from the St. Thomas' Rural District, and duly constituted an urban district to be called the Heavitree Urban District; and it was further ordered in clause 7 of the order that "all adjustments necessary in consequence of this order shall be made in the manner provided by and in accordance with the provisions contained in sect. 68 of the Local Government Act 1894, and any sum required to be paid for the purpose of an adjustment or of any award by any authority affected by this order, may be paid out of such funds as shall be determined by the agreement or by the arbitrator."

By an agreement dated the 5th Nov. 1897 and

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

made between the rural district council of St. Thomas (therein called the rural council) in the county of Devon of the one part and the urban district council of Heavitree (therein called the urban council) of the other part, after reciting that the district of the urban council was formerly part of the district of the rural council, but had been severed therefrom, and upon adjustment of the accounts between the two councils there was found to be due from the rural council to the urban council the sum of 908*l.* 11*s.* in respect of the highways, and the sum of 44*l.* 8*s.* in respect of the sanitary account, and there was also found to be due from the urban council to the rural council the sum of 3*l.* 10*s.*, being one-sixth part of the amount paid on precept by the rural council to the Exeter Port sanitary authority from the 28th July 1896 to the 30th Sept. 1897, which sums of 908*l.* 11*s.* and 44*l.* 8*s.* had on or before the execution thereof been paid to the urban council, and which sum of 3*l.* 10*s.* had at the same time been paid to the rural council (the receipt of which sums the two councils thereby respectively acknowledged), and after reciting that the rural council was liable to pay annually the sum of 3*l.* 8*s.* 10*d.* to the clerk and surveyor of the late Ottery St. Mary Highway Board, and the apportionment of that sum falling to the share of the urban council amounted to 10*s.* 8*d.*, and the sum of 12*s.* 5*d.* in respect thereof up to the 30th Sept. 1897 was due from the urban council to the rural council and had been paid, it was witnessed:

(1) That the urban council thereby released the rural council from all claims in respect of the highways and sanitary accounts respectively, and thereby covenanted and agreed to pay annually to the rural council on the 30th Sept. in every year so long as the same was payable the said sum of 10*s.* 8*d.*

(2) The urban council thereby covenanted and agreed with the rural council to pay to them yearly and every year a sum equal to one-sixth of the whole amount paid in that year by the rural council to the Exeter Port sanitary authority.

(3) The rural council thereby covenanted and undertook upon receipt of the said annual payment of 10*s.* 8*d.* to discharge from time to time the above sum of 3*l.* 8*s.* 10*d.*, and did thereby release the urban council from all claims in respect of the sum so paid by the rural council to the Exeter Port sanitary authority as aforesaid.

On the 15th Feb. 1901 the rural district council of St. Thomas by their clerk wrote to the clerk of the urban district council of Heavitree as follows:

I am instructed by this council to write to you as clerk to the Heavitree Urban Council with reference to the loss this rural district has sustained in consequence of the withdrawal of Heavitree from its contributory rateable area by virtue of the order of the county council of March 1896. Experience proves that the loss is considerable, and I beg therefore to invite your council to go into the matter with my council, so that an agreement may be come to under sect. 68 of the Local Government Act 1894, settling the amount which will be paid by Heavitree as compensation for the loss mentioned.

On the 21st Feb. 1901, the urban district council of Heavitree wrote that they had considered the matter with regard to the compensation, and that they did not acknowledge any liability, and that they must therefore decline to accept the invitation of the rural council.

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The rural and urban district councils being unable to come to an agreement on the matters mentioned in the letters, and failing to agree upon some person to act as arbitrator between them in these matters, an order was made on the 5th Nov. 1901 by a master at chambers under the powers contained in sect. 68 of the Local Government Act 1894, appointing an arbitrator "to determine the question of adjustment of accounts between the parties to the extent to which the rural district council of St. Thomas have been financially damaged by the withdrawal of the parish of Heavitree from the rural district council of St. Thomas, so far as such question is not determined by the agreement of the 5th Nov. 1897."

By an agreement of the 6th Dec. 1901, made between the rural district council of St. Thomas and the urban district council of Heavitree, after reciting that the rural district council had made an approximate statement or claim in writing dated the 25th June 1901 against the urban district council, setting forth the amount and also the capitalised loss sustained by them in consequence of the severance of the district of the Heavitree Council from that of the St. Thomas' Council, and that there had been an examination of the statement or claim and the accounts on which the same was based, it was settled and agreed by the two councils in order to facilitate and shorten the proceedings under the arbitration—

(1) That the annual loss of the St. Thomas' Council as aforesaid should be admitted and agreed at the net sum of 100*l.*, such admitted loss being attributable to highways. (2) That the St. Thomas' Council should waive so much of its claim as arose under the Public Health Acts. (3) That this agreement was without prejudice to the contention of the Heavitree Council (denied by the St. Thomas' Council) that the claim was barred by the agreement dated the 5th Nov. 1897.

The two councils, by their counsel and witnesses attended before the arbitrator on the 17th Dec. 1901.

The rural district council of St. Thomas claimed from the urban district council of Heavitree the sum of 3000*l.*, being thirty years' purchase of the above sum of 100*l.*, agreed upon as the annual loss to the rural council by such severance as aforesaid.

On behalf of the urban district council of Heavitree it was contended that—(1) The portion severed from the St. Thomas district (namely, the Heavitree Urban District) having itself been formed into and constituted an urban district, and not transferred from one existing district council to another existing district council, there was no case for adjustment within the provisions of sect. 68 of the Local Government Act 1894; (2) the agreement of the 5th Nov. 1897 was a bar to the claim made in this arbitration; (3) in any event no sum should be awarded to be paid to the St. Thomas' Rural District Council in respect of the claim in this arbitration.

The arbitrator found the following facts: (1) At the date of the agreement of the 5th Nov. 1897—(a) Both the councils were aware that the severance of the parish of Heavitree would be a considerable loss of income to the rural district council of St. Thomas; (b) No claim other than appears by the above agreement was made or put forward for such loss of income occasioned by the

severance; (c) Neither council was aware that the rural district council of St. Thomas had any right or power to make any such claim as was made in this arbitration. (2) The matters in respect of which the claim was made in this arbitration were not referred to or included in the agreement of the 5th Nov. 1897.

The questions for the opinion of the court were: (1) Whether the adjustment claimed in this arbitration was an adjustment within the meaning of sect. 68 of the Local Government Act 1894, having regard to the fact that the portion severed from the rural district of St. Thomas (namely, the urban district of Heavitree) had been formed into and constituted an urban district and had not been transferred from one existing district council to another existing district council; (2) Whether the agreement of the 5th Nov. 1897 was a bar to the claim made by the rural district council of St. Thomas in this arbitration.

If the court should be of opinion in the negative on the first question, or in the affirmative on the second question, then the arbitrator found and awarded that the rural district council of St. Thomas was not entitled to recover anything against the urban district council of Heavitree, and he awarded and directed that the rural district council of St. Thomas should pay to the urban district council of Heavitree the costs of the reference, including the costs of and incidental to the preparation of the agreement of the 6th Dec. 1901, and also the costs of this award.

If the court should be of opinion in the affirmative on the first question and in the negative on the second question, then the arbitrator found and awarded that the urban district council of Heavitree should pay to the rural district council of St. Thomas the sum of 2375*l.* and interest on the same sum at the rate of 3½ per cent. per annum from the 15th Feb. 1901 until payment of the above sum of 2375*l.*, and that the parties should each bear their own costs of this reference, including the costs of and incidental to the preparation of the agreement of the 6th Dec. 1901, and should pay one-half the costs of this award, and that if either party should in the first instance pay the whole or more than the one-half of the costs of this award, the other party should repay them so much of the amount as should exceed the one-half of the costs.

The Local Government Act 1888 (51 & 52 Vict. c. 41) provides:

Sect. 57 (1). Whenever a county council is satisfied that a *prima facie* case is made out as respects any county district not a borough, or as respects any parish, for a proposal for all or any of the following things; that is to say . . . (c) the conversion of any such district or part thereof, if it is a rural district, into an urban district, and if it is an urban district, into a rural district, or the transfer of the whole or any part of any such district from one district to another, and the formation of new urban or rural districts; the county council may cause such inquiry to be made in the locality, and such notice to be given, both in the locality, and to the Local Government Board, Education Department, or other Government department, as may be prescribed, and such other inquiry and notices (if any) as they think fit, and if satisfied that such proposal is desirable, may make an order for the same accordingly. (3) In any other case the order shall be

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submitted to the Local Government Board, &c. (5) The Local Government Board, on confirming an order, may make such modifications therein as they consider necessary for carrying into effect the objects of the order.

The Local Government Act 1894 (56 & 57 Vict. c. 73) provides:

Sect. 54 (1). Where a new borough is created, or any other new urban district is constituted, or the area of an urban district is extended, then—(a) as respects any rural parish or part of a rural parish which will be comprised in the borough or urban district, provision shall be made, either by the constitution of a new parish or by the annexation of the parish or parts thereof to another parish or parishes, or otherwise, for the appointment of overseers and for placing the parish or part in the same position as other parishes in the borough or district, and (c) provision shall also, where necessary, be made for the adjustment of any property, debts, and liabilities, affected by the said creation, constitution, or extension. (2) The provision aforesaid shall be made—(c) Where any other new urban district is constituted by an order of the county council under sect. 57 of the Local Government Act 1888.

Sect. 68 (1). Where any adjustment is required for the purpose of this Act, or of any order, or thing made or done under this Act, then, if the adjustment is not otherwise made, the authorities interested may make agreements for the purpose, and may thereby adjust any property, income, debts, liabilities, and expenses, so far as affected by this Act, or such scheme, order, or thing, of the parties to the agreement. (2) In default of an agreement, and as far as any such agreement does not extend, such adjustment shall be referred to arbitration in accordance with the Arbitration Act 1889, and the arbitrator shall have power to disallow as costs in the arbitration the costs of any witness whom he considers to have been called unnecessarily, and any other costs which he considers to have been incurred unnecessarily, and his award may provide for any matter for which an agreement might have provided.

The order made by the county council, after reciting sect. 57 of the Local Government Act 1888 and sect. 54 of the Local Government Act 1894, and that the parish of Heavitree formed part of the St. Thomas' Rural District, and that the county council, being satisfied that a *prima facie* case was made out for a proposal for the conversion of the parish of Heavitree into an urban district, had duly caused an inquiry to be made in the locality, and had given the requisite notice, and were satisfied that the conversion of the parish into an urban district was desirable, provided that the parish of Heavitree should be an urban district, and should be called the Heavitree Urban District.

The order was submitted by the county council to the Local Government Board for confirmation under the provisions of sect. 57, sub-sect. 3 of the Local Government Act 1888, and was confirmed subject to certain modifications.

Macmorran, K.C. (*B. Cunningham Glen* and *Jenkin* with him) for the rural district council of St. Thomas.—The adjustment claimed in this case is an adjustment within sect. 68 of the Local Government Act 1894. The order was made by the county council under sect. 57 of the Local Government Act 1888, and that is really the section under which the constitution of this urban district is provided for. It gives the county council power, in sub-sect. 1 (c), to convert a rural district or any part thereof into an urban district, or an urban district into a rural district. Sect. 68 of the Act of 1894 pro-

vides for adjustment of property and liabilities, and enacts that where any adjustment is required for the purpose of the Act, or of any order or thing done under the Act, the authorities interested may make agreements for the purpose, and may thereby adjust any liabilities so far as affected by the Act. In *Re an Arbitration between Buckinghamshire County Council and Hertfordshire County Council* (80 L. T. Rep. 85; (1899) 1 Q. B. 515) it was held that where, by an order under the Local Government Act 1888, part of one county was transferred to another county and the part so transferred contained no county bridges and no main roads, the arbitrator had power to award a sum of money in respect of the loss to the county of an area which contributed to expenditure on bridges and roads without involving the county in any corresponding outlay on its own account. This principle was very soon afterwards affirmed by the Court of Appeal, in *Re an Arbitration between Rochdale Union and Haslingden Union* (80 L. T. Rep. 146; (1899) 1 Q. B. 540), where it was held that there was a case for adjustment, and Lord Russell, C.J. dealing with the question whether the case was one for adjustment between the two unions, said: "The taxation of that area" (that is, the area taken away) "was a gain to the union, because the character of the district taken away was such that the union got more out of the district in rates than was required to be expended on that portion of the union for its poor. It is said that Haslingden Union has got the benefit of this, and that an adjustment ought to take place; and, in my view, that contention is right." The former case was an adjustment under sect. 62 of the Act of 1888, and the latter case was under sect. 68 of the Act of 1894, which is similar to sect. 62. In this case there has been a rateable area—namely, Heavitree—taken away from the St. Thomas district, and the part so taken away was a source of profit to the St. Thomas' district. Therefore the principle of the two cases cited would apply if Heavitree had been added to another existing district—if, for instance, it had been transferred to Exeter, instead of having been constituted a separate area or district of itself. There is no difference in principle whether the separated area be added to another existing district, or be constituted a new district of itself. In either case the parts are equally affected, and therefore they are in the same position. With regard to the second point, the agreement of the 5th Nov. 1897 is no bar to the present claim. It does not purport to be a settlement of all differences in the case, but only of certain claims in respect of highways and sanitary accounts. It is said that the Act contemplates one adjustment and no more; but by sect. 62 of the Act of 1888 the councils affected by the order "may from time to time make agreements for the purpose of adjusting any liabilities," so that there may be a series of agreements and a series of adjustments; and the Act of 1894 is still more explicit. Therefore the case is one for adjustment, and if so, the principle of the above cases applies although Heavitree was constituted a separate district, and the agreement is no bar to the claim.

C. A. Russell, K.C. (*Roskill* with him) for the Heavitree Urban District Council.—Dealing with the question whether the facts show a case for

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adjustment within the Act of 1894, all that the two cases cited decide, and the whole gist of them, is that where you have a transfer of something from one county to another county, or from one authority to another authority, and where that something which is transferred is a source of income or profit to the one from which it is taken, then there is a case for adjustment under these Acts. That principle is made perfectly clear by Wills, J. in *Re an Arbitration between Buckinghamshire County Council and Hertfordshire County Council* (80 L. T. Rep. at p. 89), and later on he says: "Justice in such a case means at the very least that neither county shall obtain any material advantage at the expense of the other. . . . In the present case, if it be true that the transferred area is such as to contribute much to, but to take little out of, the common fund, justice requires that the county which loses it should be paid something by the county which gains it. How much is for the arbitrator to say." The *ratio decidendi* is that on one side there is a loss and on the other side a corresponding gain. That has no application here. There was no advantage gained by Heavitree at the expense of the St. Thomas' district, and therefore we have here none of the facts which were said by Wills, J. to be the reasons for his judgment; and the same principle is laid down by Lord Russell, C.J. and Smith, L.J. in the *Rochdale* case (*ubi sup.*). What was there held to give rise to a case for adjustment was that what was taken away from Rochdale and given to Haslingden was a loss or detriment to Rochdale and a gain or advantage to Haslingden. Those two elements are necessary, and they are not present in this case. Those decisions, therefore, ought not to be applied to such a case as this, where the separated part is constituted a new district, and there ought to be no adjustment. With regard to the second point, as to whether it is competent for the rural council to put forward this claim, having regard to the fact of the agreement made on the 5th Nov. 1897 the two parties met in 1897 for the purpose of adjusting their liabilities, and it ought to be now held that where the parties, with full knowledge of the facts, and in the belief on both sides that the whole matters were being adjusted, made an agreement, and on that agreement made an adjustment, it ought not to be competent for them to reopen the matter and have a second adjustment. Upon both grounds the urban council are entitled to succeed.

WRIGHT, J.—I think there is nothing in the last point raised as to whether the agreement of the 5th Nov. 1897 is a bar to the claim made in this case. The agreement of the 5th Nov. 1897 appears to me to be plainly confined to a settlement of the existing accounts when there were liabilities which the undivided district was already under an obligation to pay; and I do not think that the existence of that agreement precludes the claimants here from putting forward this claim. I think it is material to notice what counsel for the claimants pointed out, that the order for the division of the district, and the constitution of the urban district out of part of the rural district, was made under the Local Government Act 1888, s. 57, and sect. 62 of that Act therefore applies to this extent, that it authorises the parties from time to time to make agreements. I think that is a guide to what the

Legislature meant, and the fact of the Local Government Board having applied sect. 68 of the Local Government Act 1894, does not of itself show that the parties are precluded from making a further claim by arbitration because they had before that time already settled their differences by agreement. It seems to me plain that in these cases there may constantly be a necessity for a supplemental agreement; and I think it would be very unfortunate if there were any language in these Acts which absolutely bound the parties by the result of an agreement, or arbitration, undertaken very likely to deal with urgent matters, and undertaken and concluded before the parties had had time to ascertain what their relative positions were. Nor can I see any sufficient defence against this claim for adjustment in the suggestion that this is not the case of a transfer of a district from one existing body to another existing body, but is the constitution of a portion of the district into a separate Local Government Board unit. Both of these cases are in one sense transfers, and the order of the Local Government Board applies sect. 68 of the Act of 1894, so that I cannot see that there is anything in that point. Then comes the main and real question. Certainly I find great difficulty in believing that any such contention as is here put forward for the claimants, the rural district council, was ever intended by Parliament. The words used are no doubt wide enough, and no doubt properly and intentionally wide enough, to include any possible adjustment, because any sort of adjustment may arise in a particular case, and if so, it must be provided for and covered. For instance, where there is any kind of a joint rate, or where a burden has been undertaken by one of the joint districts which would not fall within it, but would be undertaken by it for the benefit of the other, the words must be wide enough to deal with a case of that kind. Therefore I do not see how the Act could have been drawn not wide enough to cover a case where there is no joint rating and no burden undertaken for a consideration given as in this case. One of the main reasons for constituting an urban district out of part of a rural district very often is that it is unfair to make one part pay for the expensive works and arrangements necessary for the other part. The populous part of a district wants better sewerage and lighting, which the rural part does not want, and they divide for the very purpose of leaving the populous part to bear its own cost, which is for its own benefit; but here the rural council turn round to the urban council and say: "We used to levy rates on you; now pay us something because we have gone away from you." In view of the decision of the Court of Appeal in the case of *Re an Arbitration between Rochdale Union and Haslingden Union* (*ubi sup.*), I cannot say that it is impossible that such a claim can be maintained. Lord Russell, C.J. says (80 L. T. Rep. at p. 148; (1899) 1 Q. B. at p. 544): "The substantial cause of complaint of the Rochdale Union is that there has been taken away from it a portion of the rateable area formerly comprised in it. The taxation of that area was a gain to the union, because the character of the district taken away was such that the union got more out of the district in rates than was required to be expended on that portion of the union for its poor. It is

said that Haslingden Union has got the benefit of this, and that an adjustment ought to take place; and, in my view, that contention is right." Then Smith, L.J. says: "It is a case of a detriment to one union and an advantage to the other; and, in my opinion, it is a case which comes within sect. 68, as it certainly does within sect. 36." In view of these expressions of opinion I have only one course open to me, and that is to say that it is not impossible that such a claim as this can be maintained. That is all I can deal with. Unfortunately the two authorities here have come to an agreement as to an amount to be paid which I should have thought it impossible that any arbitrator could ever have arrived at. I should have thought that if the section meant that any contribution should be made, it ought only to be a nominal one, unless there were some consideration for it; but, of course, I cannot deal with that. There may have been reasons why the parties thought that there was good ground for awarding a substantial sum; but as they have agreed on that point I cannot deal with it in any way. It may possibly be that in future cases of this kind the Local Government Board may think it right to deal with the matter themselves, as they have power to do under sect. 59, sub-sect. 4 of the Local Government Act 1888. I see no reason why they should not deal with this case. They can deal with part of the arrangements as well as with the whole, and I should be very much surprised if they lay down any such general rule as that which is involved in this claim. As the matter stands, I must give judgment on the case for the claimants.

Judgment for the claimants.

Solicitors for the Rural District Council of St. Thomas, Coode, Kingdon, and Cotton, for Arthur E. Ward, Exeter.

Solicitors for the Heavitree Urban District Council, Gears and Pease, for J. W. W. Mathew, Exeter.

Oct. 31, Nov. 1, 1901, and Jan. 11, 1902.

(Before WALTON, J.)

URBAN DISTRICT COUNCIL OF ESHER AND THE DITTONS v. MARKS. (a)

Highways—Repair ratione tenuræ—Writ ad quod damnum—Inquisition—Presumed licence from Crown—Stopping up old highway—Obligation imposed on owner and his assigns to make and repair new road—Liability to repair ratione tenuræ—Local Government Act 1894 (56 & 57 Vict. c. 73), s. 25, sub-s. 2.

A grant of a licence by the Crown to the owner of lands to stop up and inclose for the benefit of himself and his heirs a public highway through his lands, imposing at the same time a condition that the owner should make a new road through his lands, and that he, his heirs and assigns, should keep the new road in repair, establishes against the grantee, who has acted upon the grant by stopping up the old road, an obligation ratione tenuræ to repair the new road, and it is immaterial whether such grant was made before or after the reign of Richard I., the period of legal memory. In such case the liability to repair is charged upon the heirs and assigns of

the lands, and if the lands become divided among several persons the alienee and occupier of each and every part of the lands is liable to the whole charge.

Upon an inquisition taken in 1773 under a writ of ad quod damnum the jurors presented that the King should grant to O., the owner of certain lands through which passed an old highway for horses, carts, carriages, and foot passengers, a licence to inclose and stop up the old highway and hold the same when so stopped up to him and his heirs for ever, upon the condition that O. did in his own land make and set out another road equally fit and convenient for horses, carts, carriages, and foot passengers, and that such new road should be for ever thereafter kept in proper repair by O., his heirs and assigns. The old road was stopped up and inclosed, and the new road set out pursuant to the inquisition, and has ever since been used as a highway, although at some period it was stopped up at one end for horses, carts, and carriages, and became a cul de sac for traffic of that kind, but it was always used as a highway for foot passengers. No licence from the King pursuant to the terms of the inquisition could be found, and if any such licence was granted it appeared to have been lost.

In an action against the owner and occupier of part of the lands formerly belonging to O. for the expenses of repairing the substituted highway on the ground of a liability to repair the same ratione tenuræ:

Held, that a licence from the King incorporating the conditions of the inquisition must be presumed in fact to have been granted; that the substituted road was laid out pursuant to such inquisition and licence; that the road was still a public highway, notwithstanding the changes in it, and that the defendant was an "assign" of O. within the meaning of the inquisition, and that as such "assign," and by reason of his tenure and occupation of the lands, he was liable for the repair of the highway, although he was an assign of part only of the lands formerly belonging to O.

ACTION tried before Walton, J. without a jury.

The action was brought to recover the sum of 137l. 10s. 5d. incurred by the plaintiffs as the urban district council of Esher and the Dittons and the highway authority for the district for the repair of a certain highway known as Ember-lane, which led from Bridge-road, Thames Ditton, westward to the bank of the river Ember, and which the plaintiffs alleged the defendant was liable to repair ratione tenuræ.

The statement of claim was shortly as follows:

The defendant was the occupier and owner of certain lands and tenements called Ember Court, in the parish of Thames Ditton, and by reason of his tenure and occupation of those lands and tenements ought to have repaired the aforesaid highway when and so often as there was occasion to do so.

The liability of the defendant was as the owner and occupier of lands formerly belonging to one George Onslow, and existed under and by virtue of a writ of ad quod damnum of the 6th Oct. 1773, directed to the sheriff of Surrey and the inquisition duly taken in pursuance thereof and the return made thereto, which writ and return were

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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duly enrolled with the Clerk of the Peace of the County of Surrey by order of the justices, dated the 10th Jan. 1774, and the licence granted by the Crown in consequence thereof to George Onslow to inclose and stop up and to hold so inclosed and stopped up to him, his heirs and assigns, as part of the lands a certain highway, being the highway in the writ mentioned, upon the terms and subject to the liability that George Onslow did in his own lands and soil set out in lieu of the highway another road known as Ember-lane, and that such new highway was to be for ever thereafter kept in good and sufficient repair by George Onslow, his heirs and assigns, and which first-named highway was stopped up and inclosed and ever since held by George Onslow, his heirs and assigns, as part of his lands known as the Ember Court Estate, of which Ember Court is part.

The plaintiffs also claimed in the alternative that such liability arose from a lost grant whereby the lands known as Ember Court were formerly granted to be holden by the service of repairing the highway now in question, and that such grant was to be presumed from the fact that the defendant and those who occupied the lands before him had from time out of memory been accustomed to repair the highway.

In April 1900 it was reported to the plaintiffs by a competent surveyor that the highway, Ember-lane, was not in proper repair, whereupon the plaintiffs, under sect. 25, sub-sect. 2, of the Local Government Act 1894, requested the defendant as the person liable to repair the same, to properly repair the highway, which the defendant failed to do, whereupon the plaintiffs repaired the highway, and incurred expenses to the amount of 137l. 10s. 5d., which the plaintiffs under the above statute were entitled to recover from the defendant.

The defendant in his statement of defence admitted that from the 29th Sept. 1899 to the 24th Oct. 1900 he was the owner (but not the occupier) of Ember Court, part of the lands formerly belonging to Mr. Onslow, but he denied that Ember-lane was a highway, or that he was the person liable to repair it *ratione tenuræ* within the meaning of the Act of 1894, or otherwise.

He admitted that the writ, inquisition, and return were respectively issued, taken, and made, but not that the licence mentioned in the statement of claim was granted.

He denied that the lost grant ever existed or was capable of existing, or ought to be presumed; and that if the alleged liability arose from a lost grant, the plaintiffs were not parties or privies to such grant or successors in title to the grantor (if any), or entitled to sue in respect of such grant, and that the powers conferred by sect. 25 (2) of the Local Government Act 1894 would not in that case be applicable; and he denied that he or those who occupied the lands, or Mr. Onslow or his heirs or assigns, had ever repaired the road, and that no attempt had been made to enforce the alleged liability until this action.

He further alleged that if Ember-lane was still a highway it was so for foot-passengers only, and that as a footpath it was in proper repair when he was requested to repair it; that under the return to the writ of *ad quod damnum* the liability (if any) of George Onslow, his heirs, and assigns was to repair a road fit and convenient for horses, carts, carriages, and foot-passengers to pass and

repass through the same: that before the defendant became owner of Ember Court the road had, with the knowledge and acquiescence of the plaintiffs, or of the highway authority for the time being, but not through any act or default of the defendant or any of his predecessors in title, become incapable of being used by horses, carts, and carriages, and it had become a *cul de sac*; and that therefore the liability under the return to the writ was thereby extinguished, or only survived in respect of the footpath.

The writ of *ad quod damnum*, the inquisition, and order of quarter sessions for its enrolment were put in at the trial, and evidence was given of some repairs having been done to the new road by predecessors in title of the defendant. It was admitted that the defendant was during the material times the owner and occupier of Ember Court, which formed part, but part only, of the Ember Court Estate formerly belonging to Mr. Onslow, said to be the Speaker of the House of Commons.

At some period between the date of the inquisition and the time now in question Ember-lane had been stopped up at one end for horses, carts, and carriages, but was open at the other end for such traffic, and it was and remained a public highway for foot passengers at both ends. It was a *cul de sac* so far as horse and carriage traffic was concerned.

The facts and the section of the Act (sect. 25, sub-sect. 2 of the Local Government Act 1894) under which the action was brought are set out in the judgment.

The writ of *ad quod damnum* was as follows:

George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith. To the Sheriff of Surrey greeting. We command you that by the oath of honest and lawful men of your county, by whom the truth of the matter may be best known, you diligently inquire whether or no it be to the damage or prejudice of us or of any other if we should grant to George Onslow, Esqre., licence to inclose and stop up and hold so inclosed and stopped up to him and his heirs that part of the common highway for horses, carts, carriages, and foot passengers leading from the townships or villages of Esher and Thames Ditton towards Ember Mills, East Moulsey and West Moulsey, which lies in the said parish of Thames Ditton, between the lands of the said George Onslow called the Lawn, in his own occupation, and the lands of the said George Onslow in the occupation of Edward Hopkins on the south, south-west, and west parts thereof and other lands of the said George Onslow there in the occupation of Edward Hopkins on the north, north-east, and east parts thereof, containing in length three hundred yards or thereabouts and in breadth twenty feet or thereabouts. To hold the same when so inclosed to him the said George Onslow and his heirs for ever, so that the said George Onslow doth in his own land and soil set out in lieu thereof another road as convenient and commodious for passengers through the same. And if it will be to the damage or prejudice of us or of any other Then to what damage or to what prejudice of us and to what damage or to what prejudice of any other and of whom and how and in what manner and how much that way to be hold doth contain by number of perches or feet of land as well in length as breadth. And that you return the inquisition thereof distinctly and plainly made without delay into our Chancery under your seal and the seals of those by whom it shall be so taken, together with this writ. Witness ourself at Westminster the 6th day of October in the thirteenth year of our reign by

Edward Thurlow, Attorney-General to Our Lord the King.

The execution of this writ appears by the inquisition hereunto annexed.

RICHARD EARL BEDFORD, Esqre., Sheriff.

Copy of inquisition :

Surrey.—An Inquisition indented taken at Thames Ditton, in the county of Surrey, on the 11th day of October in the thirteenth year of the reign of our Sovereign Lord George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, &c., and in the year of our Lord, one thousand seven hundred and seventy-three, before me, Richard, Earl Bedford, Esqre., sheriff of the said county by virtue of a writ of our Sovereign Lord the King, to me directed, and to the said inquisition annexed, upon the oath of Stephen Digby of Thames Ditton, Esqre., Henry Dodwell of West Molesey, Esqre., Walter Chetwynd of West Molesey, Esqre., Thomas Sutton of West Molesey, Esqre., Richard Barwell of Esher, Esqre., John Freeland of Cobham, Esqre., Thomas Willett of East Molesey, gentleman, Charles Carpenter of West Molesey, gentleman, Joseph Tealing of Thames Ditton, gentleman, William Parker of Esher, gentleman, Francis Gildart of Thames Ditton, gentleman, Thomas Davis of Thames Ditton, gentleman, Richard Whiting of Thames Ditton, gentleman, and John Brooks of Thames Ditton, gentleman, honest and lawful men of my bailiwick who, having been sworn and upon their oath charged to inquire into the matter and things in the said writ specified and directed to be inquired of, do thereupon say that it will not be to the damage or prejudice of our Sovereign Lord the King, or of any other, if our Sovereign Lord the King should grant to George Onslow, Esqre., licence that he the said George Onslow may inclose and stop up that part of the common highway for horses, carts, carriages, and foot passengers, leading from the townships or villages of Esher and Thames Ditton towards Ember Mills, East Molesey, and West Molesey, which lies in the said parish of Thames Ditton between the lands of the said George Onslow called the Lawn in his own occupation, and the lands of the said George Onslow in the occupation of Edward Hopkins on the south, south-west, and west parts thereof, and other lands of the said George Onslow there in the occupation of Edward Hopkins on the north, north-east, and east parts thereof, containing in length three hundred yards or thereabouts, and in breadth twenty feet or thereabouts, to hold the same when stopped up to him the said George Onslow and his heirs for ever, so that instead thereof he the said George Onslow doth in his own land and soil make another road, or that there do remain another road as fit and convenient for horses, carts, carriages, and foot passengers, to pass and repass through the same. And the said jurors upon their oath further say that it will not be to the damage or prejudice of our Sovereign Lord the King, or of any other, if our Sovereign Lord the King do grant to the said George Onslow such license as aforesaid, if the said George Onslow doth in his own lands and soil set out in lieu thereof another road as the same as now marked out (that is to say) of the width of twenty-eight feet, including the ditch on each side, beginning opposite the footbridge over the river Mole next below the mills in the said parish of Thames Ditton, called Ember Mills, and entering a field of the said George Onslow in the occupation of Edward Hopkins, north of the messuage and garden in the occupation of Joseph Tealing, and going through that field eastward into another field of the said George Onslow in the occupation of the same Edward Hopkins, and going through the same eastward into the present high road leading to Hampton Court Bridge towards Esher, such new road to be made with ample sweep at each end and to be for ever hereafter kept in good and sufficient repair by the said George Onslow, his heirs and assigns, and the said Jurors further say that the

said new road will be as convenient and commodious for horses, carts, carriages, and foot-passengers passing along the same as the said road so to be inclosed and stopped up, and that the said road so to be inclosed and stopped up doth contain in length eighty perches or thereabouts, and in breadth twenty-six feet or thereabouts. In testimony whereof as well I the said Sheriff as the said Jurors have hereunto severally put our seals the day and year first above written.

Surrey.—Memorandum that at the General Quarter Sessions of the Peace of our Sovereign Lord the King, holden at Southwark, in and for the county aforesaid, on Tuesday in the week next after the close of Epiphany, to wit, on Tuesday, 11th day of January, in the fourteenth year of the reign of our Sovereign Lord George the Third, King of Great Britain, &c., before Sir Joseph Mawbey, Baronet, John Mawbey, John Fassett, Samuel Swaby, Esquires, and others their fellows, Justices of our said Lord the King, assigned to keep the peace and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county.

The inquisition and return hereunto annexed were by order of the said Court entered and recorded by the Clerk of the Peace of the said county amongst the records of the said Session, according to the Act of Parliament in that case made.

LAWSON, Cl. of the Peace for Surrey.

Examined with the record by Chas. Deaves, one of the Clerks of the Petty Bagge.

Macmorran, K.C. (Manisty, K.C. with him) for the plaintiffs.—The liability which the plaintiffs now seek to enforce is a liability arising under sect. 25, sub-sect. 2 of the Local Government Act 1894, by reason of the defendant's tenure of Ember Court. The plaintiffs claim that such liability exists by virtue of the writ of *ad quod damnum* and the inquisition taken in pursuance of such writ, and in the alternative by virtue of a lost grant whereby these lands were formerly granted to Mr. Onslow on the condition of repairing this highway. To the suggestion that no grant can be produced or ought to be presumed, there are two answers, first, that by the Act of 1773 (13 Geo. 3, c. 78) the necessity for a licence was taken away; and, secondly, having regard to the fact that the new road exists, the Court will presume a legal origin for that state of things. As to the necessity for a licence, sect. 19 of 13 Geo. 3, c. 78 (since repealed), provided that the new highway so set out should be for ever a public highway to all intents and purposes; so that under that Act the licence of the Crown became absolutely unnecessary provided that the proceedings were properly taken and there was no appeal. The date of the inquisition was in 1773, and the next quarter sessions was in Feb. 1774, so that that Act would apply to the inquisition. As to the question of presumption, it must be presumed that all the formalities were duly complied with.

Leigh Urban District Council v. King, ante, p. 96; 83 L. T. Rep. 777; (1901) 1 Q. B. 747.

Phillimore, J., there says that in such cases even an order of quarter sessions might be presumed, which exactly applies here. Therefore the licence from the King may, if necessary, be presumed to have been granted, and under the writ and inquisition the liability was imposed on Mr. Onslow, his heirs, and "assigns" to maintain and keep in repair this new and substituted road. The next point is that, assuming that this was a road which Mr. Onslow, his heirs, and assigns were bound

to repair, that is a liability which falls on all his assigns. The "assigns" of Mr. Onslow who are mentioned in the inquisition, and who are made liable for the repair of the new road, are assigns of the lands through which the road was made, and that includes the assigns of any and every part of such lands, so that an assign of any part of such lands is liable for such repair. Embury Court as occupied by the defendant was part of the lands formerly belonging to Mr. Onslow. The defendant is an assign of the lands at one side of the road; he is one "assign" of the lands, and is therefore liable as such, although he is not the assign of the whole of such lands:

Mayor, &c. of Lyme Regis v. Henley, 1 Bingh. N. C. 222.

When charges of this kind are imposed on land with conditions attached, as in this case, the conditions attach to every part of the land, and it cannot be said that the charges are to be apportioned:

Reg. v. Duchess of Buccleugh, 1 Salk. 358.

The subsequent division of the lands does not affect the liability, which attaches to all these lands held by Mr. Onslow, and the division amongst several assigns would cast the liability on each and every assign, and the liability can be enforced against any assign of any part of the lands:

Pratt on Highways, 14th edit., p. 60.

The next point is as to the stopping up of the road at one end for horse and carriage traffic, and the suggestion in the defence is that by reason of the change in the road and the stopping of it up at one end it has ceased to be a highway, and the liability to repair it *ratione tenuræ* is gone altogether. There is no authority for that suggestion. If a highway be legally stopped up at both ends it then ceases to be a highway (*Bailey v. Jamieson*, 34 L. T. Rep. 62; 1 O. P. Div. 329); but the stopping up of one end of a highway does not make it cease to be a highway: (per Lord Coleridge, C.J., *ibid.*). The road is still a highway although it is stopped up at one end for horses and carts and is a *cul de sac*:

Per Alderson, B. in *Gwyn v. Hardwicke*, 25 L. J. 97, M. C.; 1 H. & N. 49;

Re v. Marquis of Downshire, 4 A. & E. 698;

Reg. v. Burney, 31 L. T. Rep. 828.

If the highway were practically destroyed the liability to repair it *ratione tenuræ* would cease:

Per Lord Coleridge, C.J. in *Reg. v. Barker*, 62 L. T. Rep. 578; 25 Q. B. Div. 213.

There has been nothing of the kind here, and the only suggestion that can be made is that at some period there has been some encroachment on the road, which does not affect the matter. If the liability once existed, no length of time would affect it; there is no statute of limitations in such a case, and the mere failure to enforce the liability does not extinguish it. The plaintiffs rely on the inquisition, and not on the repairs from time immemorial.

Robson, K.C., and *G. F. Hart* for the defendant.—The plaintiffs are proceeding under sect. 25 (2) of the Act of 1894. Their proceeding is entirely misconceived. They rely on the inquisition and licence as proving a liability *ratione tenuræ*, but, in the first place, this is not a case of repairing the road *ratione tenuræ* at all; the

repair (if any) by the defendant's predecessors in title was a repair not by reason of the tenure of the lands, but by reason of the agreement or licence. There is no definition of what repair *ratione tenuræ* means; but if the defendant is right in saying that this is not a repair *ratione tenuræ*, then the plaintiffs are wrong in proceeding under sect. 25 (2) of the Act of 1894: (Pratt on Highways, 14th edit., p. 334). They ought to have proceeded under sect. 34 of the Highway Act 1862. The words "or otherwise howsoever" in that section are wide enough to include this case. That section remains good, but is modified by the section in the Act of 1894, under which the plaintiffs are proceeding. Sect. 25 (2) of the Act of 1894 refers alone to repairs *ratione tenuræ*; and except as to these, the provisions in sect. 34 of the Act of 1862 stand, and under these provisions the highway authority must go before justices for an order. An obligation to repair *ratione tenuræ* can exist by prescription only; so that where the road can be shown to have been made within legal memory the liability cannot exist. It is a class of legal obligations to which the law has given effect in the absence of any legal document, and it assumes a lost grant, and that what the parties have done from time immemorial has been done under a grant:

Re v. Inhabitants of Hatfield, 4 B. & A. 75.

If the instrument exists, then the liability to repair is under the instrument, and not *ratione tenuræ*:

Archbold's Criminal Pleading, 22nd edit., p. 1160, Form of Plea;

Reg. v. Sheffield Canal Company, 13 Q. B. 913, at p. 926;

Re v. Hayman, M. & M. 401;

Reg. v. Beeby, 8 L. J. N. S. 38, M. C.

Only the occupier can be proceeded against, and not the owner, whereas if the liability arise under a deed any person named in the deed can be proceeded against:

Reg. v. Barker, 62 L. T. Rep. 578; 25 Q. B. Div. 213.

This liability must be proved from the acts of the parties from time immemorial; and no liability *ratione tenuræ* can exist except such liability as can be proved by the acts of the parties in the absence of a document. The next point is that the plaintiffs rely on the writ and inquisition. These contemplate a Crown grant and that Mr. Onslow should provide and make and keep up a new substituted road. The fair inferences are either that there was a licence granted without the additional term imposed by the jury, or that Mr. Onslow said he would not have the licence on any such term, and the matter would go on without his having any such licence. The licence must be presumed not to have been in the terms of the inquisition. The present road (which is 21ft. wide) differs from that specified in the inquisition (which was 28ft.), and therefore the present road must be presumed to have been made not under the inquisition, but under a lost document. The mere fact that some slight repairs have been done to the road is not sufficient, and is no evidence of any liability to repair *ratione tenuræ*:

Rundle v. Hearle, 78 L. T. Rep. 561; (1898) 2 Q. B. 83.

The next point is that the road has been changed;

it has been destroyed as a carriage-way and turned into a *cul de sac*. It is no longer a highway; but is a mere footpath, and the local authority, in allowing this change, have abandoned it as a highway, and there is no longer any liability to repair it *ratione tenuræ*, if such ever existed:

Reg. v. Barker (ubi sup.);

Bourke v. Davis, 62 L. T. Rep. 34, at p. 36; 44 Ch. Div. at pp. 121-3.

Then the "order or proceeding" referred to in sect. 19 of 13 Geo. 3, c. 78, seems rather to refer to the order and proceeding before the two justices, and not to the proceeding on the writ *ad quod damnum*. The plaintiffs, therefore, cannot avail themselves of that section; but they rely on *Leigh Urban District Council v. King (ubi sup.)*, and they say that although they have no certificate by two justices, one ought to be assumed. There never was a certificate, and one ought not to be presumed. Lastly, the covenant does not run with the land, and therefore the assigns are not bound. They referred to

Mayor of Lyme Regis v. Henley (ubi sup.).

Macmorran, K.C., in reply, referred to

Ex parte Venner, 3 Atk. 766;

Fitz. Nat. Brev. tit. "Writ of Ad quod damnum," pp. 221-226.

Cur. adv. vult.

Jan. 11.—WALTON, J. read the following judgment: In this action the Urban District Council of Esher and the Dittons claim a sum of 137l. 10s. 5d., the amount of expenses incurred by the district council in the repair of a road within their district called Ember-lane. The action is brought under the Local Government Act 1894, s. 25, sub-s. 2, which provides: "Where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair the same fails when requested so to do by the district council to place it in proper repair, the district council may place the highway in proper repair and recover from the person liable to repair the highway the necessary expenses of so doing." The history of Ember-lane appears to be as follows: In the year 1773 Mr. George Onslow was the owner of lands which may be described as the Ember Court Estate. Ember Court, or as it was then more commonly called, Imber Court, or, by a still earlier name, Imworth, was a manor in the parish of Thames Ditton: (see the recitals of the Inclosure Act. 48 Geo. 3, c. cxxxiv.). Through those lands of Mr. Onslow there passed an old highway, leading from Thames Ditton and Esher towards East and West Molesey. Mr. Onslow desired to stop up and inclose this highway, and accordingly, on the 6th Oct. 1773, he sued out a writ of *ad quod damnum*; and on the 11th Oct. in the same year an inquisition was taken before the sheriff of the county of Surrey by virtue of such writ, and the jurors upon this inquisition found that it would not be to the damage of the King, or of any other, if the King should grant to George Onslow a licence to inclose and stop up the old highway, which was a highway for horses, carts, carriages, and foot passengers, and to hold such road when stopped up to George Onslow and his heirs for ever, so that instead thereof George Onslow did in his own land make another road as fit and convenient for horses,

carts, carriages, and foot passengers to pass and repass; and the jurors further said that it would not be to the damage or prejudice of the King, or of any other, if the King granted to George Onslow such licence if George Onslow did in his own lands set out in place of the existing highway another road commencing opposite to the foot-bridge over the river Mole next below Ember Mills and passing through certain land belonging to George Onslow to the road leading from Hampton Court-bridge towards Esher, such road to be for ever thereafter kept in good and sufficient repair by George Onslow, his heirs, and assigns. At the following quarter sessions for the county of Surrey, held on the 11th Jan. 1774, the inquisition and return were by order of the court entered and recorded amongst the records of the sessions. It is not disputed—indeed upon the pleadings it was admitted—that the old highway referred to in the inquisition was stopped up and inclosed and was from that time held by George Onslow, his heirs, and assigns, as part of his lands known as the Ember Court Estate. And it cannot be doubted (nor was it disputed at the trial, although a question was raised as to a subsequent alteration in its character) that Ember-lane, as originally set out, was the road which Mr. Onslow was required by the terms of the inquisition to set out, and which he did set out for the use of the public in place of the old highway which he stopped up and inclosed. Apparently, when Ember-lane was first made it led to a foot-bridge across the river and by a ford for horses and carriages to a cart or carriage way on the other side of the river, leading to East and West Molesey. It may be noticed that in the finding of the jury the new road was described as commencing opposite the foot-bridge over the river Mole. The river Mole empties itself into the Thames by two mouths, one of which is called the Mole and the other is now called the Ember. The road called Ember-lane in fact commences opposite to a foot-bridge across that mouth of the Mole which is now called the Ember. I am satisfied that in 1773 both mouths were spoken of as the "Mole," or perhaps more commonly as the "Moulsey river." This appears from old maps, and even if I am not entitled to take judicial notice of this as a geographical fact, I am satisfied upon the evidence—and, as I have said, it was not really disputed—that Ember-lane is the road which was set out pursuant to the inquisition of 1773. I shall deal with the question as to its subsequent change of character presently. I have first to consider a difficulty which arises in the present case from the fact that, although the terms of the writ and inquisition and return have been proved by the production of the records of the Quarter Sessions of Surrey, no trace can be found of any licence by the King, which in the ordinary course should have been granted in the terms of the findings of the jury upon the inquisition. If any such licence was granted it appears to have been lost. There is no doubt that the inquisition was acted upon, the old road was stopped and the new road was made and has ever since been used as a highway. There was also evidence which satisfies me that the new road was never repaired by the inhabitants or by any public authority. There was evidence that such repair as has from time to time been done was done by owners of lands forming part of

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the lands referred to in the inquisition as the lands of Mr. Onslow. This evidence of repair would not be sufficient to prove a liability to repair by prescription; but, taken in connection with the other facts showing that the inquisition was acted upon, it cannot be entirely disregarded. The case of *Leigh Urban District Council v. King (ubi sup.)* is an illustration of the kind of inference which a court is entitled to draw in a case of this kind, where certain formal orders and proceedings necessary to legally justify the substitution of one highway for another cannot be proved. In such cases when, for a long period of time every one has acted openly as if the required orders and proceedings had been made and taken, there is a strong presumption that such orders were made and such proceedings taken, and that the records and evidence of them have been lost. I have no hesitation in finding as a fact that a licence was granted by the King, and that the old road was stopped up, and Ember-lane set out and substituted for it under such licence. The question no doubt remains whether the licence incorporated the conditions required by the findings in the inquisition. When one remembers that as far back as 8 & 9 Will. 3 any member of the public aggrieved by the inclosure of a road under an inquisition taken upon a writ of *ad quod damnum* had an appeal to quarter sessions, and the determination of such appeal was final and conclusive, it is impossible to suppose that the Crown would override the rights of the public by granting a licence which did not give to the public the protection required by the inquisition. I find, therefore, that a licence was granted by the King in the terms and subject to the conditions of the inquisition. A point was raised by Mr. Robson on behalf of the defendant with which it will be convenient to deal at once. He contended that the case was similar to *Reg. v. Barker (ubi sup.)*, and that the old road set out as a highway in 1774 or thereabouts had disappeared; that its character had been so completely changed that it had, long before any question arose between the plaintiffs and the defendant, ceased to be the road which Mr. Onslow, his heirs and assigns, were required to repair, and had become something entirely different. It is true that at some date later than 1773, probably about 1821, the road on the other side of the river towards which Ember-lane led ceased to be used by carts or carriages, and for many years past there has been no access to or egress from Ember-lane at the end nearest to the river except for foot-passengers. Ember-lane itself, however, has always been open from the other end to the use of the public for cart and carriage traffic, although, no doubt, it has in fact been used principally by foot-passengers. It was contended by Mr. Robson, on behalf of the defendant, that it had ceased to be a highway for carts and carriages, but in my judgment, the fact that it has become a *cul de sac* for traffic of that character has not taken away the rights of the public to use it so far as it may be found convenient to do so for carts, carriages, and horses: (see *Gwyn v. Hardwicke, ubi sup.*; *Reg. v. Burney, ubi sup.*). I am further satisfied that there has been no such change in the character of the road as to make it so different from the road which Mr. Onslow and his heirs and assigns were required to keep in repair, that the old Ember-lane can be said to have disappeared. I find

therefore that Ember-lane was and is a highway for horses, carts, carriages, and foot-passengers, and that it was laid out and thrown open to the public pursuant to the inquisition of the 11th Oct. 1773, and a licence of the Crown, which allowed Mr. Onslow to stop up the old road on condition that he and his heirs and assigns should keep the substituted road Ember-lane in repair. About April 1900 it was reported to the plaintiffs by their surveyor (who was a competent surveyor within the meaning of sect. 25, sub-sect. 2 of the Act of 1894) that Ember-lane was not in proper repair so as to be fit for use either by carts or carriages or by foot-passengers. At this time the defendant Mr. Marks was the owner and occupier, and as such was an assign of Mr. George Onslow of part of his lands referred to in the inquisition. The district council claimed that as such assign and by reason of his tenure and occupation he was liable to repair Ember-lane. Certain correspondence passed in April 1900 between the district council and the defendant, and by a letter of 24th April the council required the defendant to place the road in a proper state of repair. The defendant, however, repudiated any liability to repair, and the plaintiffs thereupon placed the road in proper repair, incurring expenses in so doing which amounted to 137*l.* 10*s.* 5*d.*, the amount claimed in this action. It was contended on behalf of the defendant that a liability to repair a highway *ratione tenuræ* can exist by prescription only, and therefore that where the road in question can be shown to have been first made within the period of legal memory there can be no such liability; and that as Ember-lane did not exist as a road before the year 1773 the defendant could not be liable to repair it *ratione tenuræ*. It is true that in cases in which the claim against an occupier of land, that he is bound to repair *ratione tenuræ*, is founded upon usage or, in other words, on evidence of acts of repair, such usage must be immemorial, and if it can be shown in such a case that the usage commenced at some time since the reign of King Richard I., the attempt to establish a liability to repair *ratione tenuræ* fails. In other words, to prove such an obligation by prescription the usage must be immemorial. But, as was pointed out in the case of *Mayor of Lyme Regis v. Henley (ubi sup.)*, prescription necessarily implies some legal origin, and the legal origin of an obligation to repair *ratione tenuræ* may be a grant from the Crown. If it can be proved that the King granted a licence to the owner of certain lands to stop and inclose for the benefit of himself and his heirs a public highway passing through such lands, imposing at the same time a condition that the owner of such lands should make a new road in place of the old one, and that he, his heirs, and assigns should keep such new road in repair, and if it can further be proved that the grantee accepted and acted upon such grant by stopping up the old highway, this would, in my judgment, be sufficient to establish an obligation *ratione tenuræ* to repair the new road made in place of the old road so stopped up. And it appears to me to be immaterial whether such grant was made and accepted before or after the reign of King Richard I. For these propositions the case which I have cited of *Mayor of Lyme Regis v. Henley (ubi sup.)* appears to me to be a sufficient authority. The *Stratford Bridge* case (2 M. & S. 520 n.)

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affords an example of the way in which this kind of liability might arise before the reign of Richard I. It may, however, be suggested that the defendant was not an assign of Mr. Onslow within the meaning of the inquisition. He admits that he was the owner and occupier of Ember Court from 29th Sept. 1899 to 24th Oct. 1900, and that Ember Court formed part of the lands formerly belonging to George Onslow, and that the expenses in question were incurred about Aug. 1900. But it is true that some part of the lands of George Onslow referred to in the inquisition never belonged to the defendant. In *Reg. v. Duchess of Buccleugh* (*ubi sup.*) it was held that where a manor was held subject to an obligation of repairing a highway and the manor became afterwards divided amongst several persons, each alienee was liable to the whole charge, his remedy being by contribution from the others. In the present case there was a licence to the owner of lands to stop and inclose a highway passing through such lands and "to hold it, when stopped up, to him and his heirs for ever," subject, however, to the condition that the owner of the lands should make another road through his lands in place of the old road, and that he, his heirs and assigns, should for ever keep the new road in repair. I think that "heirs and assigns," within the meaning of the inquisition, are the heirs and assigns of the lands through which the old road passed and through which also the new road was to pass—that is to say, the lands constituting the Ember Court Estate of Mr. Onslow. In my judgment, therefore, the liability to repair was charged upon the heirs and assigns of that estate. Following the principle of the case which I have cited, when the estate became divided among several persons, each alienee and occupier of any part of the estate, and, therefore, the defendant, was liable to the whole charge. It was further suggested that, even if there was an obligation upon the defendant to repair, it was not an obligation *ratione tenuræ*, because such an obligation is enforceable against an occupier only, and not against an owner who is not an occupier, and therefore an action under sect. 25, sub-sect. 2 of the Act of 1894 would not lie, and that the only remedy was under sect. 34 of the Highway Act 1862. In the first place, it is admitted that at all material times the defendant was occupier as well as owner. In my judgment, a grant of a licence by the Crown in the terms of the inquisition of 1773 is sufficient to create an obligation *ratione tenuræ*. The cases already cited of *Mayor of Lyme Regis v. Henley* (*ubi sup.*) and the *Stratford Bridge* case (*ubi sup.*) appear to me to establish this. The rule that was acted upon when highways were stopped and substituted roads made under a licence granted pursuant to an inquisition upon a writ of *ad quod damnum* was to leave the burden of repair as far as possible where it lay before: (see *Ex parte Venner*, *ubi sup.*; *Re v. Inhabitants of Flecknow*, 1 Burr. 461; and see also the concluding words of sect. 19 of the contemporaneous statute of 13 Geo. 3, c. 78). There is the strongest ground for inferring that the reason why Mr. Onslow and his heirs and assigns were required to repair the new road was that the old road which was stopped up was one which the owner of Ember Court was bound to repair *ratione tenuræ*. A similar liability was imposed

in respect of the new road. For these reasons I think that the plaintiffs have established their case, and, as there is no dispute as to the amount, there will be judgment for the plaintiffs for 137*l.* 10*s.* 5*d.* and costs.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *Charles Mylne Barker*.

Solicitors for the defendant, *Michael Abrahams, Sons, and Co.*

Monday, Feb. 24, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

JUSTICES OF OLDHAM (apps.) v. GEE (resp.). (a)
Licensing — Transfer — Condition on original grant — Licence to be given up on applicant leaving — Application for transfer — Discretion.

A licence was granted by justices subject to the condition that it should be given up upon the original holder leaving or ceasing to carry on business upon the premises.

Held, that this condition was not a bar to the justices granting a transfer of the licence upon the original holder leaving or ceasing to carry on business on the premises.

CASE stated by the quarter sessions for the Hundred of Salford.

On the 23rd Aug. 1894 one Samuel Turner applied at the general annual licensing sessions for the borough of Oldham for a certificate or licence to sell by retail, at a house situate at 52, Abbey Hills-road, in the borough, beer to be consumed off the premises, in pursuance of 11 Geo. 4 and 1 Will. 4, c. 64, and the statutes amending the same.

When Samuel Turner made the application to the justices of the borough sitting in such licensing sessions, he proposed that such certificate or licence should be granted to him subject to the condition: (1) That the premises in respect of which the licence was granted should be closed during the whole of Sunday; and, pending the application, assented to another condition which was suggested by the justices, namely, (2) that the licence should be given up upon his leaving or ceasing to carry on the grocery business on the premises.

Thereupon the justices granted the licence to Samuel Turner subject to the conditions, which were duly embodied in the licence. The justices would have refused the application if the applicant had not offered to submit to condition No. 1 and assented to condition No. 2.

At the date of the application Samuel Turner was the tenant of the premises under a lease granted by the owner, Mrs. Jane Kershaw, for a term of five years expiring on the 23rd July 1899, and carried on the business of a grocer upon the premises. Upon the determination of the lease Samuel Turner became a tenant from year to year of the premises, and continued to carry on his grocery business.

The certificate or licence was renewed to Samuel Turner each year at the general annual licensing sessions of the borough, subject to the conditions embodied in the licence, and remained in force until the 24th Dec. 1900.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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On the 24th Dec. 1900 the respondent Thomas Gee applied to the appellants for a transfer of the licence to him from Samuel Turner, who was about to give up possession of the premises and to cease to carry thereon the business of a grocer. The respondent was willing, if the transfer was granted, to take over and continue to carry on upon the premises the business of a grocer as theretofore carried on by Samuel Turner.

Thereupon the appellants refused to grant the transfer from Samuel Turner to the respondent on the ground that the transfer was contrary to the second of the above conditions inasmuch as Samuel Turner would, in the event of the transfer being granted, leave the premises and cease to carry on the grocery business upon the same.

It was contended before the quarter sessions on behalf of the appellants that they sitting as a court of special sessions of His Majesty's justices of the peace for the purpose of granting and transferring licences as aforesaid could lawfully in their discretion impose the above conditions on the original grant of the licence to Samuel Turner, and could lawfully refuse the transfer from Samuel Turner to Thomas Gee on the ground that such transfer was in contravention of the second of the conditions.

It was contended on behalf of the respondent that the appellants sitting as such court as aforesaid had no such power vested in them.

The Court of Quarter Sessions held the contention of the respondent to be right, and reversed the order of the appellants and granted the transfer.

Acland for the appellants.

F. H. Mellor for the respondent.

LORD ALVERSTONE, C.J.—We agree with Mr. Acland that the real question for our decision, or the real grounds on which the magistrates acted in the statement of this case, are not very clearly stated in the special case. It is only because stating the special case seems to me to be only consistent with one view that we think we see our way to decide this case. It seems to us that the objection must have been taken before the licensing justices, not that they could take this matter of the previous conditions into their consideration amongst other circumstances, but it was urged that they had no power to grant the transfer, because of the pre-existing conditions. They having adopted that view, there being, we are told, no dispute as to the suitability of the applicant, or the other necessary conditions upon which justices exercise their discretion. When it came to a matter of appeal it was again contended on behalf of the present appellants that the pre-existing condition which had been imposed some four or five years before, but renewed, or taken to have been renewed, on the occasion of every renewal of the licence, prevented the licensing justices from having power to grant this transfer. That point was taken as going to the root of the jurisdiction of the justices. We think that, although it was a circumstance which could be taken into the consideration of the justices, it was not an objection which prevented the justices entertaining the application for a transfer of the licence. If that is so, the quarter sessions have set the matter right by holding that it was not a bar on the power of

the licensing justices to grant the transfer, but only a circumstance to be taken into consideration. In my opinion, as the question of transfer must be dealt with judicially, no condition of this kind would bind future justices. This the quarter sessions considered was not a bar, and they granted the transfer to the respondent. Therefore we think that this appeal should be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Appeal dismissed.

Solicitors: *H. Booth and Sons*, Oldham; *R. M. Sizemith*, Oldham.

Monday, Feb. 24, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

CHURCHWARDENS OF ST. STEPHEN (apps.) v. GREAT NORTHERN AND CITY RAILWAY COMPANY (resps.). (a)

Rating — Distress warrant — Objection before justices on application for — Jurisdiction to rate — Appeal.

By sect. 69 of the Great Northern and City Railway Act 1892 it was enacted: "The company shall in respect of all lands and buildings acquired by them under the powers of this Act be liable to and pay all the consolidated sewer and other rates and contributions leviable in respect of such lands and buildings as if the company were assessed in respect of such lands and buildings in the valuation list in force for the parish or place within which such lands and buildings are situate at the time the company acquire such lands and buildings, whether such lands and buildings be occupied or vacant, and shall continue liable to and pay all such consolidated sewer and other rates and contributions until the undertaking shall be completed and assessed or liable to be assessed to the before-mentioned rates and contributions, or until such of the said lands and buildings as may not be required for the purposes of the undertaking shall have been otherwise duly assessed or liable to be assessed and become liable to the before-mentioned rates and contributions."

The railway company acquired certain land under this Act upon which buildings formerly existed but had been pulled down before the railway company had acquired any interest in the land. Held, that the railway company were not liable to be rated in respect of these buildings under sect. 69.

Held, further, that as the objection raised by the respondents as to their liability went to the jurisdiction to rate, that objection could be entertained by the justices upon an application for a distress warrant.

CASE stated by two justices for the city of London.

On the 20th July 1901 complaint was made on behalf of the appellants, the churchwardens and overseers of St. Stephen, Coleman-street, that the respondents, being duly rated and assessed in two poor rates, amounting to 45l. 0s. 4d., had not paid and refused to pay the same.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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The following facts were proved or admitted before them:—

The respondents were incorporated under the Great Northern and City Railway Act 1892. Under that Act and the Acts incorporated therewith the company were authorised to acquire lands for the purposes of the works thereby authorised.

The respondents on the 1st Jan. 1900 acquired certain land in the parish of St. Stephen, upon which premises consisting of a shop, offices, and warehouse, formerly known as 30, Finsbury-pavement, had existed, but they did not take actual physical occupation until Oct. 1900. The shop, offices, and warehouse were pulled down about May 1899, at which time the railway company had no interest therein.

At the time the respondents acquired the land in Jan. 1900 no business of any kind was carried on upon it. It was a piece of vacant land.

In the valuation list in force in Jan. 1900, being the quinquennial valuation list made in 1895, the premises were assessed at 292*l.* rateable value.

In 1899 a supplemental valuation list was made for the parish pursuant to the Valuation (Metropolis) Act 1869, by which this property was proposed to be taken out of rating, as it was then vacant land. The list was duly confirmed pursuant to the said Act on the 24th Nov. 1899, but did not come into operation until the 6th April 1900.

Before that date—viz., on the 4th April 1900—a provisional list continuing the property in the valuation list was made for the parish, which was confirmed by the Assessment Committee of the City of London Union, in which the parish is situate, on the 31st Oct. 1900. In this provisional list premises therein described as No. 30, Finsbury-pavement were inserted at the rateable value at which the premises formerly known as No. 30, Finsbury-pavement were assessed and rated before the shop, offices, and warehouse were demolished—viz., 292*l.*

A poor rate was duly made and published on the 8th May 1900, and another on the 5th Nov. 1900. The rate-books were produced, in which the respondents were rated in respect of premises described as "shop, offices, and warehouse," upon the rateable value at which the premises described as No. 30, Finsbury-pavement were assessed in the said provisional list—viz., 292*l.*

Payment of the sums claimed under the said rates was duly demanded, but the amount was not paid. At the dates of the rates respectively, the undertaking of the respondents had not been completed and assessed or become liable to be assessed to consolidated sewer and other rates, nor had such of the lands and buildings acquired by the respondents as were not required for the purposes of the undertaking been otherwise assessed or become liable to be assessed or become liable to the said rates and contributions.

On behalf of the respondents it was contended: (a) That their liability (if any) in respect of the said property was enforceable only by action to recover the amounts charged by the said rates, and was not enforceable before justices, and *Fourth City Mutual Building Society v. Churchwardens and Overseers of East Ham*, (1892) 1 Q. B. 661, *Farmer v. London and North-Western Railway Company* (59 L. T. Rep. 542; 20 Q. B. Div. 788), and sect. 69 of the Great

Northern and City Railway Act 1892 were referred to; (b) that at the time the rates in question were made the land was vacant land, and the respondents were not liable to be assessed in respect of it; (c) that the respondents were only liable to be rated (if at all) in respect of the land as if they were assessed in respect of it in the valuation list in force for the parish at the time they acquired the land.

On behalf of the appellants it was contended that under sect. 69 of the Great Northern and City Railway Act 1892 the respondents were rightly rated in respect of the property in question and were liable to pay the rates whether the lands and buildings were occupied or not, and that, as the respondents had not appealed, the justices were bound to enforce the payment.

The justices overruled the contention of the respondents that the amount could only be recovered by action, and they held that they had jurisdiction to go behind the rate-book and inquire into the validity of the rate, and on the ground that at the time when the rate was made there were no such premises in existence as were described in the rate-book, and had not been when the respondents acquired their interest, but the property was then only vacant land, they declined to issue a distress warrant.

Ryde for the appellants.—In this case the clause of the special Act is somewhat like sect. 133 of the Lands Clauses Consolidation Act 1845. Three questions arise—namely, whether the proceedings by distress warrant were right; what is the construction to be placed upon sect. 69 of the Great Northern and City Railway Act, and whether the respondents should have appealed against the rate to quarter sessions. You can take objections before the justices upon a summons for a distress warrant. No doubt under the Lands Clauses Consolidation Act there would be no liability to pay this rate and these proceedings would be wrong, but although the present section is somewhat like the section in that Act, it differs, and the respondents are liable to pay this rate. He referred to

Mayor of London v. St. Andrew, Holborn, 16 L. T. Rep. 665; L. Rep. 2 C. P. 574.

In the light of that decision and of the Lands Clauses Consolidation Act, it is clear that there is a liability under sect. 69 of the present Act. Under this the company must be rated, otherwise the effect of the section is *nil*. As to the liability to pay the rates. This point cannot be taken before the justices, but must be appealed to quarter sessions. He referred to

Marshall v. Pitman, 9 Bing. 595; 2 M. & S. 745.

If there is jurisdiction to rate, then you cannot take any objection on the application for a distress warrant, but you must appeal. He referred to

Reg. v. Justices of London, 80 L. T. Rep. 286; (1899) 1 Q. B. 532.

Cunningham Glen for the respondents.—The railway company could show before the justices that the premises did not exist. Existence or no existence is a matter for the justices. In *Fourth City Mutual Building Society v. Overseers of East Ham*, (1892) 1 Q. B. 661 it was laid down that justices sitting to hear an application for the issue of a distress warrant for the nonpayment of

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poor rates are not necessarily exercising a ministerial duty, but are authorised to inquire into the validity of the objections taken by the party summoned. There could not have been an appeal here against the provisional list. The respondents are not rendered liable by sect. 69 at all. The liability contemplated by the section is not a liability to be rated or assessed, but merely a liability, if any, to pay, and an action should be brought and not proceedings taken before the justices.

Ryde in reply.

Lord ALVERSTONE, C.J.—In this case we have to construe a most obscurely worded section. There is this additional difficulty to my mind, that I think one can see very clearly what the persons who framed the section wanted to enact and were driving at; and therefore one is rather tempted to try and construe words which I do not think will bear that construction. They were enacting in respect of other rates than the poor rate, a substitution for sect. 133 of the Lands Clauses Consolidation Act. I think they had in their minds that they wished the railway company to pay what would have been paid if they had not acquired the property. But when you come to apply these words to the actual state of facts found, in my opinion the language is not sufficient to enable the company to be made liable in respect of this particular rate, and that will be found to be important when we deal with the question of the right to raise this point in answer to an application for a distress warrant. The words are: "That the company shall in respect of all lands and buildings acquired by them under the power of this Act be liable to and pay all the consolidated sewer and other rates and contributions leviable in respect of such lands and buildings as if the company were assessed in respect of such lands and buildings in the valuation list in force for the parish or place within which such lands and buildings are situate at the time the company acquire such lands and buildings, whether such lands and buildings be occupied or vacant." Now, it is contended by Mr. Ryde that, because in the valuation list for the year 1895 these buildings when they existed stood at 292l., it must be taken that the company must be liable not only to be assessed, but to be rated in respect of that land because they had taken the land on which the buildings had stood. In my opinion the section, if that was the intention of it, does not carry it out. I think that argument overlooks the cardinal fact that prior to the time of the land and buildings being taken the buildings had ceased to exist, and it is not denied by Mr. Ryde, who has argued the case perfectly fairly, that in the hands of the then owners, the company, they were entitled, either by means of the overseer doing his duty, or by means of an appeal against the supplemental list, to have said: "There is no rate leviable in respect of this property now, because the building is pulled down, and therefore the land is not liable; it is vacant land, and we have no buildings upon it." Applying this section to that state of things, it seems to me that further words would be required than those which are in this section. It seems to me that the words required are: "The company shall be liable to be assessed and to be rated at the amount at which this land and

building stood in the last valuation list, even although it had been pulled down before the company took possession"; and I must say I think, inasmuch as the primary object of the Legislature was to substitute provisions for making good, you would not expect to find the company made liable to pay more than the persons from whom they bought the property paid. Mr. Ryde says that difficulty is met by the words "whether such lands and buildings be occupied or vacant." I cannot think that those words were intended to apply to the state of things we are now considering, the governing words being "rates leviable in respect of such lands and buildings." The words "whether such lands and buildings be occupied or vacant" are necessary to apply to the interim state of things when the company pull down the buildings and may leave the land vacant for a considerable time. Those words are wanted, it seems to me, in order to show that, though the company have no beneficial occupation out of the land, if they have taken possession of the land and buildings they are to be liable to be rated in respect of the same rateable value as the parish could have enforced and exacted from the owners from whom they bought. I think it is not established on the facts here that there was a rate or contribution leviable in respect of these lands at the time the company was assessed to the extent of 292l. or any sum. In order to meet that difficulty, Mr. Ryde's next point is that this ought not to be raised by way of an answer to an application for a distress warrant, which was only a ground for appeal as I understand it. The principle has been stated more than once by my brother Channell. If the objection raised in answer to the application for a distress warrant is, "You have no jurisdiction to make us liable in respect of this rate at all," that is an objection which can be taken, but if, on the other hand, it is, "You ought not to have assessed us in respect of this property at this amount," or on some other ground which is a ground for an appeal, that cannot be taken. In this case this rate is for shops, offices, and a warehouse at 30, Finsbury-pavement which were in the occupation of the Great Northern and City Railway Company. There were no shops, offices, or warehouses in their general occupation. What can be said is that there once had been there shops and offices, and that they levied rates in respect of the assessment. If the rate had purported to be, on the face of it, a rate in respect of making good a deficiency, I think it would have been a difficult point as to whether or not it could be raised in answer to an application for a distress warrant, but I think this was an objection which went to the jurisdiction of the rating of the Great Northern and City Railway Company for the shop, offices, and warehouse that they did not exist at the time of the rate, and that they did not exist at the time when they acquired the property, although there was a pre-existing state of things in respect of which they could not be properly assessed. With regard to the contention which Mr. Glen raises—namely, that the company could be rated or could be assessed—I should have thought it was right, and that, having regard to the words of the section, the company could not be sued by means of an action, but I do not wish to express a final opinion

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about that, because I think there are difficulties with regard to it. For the reasons I have given I think on this section the appellants have failed to make the company liable on the hypothetical theory that they are still occupying houses which were in fact pulled down some months before they acquired the property. The appeal will therefore be dismissed.

DARLING, J.—I am of the same opinion. The liability of the railway company depends upon the effect to be given to sect. 69 of the Great Northern and City Railway Act 1892, and there is no doubt that the payment of this rate, which it was said the company was liable to pay, might have been escaped from by the people from whom the company bought that land, because the buildings upon that land had been pulled down, and those who were the owners before the company bought could have escaped payment of the rate, and could have escaped it very justly and properly, for the simple reason that it is not fair to make people pay rates upon buildings which have ceased to exist. Now, the company acquired the land, and the section which makes them liable says: [Reads it.] Now, it seems to me that they are not liable in respect of this, because they never did acquire the buildings at all. The buildings had been pulled down before they had acquired the land. They did not acquire land and buildings. They acquired land and no buildings. If it is said that they are to be made liable on the valuation list in force, when is it to be in force? It is put in force at the time the company acquired such lands and buildings. No such list ever was in force, because there was no time when they acquired lands and buildings, since they never acquired buildings at all. It is perfectly obvious I may say in passing, that to hold otherwise than what we are going to hold would be to do the company a manifest and gross injustice, because it would be to make them pay on what other people would not have had to pay on. It would be to make them pay on the value of buildings which they never had got. It is said that this necessarily follows from the section, which I will not read, and, to show that it follows, these words are relied upon: "Whether such lands and buildings be occupied or vacant." Now, it seems to me that the expression liable for buildings, whether occupied or vacant, does not apply, for then, were no buildings at all, either occupied or vacant, and the expression "occupied or vacant" is not confined to the land at all, but it is applied to the land and buildings. If it had been applied to the land alone, I think it would have been possible to say that shows that Parliament in 1892 was bent upon doing a gross injustice, and used language applicable to it. But, short of words from which one could not escape, I should not feel inclined to hold any such thing.

CHANNELL, J.—I think this appeal must fail and substantially upon the ground upon which the justices appear to have decided—namely, that at the time the rate was made there were no such premises in existence as those described in the rate-book, and that at the time when the Great Northern and City Railway Company acquired their interest it was only vacant land. Now, the section undoubtedly was intended to make up to the local authority a deficiency in the consolidated

sewer and other rates which might be occasioned by the act of the company. So far as the poor rate was concerned, that was provided for in the Lands Clauses Consolidation Act, and the Lands Clauses Consolidation Act was incorporated with this Act. The main object of this section, I cannot help thinking, was to include the other rates. It may or it may not have been intended to alter the machinery by which the local authorities were to get their deficiency in respect of the poor rate; but the difficulty is that, when one comes to look at the section, it is absolutely impossible to understand the machinery by which it was intended that the local authorities should get their deficiency, or this additional rate, or to understand what it was that they were to do. I myself feel quite unable to understand the section. I think it arises very possibly from the clause being hurriedly drafted; I do not know. But it arises from the fact that the draftsman, whose language of course it is, although adopted by the Legislature, certainly did not understand clearly the machinery of rating—namely, what the effect of putting a name in the valuation list was, or what the effect of property being vacant, and so on, was. It is quite clear he did not understand it, or it was impossible that the words could have been used that are used here, and inasmuch as the local authorities, in order to get this money, have got to show us what the meaning is. If we cannot understand it we can only say they fail. But, apart from technical grounds and the difficulty of understanding the machinery, there is a point of substance. There is not a word in that section to indicate anything more than an intention to make the company liable for a loss arising from their own act. What was contemplated no doubt was that the company coming will pull down the buildings, will leave the land vacant for a considerable time, and will in consequence cause loss. But there is not a word here indicating any intention that the company shall pay anything more than the rates which would have been paid if everything had remained exactly as it was at the time when they acquired their interest. At the time they acquired their interest, if things had remained exactly as they were, there would have been none of these rates leviable, and consequently it seems to me that in point of substance it cannot be made out on this section that the company have got to pay anything more than the former owners would have paid if the state of things had continued exactly as it was on the date in Jan. 1900 when the company acquired the property. That is all I have to say on that point of substance, but, as far as construing the section is concerned, I am quite sure I do not understand it, and I cannot give any judgment on that ground, except to say that anybody who has to show the court the meaning of this section in my opinion fails.

Appeal dismissed.

Solicitors: *Roche and Son; Le Brasseur and Oakley.*

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STOURBRIDGE MAIN DRAINAGE BOARD v. SEISDON UNION.

[K.B. Div.]

Monday, Feb. 24, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

STOURBRIDGE MAIN DRAINAGE BOARD (apps.)
v. SEISDON UNION (resps.). (a)*Bating—Sewage farm—Lease to tenant—Sewage works on farm—Occupation by sewerage board.**The S. M. D. Board acquired a sewage farm, and laid down thereon certain carriers and other sewage works and plant.**They leased the farm to one C., reserving the right of entry thereon for the purpose of constructing, maintaining, altering, and repairing the works as might be requisite for using the farm as a sewage farm.**C. was to irrigate by means of the works on the farm, and was to keep the pipes and carriers properly flushed and cleaned.**The board kept the works in repair, and from time to time their surveyor and agents went on the land to see that the sewage was properly distributed and treated, and to do repairs.**Held, that the board were rightly held not to be in occupation of these carriers and other sewage works and plant, and so not legally rateable in respect thereof.*

CASE stated by quarter sessions.

The appellants are a sewerage board duly constituted for the purpose of dealing with sewage from the urban district of Stourbridge.

For the purpose of carrying out the duties imposed on them they acquired a farm, and laid down upon the farm certain sewage works and plant, consisting of a valve-house, carriers, distributing chambers, effluent drain, and other accessories, all of which were necessary for the purpose of enabling them to carry out their statutory duties by dealing with the sewage in their district.

The hereditaments which formed the subject of the rate were (a) a rising main to the valve-house on the farm, and the valve-house, and (b) the carriers and other sewage works and plant.

The appellants were rated by a poor rate made the 29th Oct. 1900 in respect of both these hereditaments, and upon appeal to quarter sessions it was held that they were legally rateable in respect of (a), and no appeal was brought therefrom, but in respect of (b) the quarter sessions held that the appellants were not legally rateable, and they allowed the appeal and reduced the rate.

By a lease dated the 9th Dec. 1897 the appellants let the farm to one Chatham, and under its provisions all the farm lands were demised, together with the appurtenances, but the right of entry was reserved to the board and their agents to construct, maintain, alter, or repair the main outfall chambers or outfall sewers, the rising main, valves, sluice chambers, sewers, drains, carriers, and other works as might be requisite for the purpose of the user by the board of the farm as a sewage irrigation farm; and the board were to have full and sole possession and control of the main outfall valve chambers and the valves and fittings therein, and the rising main or outfall sewer.

It was further provided that Chatham should during his tenancy keep the lands well cultivated as a sewage irrigation farm, and that he should

properly irrigate to the satisfaction of the board surveyor every part of the farm with sewage, so far as he could, by a proper use of the sluices, pipes, carriers, and other works, and he was, so far as he was able, by a reasonable and proper use of the sluices, pipes, carriers, and other works to receive, pass, and distribute on the lands all the sewage pumped by the board, and he was, at his own cost, to keep the sluice chambers, pipes, carriers, and catch-pipes to all the effluent pipes and drains freed from deposit or sediment, and to keep the pipes and carriers properly flushed and cleansed.

By further provisions in the lease the board were to keep the outsides and insides of the valve chambers and carriers in substantial repair, and to cause the sewage to be pumped up into the outfall chambers.

By the rate appealed against Chatham was rated by the respondents in respect of the farm, apart from the hereditaments referred to above as (b).

The valves in the valve-house worked automatically and regulated the flow of sewage upon the farm. The key of the valve-house was kept by Chatham as a convenient depository for the same, and the various officials of the appellants obtained access to the valve-house when they required to enter to inspect or do necessary works to the apparatus in the valve-house. It was not necessary for Chatham to enter the valve-house for the purposes of the farm or to carry out the covenants of the lease.

From the valve-house the sewage flowed through the various distributing carriers upon the farm, and Chatham, by means of sluices and other proper apparatus connecting with the distributing chambers, could and did, subject to the provisions of the lease, but otherwise without interference from or control by the appellants, turn the sewage upon and to such parts of the farm as he required it, and could with the appellants' consent sell it.

The provisions of the lease were generally carried out in practice between the appellants and their tenant Chatham.

The surveyor and other officials of the appellants went upon the farm from time to time to see that the sewage was properly distributed and treated upon the farm and that the works were in order, and for the purpose of doing the necessary repairs thereto.

The appellants from time to time, as they were required for the purpose of efficiently dealing with the sewage, made alterations and extensions in the works.

Upon the facts aforesaid the appellants contended that they had not such occupation of the sewage works and plant as to be rateable in respect thereof, but that Chatham was the occupier of such sewage works and plant, and was the person to be rated in respect thereof.

The respondents, on the other hand, contended that Chatham was in occupation only of the farm as an agricultural tenant; that the sewage works and plant were a distinct hereditament created by the appellants to enable them to carry out their statutory duties, and that in law they could not part with the possession, control, or occupation of such works and plant; and that if such works were in the physical possession, control, or occupation of Chatham, he was a mere agent of

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

K.B. Div.]

STOURBRIDGE MAIN DRAINAGE BOARD v. SEISDON UNION.

[K.B. Div.]

the appellants, who had and have the legal possession, control, and occupation of the works; and, further, that, on the true construction of the lease and the facts aforesaid, the appellants were such occupiers of the works, as distinct from the farm, as to be rateable.

The Court of Quarter Sessions held that the appellants were not rateable in respect of the carriers and other sewage works and plant, and accordingly reduced the rate and allowed the appeal as above stated.

Disturnal (Hugo Young, K.C. with him) for the union.—The point raised here is whether or not the drainage board are in occupation of the carriers and other sewage works and plant, and are therefore rateable in respect of them. It is said that the tenant under the terms of the lease is in occupation and liable to be rated. There is nothing in the parcels of the lease which shows a demise of the works, carriers, and plant to such tenant. The covenant by the tenant to irrigate and for that purpose to use the carriers cannot make him the occupier thereof. The board, the landlords, can enter upon the land and alter and repair the carriers, &c. They have the control. The covenant to keep the sluices, drains, &c., clean is the only one which imposes any duty on the tenant, and that cannot make him the occupier. [Lord ALVERSTONE, C.J.—The whole question is, Who is the occupier?] That is so. Who has exclusive occupation of these works and plant? The board keep the right of entry and the right of going on the land and altering the works, carriers, and chambers, and, in order to escape liability, they must show that the tenant has exclusive occupation. Under sects. 27 and 29 of the Public Health Act 1875 the board have the right to make the lease. A distinction is there drawn between the land and the works on the land, and, although they have the right to lease and so part with the land, when they have spent money on the works there is no statutory authority which allows them to part with the appliances they have put up. [Lord ALVERSTONE, C.J.—Do they not become land for this purpose?] No; they are distinct hereditaments. [Lord ALVERSTONE, C.J.—The question seems to arise whether or not the drainage board have cut off their occupation, under this lease, at the distributing house.] If the lease was *ultra vires* and beyond the statutory powers of the board, the tenant would become the agent of the board and they would be liable as occupiers. If, however, they have power to make this lease, it is clear from its terms that, although the tenant has control of the land, a distinction is drawn between this land and these appliances, and the tenant is not in the exclusive occupation or control of the latter. In *Mayor of Southport v. Ormskirk Union* (69 L. T. Rep. 852; (1894) 1 Q. B. 196) the local board had to lay and keep in repair all gas mains, but the corporation of Southport were empowered to use these mains, and it was held by the Court of Appeal, affirming the Divisional Court, (1893) 2 Q. B. 468, that the corporation had only the right to the use of the mains for the sole purpose of the supply of gas, and had no exclusive occupation of the mains so as to render them liable to be rated in respect of them. [Lord ALVERSTONE, C.J.—Cave, J. in the Divisional Court laid down the test to be applied as follows:

"Ownership and occupation are names given to certain bundles of rights. A man who is both owner and occupier possesses, roughly speaking, all the rights which attach to the portion of the land that he owns and occupies. When he lets off this land, he divests himself of some of those rights and retains others. When he grants a right of way or other easement over the land, he again divests himself of certain rights and retains others. When does he divest himself of the occupation and when does he retain it? If the cases are examined, I think they will be found to proceed upon this principle—that so long as a man who is both owner and occupier grants away certain limited rights only, reserving to himself all the rights except those which he so grants away, he retains the occupation and the grantee merely gets the limited rights; where, on the other hand, he grants away his rights generally (although, of course, only for a limited time, as must be the case in every tenancy), then, although he may reserve certain rights to himself, he ceases to be occupier, and the person to whom the general grant is made becomes the occupier in his place." Do you come within that test? Yes. I say that here the owners, the drainage board, have only granted limited rights, and they are still the occupiers. In *Reg. v. St. Mary Abbots, Kensington* (12 A. & E. 824), a company had power to purchase land for a cemetery, to make vaults, &c., in it, and to sell in perpetuity or for a term the exclusive right of burial. They were bound to keep the whole of the cemetery in repair, and they were held to be liable to be rated as occupiers of the whole cemetery although they had sold the exclusive right of burial in the vaults, &c., and, having delivered the keys to the purchasers, had ceased to exercise any act of ownership. That case was followed in *Reg. v. Abney Park Cemetery Company* (29 L. T. Rep. 174; L. Rep. 8 Q. B. 515). He also referred to

London and North-Western Railway Company v. Buckmaster, 33 L. T. Rep. 329; L. Rep. 10 Q. B. 70, 444.

Although in this case limited rights passed to the tenant, that does not make him occupier. The drainage board are the occupiers, and therefore liable to be rated.

Hon. A. Lyttelton, K.C. (Stamford Hutton with him), for the board, were not called upon to argue.

Lord ALVERSTONE, C.J.—This case was extremely well argued, and I am sure the appellants have in no way suffered from the absence of Mr. Young. Mr. Disturnal has argued it extremely well. Now, the real question is one of fact that has often been discussed before. It is difficult and impossible to say that any one case lays down a hard-and-fast rule as to what is or is not "occupation," though of course there are many cases that lay down or point out circumstances which are of great weight when you come to consider the particular case. In this case a sewage authority under its statutory powers possesses and has constructed, or has been in occupation of—for this purpose it is not very material now—a main drain and a valve-house in respect of which the sessions have found they are rateable. From that point there is an hereditament in respect of which this question, not without difficulty, arises. There is an ordinary sewage

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farm for receiving sewage, and with appliances that are perfectly well known. Over that sewage farm there are a number of carriers used in a great many places, and there are these valve chambers, sometimes called catch-pits, by which there is a means of diverting the sewage over particular areas of the land. The farm is let to a Mr. Chatham, who pays a rent. We have nothing in the world to do with that question, although there was an ingenious point raised by Mr. Disturnal as to the difficulties that might arise, but that is really only a question of *quantum*. It has been always a question whether a particular land was sufficiently rated, having regard to the facility the tenant has got for this or that sort of work. It is said under these circumstances that the drainage board are not the occupiers of these carriers, and that they were in Mr. Chatham's occupation. Now, the fact upon which Mr. Disturnal relies is the fact that there is a right to alter the carriers, and he says the only right Chatham has is an obligation to keep the carriers clean, and a right to turn the sewage out at various parts of the farm. That raises just the state of circumstances which was a question of fact for the tribunal; whether, looking at the nature and character of the structure, the way it is held, the way it is demised, and the rights that are reserved, they find as a matter of fact it was in the occupation of the one person or the other, or rather, to state it more accurately, that it was not so much in the occupation of the drainage board as to bring them within the case when it was held they were to be occupiers. I think it is a case where I should have come to the same conclusion as the sessions. It seems to me impossible for us to say, on the facts before us, that the sessions were bound to hold the drainage board were occupiers, and they must be liable in respect of that part of the hereditament; therefore I think this appeal must be dismissed with costs.

DARLING and CHANNELL, JJ. concurred.

Appeal dismissed.

Solicitors for the board, *Harwards and Co.*, Stourbridge.

Solicitors for the union, *H. Taylor*, Wolverhampton.

Monday, Feb. 24. 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HOARE (app.) v. TRUMAN, HANBURY, BUXTON, AND Co. (resps.). (a)

Factory—Non-textile—Bottling and aerating beer—Factory and Workshop Act 1878 (41 Vict. c. 16), s. 93.

Certain premises were used for the purpose of aerating and bottling beer in order to adapt it for sale as bottled beer. Gas engines were used for the purpose of aeration, but the bottling was done by hand, the bottling machine not being worked by mechanical power, and the bottle filling by means of the pressure of gas with which it had been aerated.

Held, that these premises were a non-textile factory within sect. 93 of the Factory and Workshop Act 1878.

Law v. Graham (84 L. T. Rep. 599; (1901) 2 K. B. 327) considered.

CASE STATED.

The respondents were charged on an information that they, the respondents, on the 7th June 1901, being then the occupiers of certain premises, the same being a non-textile factory within the meaning of the Factory and Workshop Acts 1878 to 1895, did unlawfully employ a certain young person of the age of fifteen years, one Samuel Williams, until 9.30 p.m., contrary to the statutes.

The following facts were proved or admitted:—

The appellant was one of His Majesty's inspectors of factories and workshops.

The respondents were on the 7th June 1901 the occupiers of certain premises, which premises included a building used as a bottling stores.

On the 7th June 1901 Samuel Williams, a young person within the meaning of the Factory and Workshop Acts 1878 to 1895, was employed by the respondents in the bottling stores from 7 a.m. to 9.30 p.m.—that is to say, beyond the period of employment permitted by sect. 13 of the Factory and Workshop Act 1878, or sect. 36 of the Factory and Workshop Act 1895.

If the bottling stores were a non-textile factory within the meaning of the Factory and Workshop Act 1878, s. 93, then the respondents on the 7th June 1901 infringed the provisions of sect. 13 of that Act.

The respondents contended that the bottling stores were not a non-textile factory, on the ground that mechanical power was not used in aid of any manufacturing process carried on there.

The bottling stores were used by the respondents for the purpose of aerating and bottling beer, and the gas engines situate in the bottling stores were used by the respondents in the manner hereinafter mentioned.

The beer was so aerated and bottled for the purpose of adapting it for sale as bottled beer.

The beer was brought in barrels into the bottling stores. It was then forced out of the barrels into a cooling tank by means of an air-pump, driven by mechanical power—to wit, a gas engine. Thence it was forced by an air-pump, driven by mechanical power, into a cylinder (hereinafter called the mixing cylinder) situate in a room adjoining and communicating with that in which Samuel Williams was employed.

The mixing cylinder contained a mechanical mixer rotated or driven by mechanical power—to wit, a gas engine. Attached to and communicating with the cylinder were high-pressure cylinders containing carbonic acid gas, which were brought already charged with such gas into the bottling stores. By the action of the mixer, the beer and the carbonic acid gas were mixed together and the beer aerated.

It was the duty of Samuel Williams, which he was performing during his employment on the 7th June 1901, to place an empty bottle in the bottling machine and pull down by hand into the neck of such bottle, by means of a lever, the nozzle of a tap communicating by a pipe with the mixing cylinder. The beer flowed through the pipe from the tap owing to the pressure of the gas with which it had been aerated and filled such bottle. The bottling machine was not worked by mechanical power.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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The bottles before being filled were drained and soaked by hand, and afterwards rinsed out by a brush driven by a gas engine on another floor of the premises.

The magistrate dismissed the information on the ground that the premises were not a non-textile factory within the meaning of sect. 93 of the Factory and Workshop Act 1878, inasmuch as the work done by Samuel Williams was manual work only, and it was immaterial how the beer was conveyed to the bottling machine.

By sect. 93 of the Factory and Workshop Act 1878 (41 Vict. c. 16), factory means "textile factory" and "non-textile factory," or either of such description of factories. "Non-textile factory" means:

(1) Any works, warehouses, furnaces, mills, foundries, or places named in part one of the fourth schedule to this Act; (2) also any premises or places named in part two of the said schedule wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there; (3) also any premises therein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them—that is to say, (a) in or incidental to the making of any article or of part of any article; or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or (c) in or incidental to the adapting for sale of any article and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

Sutton (G. S. Robertson with him) for the appellant.—The magistrate has held these premises not to be a textile factory because the work done by Williams was manual work only. That can have nothing to do with the question. *Law v. Graham* (84 L. T. Rep. 599; (1901) 2 K. B. 327) is no authority in this case. There certain premises were solely used for the purpose of washing bottles and bottling beer. Before the bottles were filled, which was done by manual labour, they were washed inside by a rotary brush driven by a small gas engine, the bottles being held in position by hand, and the outsides being washed by manual labour. Nothing was done to the beer itself, and no process of any kind, manufacturing or otherwise, was done on the premises. That was very different to the present case. *Petrie v. Weir* (Ct. Sess. Cas. 5th series, vol. 2, 1041) is in point here. There the premises consisted of a yard in which stones were dressed by manual labour, and included an engine house where the workmen's tools were sharpened on a grindstone driven by a gas engine. No other mechanical power was used on the premises, but they were held to be premises in which mechanical power was "used in aid of the manufacturing process carried on therein." Again, in *Henderson v. Glasgow Corporation* (Ct. Sess. Cas. 5th series, vol. 2, 1127), in the Refuse Dispatch Works of the corporation certain saleable parts of the city refuse were separated from the unsaleable part by processes in which steam power was used. It was held that these works fell within the definition in sect. 93 of the Factory and Workshop Act 1878 as there was an adaptation for sale. In the present case there is an adapting for sale, and mechanical power is used in aid of a manufacturing process.

Travers Humphreys for the respondents.—There is no manufacturing process here at all. There may be an adapting for sale. The mechanical power here was not used in aid of the manufacture of the article—i.e., bottling the beer.

Lord ALVERSTONE, C.J.—When the words of this section are read, I think it is quite clear that in this case the magistrate ought to have convicted. The words are: "Any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them—that is to say, (c) in or incidental to the adapting for sale any article and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." In this case the facts show that upon these premises and in the curtilage and within the words of that section carbonic acid gas and beer are mixed together by mechanical means and are then together put into the bottles. It seems to me that that is clearly a case of adapting for sale beer, and adapting for sale bottled beer. Under those circumstances, there having been manual labour on those premises at the same time there is this mechanical power which is used for that purpose, the words of the section are fulfilled. I wish only to say that I think the distinction which I drew in *Law v. Graham* (ante, p. 212; 84 L. T. Rep. 599; (1901) 2 K. B. 327) is right, and that it certainly is no authority against the view we are now holding. There we thought we could not overrule the magistrate, who came to the conclusion that the washing of the bottles was not doing anything incidental to the adapting for sale of bottled beer. Whether we were right or wrong in that case, it certainly is no authority against the view we are now taking in this case, and I think the case should go back to the magistrate to convict.

DARLING and CHANNELL, JJ. concurred.

Appeal allowed.

Solicitors: *The Solicitor to the Treasury; Clapham, Fitch, and Co.*

Feb. 24 and 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

DAVIES (app.) v. EVANS (resp.). (a)

Fishery—Bye-law—Fishing for salmon in weekly close time—Intention—Evidence.

D. had a net fixed and kept up and closed in salmon waters capable of taking salmon during the weekly close time provided by the bye-laws, and in which salmon had been in fact taken, and in respect of which he had taken out a salmon license. The mesh of the net was smaller than that allowed by the bye-laws.

Held, that, provided the justices found intention, there was evidence of fishing for salmon otherwise than by rod and line during the weekly close time, and of attempting to take salmon with smaller meshes than that allowed by the bye-laws.

(a) Reported by W. de B. HERBERT, Esq., Barrister-at-Law.

K.B. Div.]

WHITAKER (app.) v. POMFRETT BROTHERS (resps.).

[K.B. Div.]

CASE stated upon two informations preferred by the respondent against the appellant charging him in the first with unlawfully fishing for salmon otherwise than by rod and line in certain waters during the weekly close time, contrary to certain bye-laws made by the Board of Conservators by virtue of 36 & 37 Vict. c. 71, s. 39, sub-ss. 2, 4, and in the second with attempting to take salmon with a net of less dimensions than that allowed by the bye-laws.

Upon the hearing the following facts were proved:—

The appellant was the owner of a net in the estuary of the Towy within the district of the board, permanently fixed in a position about 700 or 800 yards from the bed of the river Towy and about 240 yards from the bed of the river Gwenraethfach, which is a tributary of the Towy.

The mesh of the net was smaller than the mesh required by the law regulating the size of the mesh for salmon nets.

The net was kept up by the appellant during the weekly close time fixed by the bye-law in that behalf.

The net had been so used as aforesaid for many years.

The appellant shortly before the alleged offence against the bye-law had been warned by the water bailiffs to open the net during the weekly close time which the applicant refused to do, asserting his intention to keep it down.

Large quantities of coarse fish such as bass, herrings, flat fish, and sprats were caught in the net all the year round. As much as 4785lb. were caught from June 1900 to Jan. 1901.

Salmon were occasionally caught in the net as in other nets, fixed in the estuary for catching fish other than salmon. During the three weeks previous to the hearing 9½lb. of sewin had been caught. No salmon had been caught therein this season. In the summer months of 1900, salmon weighing 60lb. to 70lb. were caught in the net.

In the district in question the words "sewin" and "salmon" are used differentially, although in the Salmon Fishery Act 1861, s. 4, "salmon" includes "sewin."

The defendant held a salmon licence in respect of the net, in pursuance of a specific charge in respect thereof in the scale of licence duties.

No bye-law had been made by the board under sect. 39 (11) of 36 & 37 Vict. c. 71.

On the part of the appellant it was contended that the net was not a net peculiarly adapted for catching salmon, and that it was not fixed for that purpose, and that the licence which had been taken out was taken out for the purpose of enabling the appellant to keep any salmon which might occasionally be caught in the net, and did not convert it into a salmon net, so as to render it subject to the bye-laws under which the appellant was charged as aforesaid, and the cases of *Watts v. Lucas* (24 L. T. Rep. 128; L. Rep. 6 Q. B. 226), *Pidler v. Berry* (59 L. T. Rep. 23), *Marshall v. Richardson* (10 L. T. Rep. 605), and *Wood v. Venton* (54 J. P. 662) were referred to.

On the part of the respondent it was contended that the fact that the net was fixed in salmon waters, that it was capable of catching and it did in fact catch salmon, and the appellant had taken out a licence in respect of the net brought the same within the operation of the bye-law. The

cases of *Lyne v. Leonard* and *Lyne v. Fennell* (18 L. T. Rep. 55; L. Rep. 3 Q. B. 156), *Short v. Bastard* (46 J. P. 580), and *Hill v. George* (44 J. P. 424) were referred to.

Upon the foregoing evidence the justices were of opinion that the appellant had offended against the bye-law, which had been made under statutory power, and they convicted him on both informations.

The question of law upon which this case was stated for the opinion of the court was whether the net having been fixed in salmon waters (which as a fact were tidal waters), being capable of taking and having taken salmon, and the appellant having taken out a salmon licence in respect of the net, brought the same within the operation of the bye-laws relating to the weekly close time.

S. T. Evans, K.C., and *J. D. Williams* for the appellant.

Willis Bund for the respondent.

LORD ALVERSTONE, C.J.—We all think that this case ought to go back to the justices with a direction, that, provided they find intention the facts would be sufficient to justify a conviction. The facts would give jurisdiction to find that there was an offence under the bye-laws. I think that intention is necessary, and it must be gathered from what the appellant does. It would not be sufficient for the appellant to say that he had no intention. That must be gathered from his conduct.

DARLING, J. concurred.

CHANNELL, J.—The facts here are sufficient evidence of intention. If on those the justices find there was intention, then that would justify a conviction.

Case remitted to the justices.

Solicitors: *Clarke, Rawlins, and Co.*, for *Stephens and Soppitt*, Carmarthen; *Indermaur and Brown*, for *James John*, Carmarthen.

Tuesday, Feb. 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WHITAKER (app.) v. POMFRETT BROTHERS (resps.). (a)

Adulteration—Warranty from original vendor—Proceedings—Limitation—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11—*Sale of Food and Drugs Act 1875* (38 & 39 Vict. c. 63), s. 20—*Sale of Food and Drugs Act 1899* (62 & 63 Vict. c. 51), s. 20 (6).

Proceedings against a person who, in respect of an article of food or drug sold by him as principal or agent, has given to the purchaser a false warranty in writing, under sect. 20 (6) of the Sale of Food and Drugs Act 1899, must be commenced within six months from the giving of warranty.

CASE STATED.

On the 22nd July 1901 an information (dated the 6th July 1901) was preferred by the appellant against the respondent under sect. 20, sub-sect. 6, of the Sale of Food and Drugs Act 1899, charging that they (the respondents) on the 16th May 1901,

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

K.B. Div.]

WHITAKER (app.) v. POMFREY BROTHERS (resps.).

[K.B. Div.]

in respect of an article of food—to wit, pepper—sold by them as principals did give to the purchaser the cof a false warranty in writing, the warranty so given stating the pepper to be genuine white pepper, whereas the same contained not less than 10 per cent. of pepper husks contrary to the provisions of the section.

Upon the hearing of the information the following facts were proved by the appellant and not disputed by the respondents:—

John Milne carried on business as a retail grocer in Manchester-road, Haslingden, and he, on the 20th Nov. 1900 purchased from the respondents, who carry on business as wholesale grocers, 3lb. of white pepper.

Milne purchased the pepper as genuine white pepper, and with a written warranty to that effect given by the respondents.

On the 16th May 1901 Milne sold to Arthur Bland, sergeant of police (a subordinate officer of the appellant), at his shop in Manchester-road, Haslingden, 6oz. of the pepper.

The pepper was bought by Bland for purposes of analysis, and was divided by him into three parts in the manner prescribed by the statute and one portion sent to the county analyst, and all the requirements of the Sale of Food and Drugs Act 1875, s. 14, were complied with.

On being analysed the pepper was found to contain not more than 90 per cent. of genuine white pepper, and not less than 10 per cent. of bleached pepper husks, and a certificate in the statutory form was given to that effect.

Thereupon a complaint was laid against Milne for selling to the prejudice of the purchaser an article of food, to wit, pepper not of the nature, substance, and quality demanded by the purchaser.

That complaint came on for hearing before the justices at Haslingden, on the 24th June 1901, and at the hearing Milne proved to the satisfaction of the justices that he had purchased the pepper as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect—namely, the warranty given to him by the respondents on the 20th Nov. 1900, and that he had no reason to believe at the time when he sold it, that the article was otherwise, and that he sold it in the same state as when he purchased it. Thereupon the justices dismissed the complaint against Milne under the provisions of sect. 25 of the Sale of Food and Drugs Act 1875.

Upon the hearing it was contended on behalf of the respondents (a) that apart from the evidence relating to the warranty, dated the 20th Nov. 1900, no evidence had been offered to the justices of the giving of a false warranty by the respondents on the 16th May 1901; (b) that the offence (if any) was committed and completed on the 20th Nov. 1900 when the warranty was given, and the pepper sold to Milne; (c) that the information having been laid on the 6th July 1901 (more than six months after the 20th Nov. 1900) was not within the time specified in sect. 11 of 11 & 12 Vict. c. 43.

On behalf of the appellant it was contended (a) that the warranty given by the respondents was a continuing warranty running on until the whole of the pepper covered by it had been disposed of, and that the offence was a continuing offence; (b) that the warranty was in force on the

16th May 1901, when Milne sold a portion of the pepper to Bland, and which warranty protected Milne from conviction as hereinbefore set out; (c) that the information was laid on the 6th July 1901, and within six months of the 16th May 1901, the date of the sale to Bland on which date the warranty came into force for the purposes of this particular purchase, and therefore within the time specified by sect. 11 of 11 & 12 Vict. c. 43.

The justices, however, were of opinion that the prosecution was not brought in time under the provisions of 11 & 12 Vict. c. 43, and they dismissed the information.

The question of law arising on the above statement for the opinion of the court was whether the information was laid in time.

F. H. Mellor (James Openshaw with him) for the appellant.—The point raised here is what is the time within which proceedings are to be taken against a person who gives a false warranty under the sale of Food and Drugs Act. The summons was under sect. 20 (6) of the Sale of Food and Drugs Act 1899. The first section in point is sect. 20 of the Sale of Food and Drugs Act 1875, which, *inter alia*, provides: "Every penalty imposed by this Act shall be recovered in England in the manner prescribed by the 11 & 12 Vict. c. 43." That statute provides that such complaints shall be made, and such information shall be laid "within six calendar months from the time when the matter of such complaint or information respectively arose." That was the state of things in 1875, and in 1879 an amending Act was passed. By sect. 10 of that statute it was provided that in all prosecutions under the principal Act, and notwithstanding the provisions of sect. 20 of that Act, the summons shall be served upon the person charged within a reasonable time, and in case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person of the food or drug for test purposes. That section has been repealed but its words are important because of the case of *Cook v. White* (74 L. T. Rep. 53; 1896) 1 Q. B. 284 which was decided upon it, and upon which we found our argument. By sect. 19 (1) of the Act of 1899 it is provided that "when any article of food or drug has been purchased from a person for test purposes, any prosecution under the Sale of Food and Drugs Act in respect of the sale thereof, notwithstanding anything contained in sect. 20 of the Sale of Food and Drugs Act 1875, shall not be instituted after the expiration of twenty-eight days from the time of the purchase." In the schedule to that Act sect. 10 of the Act of 1879 is repealed. Under that section proceedings must be taken within twenty-eight days, and in the case mentioned above it was argued that the reasonable time commenced to run after the twenty-eight days. That twenty-eight days was six months by Jervis' Act (11 & 12 Vict. c. 43). The time in this case begins to run from that time, and not from the date of the false warranty. In *Cook v. White (sup.)* it was laid down that a summons under sect. 27 of the Sale of Food and Drugs Act 1874 against the original vendor of a perishable article of food for giving a false warranty in writing in respect of it to a purchaser, need not be served within twenty-eight days from the purchase of the food for test purposes from that purchaser. He referred to

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the judgments of Lindley and Kay, L.J.J. The Legislature in repealing sect. 10 of the Act of 1879 has kept alive the twenty-eight days after the date of buying for test purposes, and it has only substituted the six months in Jervis' Act, for the reasonable time that is mentioned in sect. 10. The section which enables us to proceed against the warrantor is sect. 20 (6) of the Act of 1899. That provides: "Every person who in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction, for the first offence to a fine not exceeding 20*l.*, for the second offence to a fine not exceeding 50*l.*, and for any subsequent offence to a fine not exceeding 100*l.*, unless he proves to the satisfaction of the court, that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true." This offence is really a continuing one, and so long as the shopkeeper is entitled to rely on the warranty and keep it as a defence, so long there is a continuing offence committed. The matter of the information or complaint arose, when the retailer was entitled to set up the warranty.

Frank Mellor for the respondents.

LORD ALVERSTONE, C.J.—One cannot help feeling some regret that these proceedings must fail upon the point taken, for the reasons pointed out by Kay, L.J. in *Cook v. White* (74 L. T. Rep. 53; (1896) 1 Q. B. 284), that in the case of some articles, non-perishable, which may be kept a long time, proceedings cannot be taken against persons who have given a false warranty. It seems to me that is a matter which must be put right by the Legislature. The case stands in this way. Under sect. 20 of the Act of 1875 it is provided that in proceedings against offenders "every penalty imposed by this Act shall be recovered in England in the manner prescribed by the 11 & 12 Vict. c. 43." Therefore that does, in regard to proceedings against offenders, bring in the provisions of Jervis' Act. Then came the section of the repealed Act, which provided that proceedings under sect. 20 should be in the case of perishable articles within twenty-eight days from the time of its purchase. Then, as Mr. Mellor has properly pointed out, that is extended by the Act of 1899 to both perishable and non-perishable articles. Therefore, in so far as the actual proceedings have to be taken in respect of the sale there are limits of time less than the six months. Now, in order to enable these proceedings to be taken against the persons who have given the warranty, you must find something in the Act which either directly or by implication excludes the operation of sect. 20 in regard to this particular offence. It seems to me that when you look at the amending Act of 1899 the words are not sufficient: "Every person who in respect of an article of food or drug sold by him as principal or agent gives to the purchaser a false warranty in writing shall be liable on summary conviction for the first offence to a fine not exceeding 20*l.*" Now, the words of that section creating that offence seem to me directly to correspond with the class of offence to which it was intended that the limits laid down by sect. 20 of the Act of 1875 should apply. I think that if it was intended to

exclude the general limits of time which were brought in by the incorporation of the provisions of Jervis' Act, you would require special words to say that such proceedings may be taken within some time as any time that may be named, e.g., from the time of the purchase of the articles from the sub-purchaser, or a direction that, for the purpose of a summons under that section, the date of purchase should be taken to be the date when the false warranty was supposed to be given. I think it is impossible for us to give proper effect to sect. 20 of the Act of 1875, if we hold that these proceedings could be taken more than six months from the date of the offence—namely, the offence of giving the false warranty. Therefore, though I quite agree that the case is one which it is desirable should be met, if it is intended that the proceedings are to be taken against the person who has given the false warranty, more than six months before, I think it must be by an Act, and not by putting a construction on the Act which the plain language of it does not justify.

DARLING and CHANNELL, JJ. concurred.

Appeal dismissed.

Solicitors: Snow, Fox, and Co. for H. Clare, Preston; Williamson, Hill, and Co. for Marsden and Marsden, Blackburn.

Wednesday, Feb. 26, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PEARKS, GUNSTON, AND TEE LIMITED (apps.) v. HOUGHTON (resp.). (a)

Adulteration of food—Sale of mixed or blended article—Notice in shop that article is blended—Protection of seller by notice—Sale to prejudice of purchaser—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6, 8.

To a purchaser who asked for half a pound of 1*lb.* butter, the appellants, who were grocers, sold in their shop butter which contained nearly 8 per cent. excess of water, this excess of water not being added separately, but being derived solely from milk added to the butter by a process of blending.

On the wall behind the butter counter in the shop there was a notice in large letters that the butter sold at the establishment was blended with full cream milk whereby it retained from 20 to 24 per cent. of moisture. This notice was visible to anyone going into the shop, though the purchaser, who was an inspector, did not observe it, and his attention was not called to it.

Held, that, as an ordinary purchaser going into the shop would see and must be taken to have seen the notice, the article sold must be taken to have been in fact sold not as ordinary butter simply, but as blended butter, and therefore the sale could not be considered to be to the prejudice of the purchaser within sect. 6 of the Sale of Food and Drugs Act 1875, and there was no offence committed under that section.

CASE stated by justices of the peace for the borough of Richmond, in the county of Surrey.

At a court of summary jurisdiction held in the borough of Richmond on the 8th Aug. 1901 an

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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information was preferred by Houghton (the respondent) against Pearks, Gunston, and Tee Limited (the appellants) under sect. 6 of the Sale of Food and Drugs Act 1875, charging that the appellants on the 12th July 1901, at the borough of Richmond, did unlawfully sell to the prejudice of the purchaser a certain article of food—to wit, half a pound of 1s. butter—which was not of the nature, substance, and quality demanded, the same having had water added thereto to the extent of 7·8 per cent. of water beyond the usual limit of 16 per cent. of water natural to butter.

This information was heard and determined by the justices, and upon such hearing the appellants were convicted of the offence, and the justices adjudged that they should forfeit and pay a penalty of 20*l.* and costs.

The appellants were grocers and provision merchants, and carried on business, amongst other places, in the borough of Richmond, their registered office being in the city of London.

The respondent was an inspector under the Sale of Food and Drugs Acts for the borough of Richmond.

On the 12th July 1901 the respondent caused one Alfred Houghton to ask for and purchase on his (the respondent's) behalf at the appellants' shop in Richmond half a pound of 1s. butter for the purpose of analysis.

Immediately after such purchase the respondent entered the shop, and Alfred Houghton thereupon handed the butter as purchased by him to the respondent, who then in the shop divided the butter into three parts for the purpose of analysis.

The public analyst certified that the butter "contained 23·8 per cent. of water, which was 7·8 per cent. more water than the extreme limit of 16 per cent. natural to butter."

The butter so purchased was handed by the assistant who sold the butter in the appellants' shop to Alfred Houghton, and by him to the respondent, wrapped in two pieces of paper.

On the inside paper or wrapper there was printed in large type the words "Pearks' Butter," and underneath, in much smaller type, a statement that the butter was blended with pure English cream milk by new and improved machinery whereby it retained about 20 to 24 per cent. of moisture. This inside wrapper was as follows:

Pearks' Butter.—This is choicest butter blended with pure English full cream milk, by new and improved machinery, whereby it retains about 20 to 24 per cent. of moisture and acquires that delicacy of flavour which has made Pearks' butter so famous.—Half-pound.

The outside wrapper was a piece of opaque paper which had no writing or print of any kind on it, a specimen of which was annexed to the case.

When the respondent took off the outside paper wrapper in the appellants' shop in order to divide the half a pound of butter into three parts for analysis, he saw that there was something printed on the inside wrapper, but did not read it, and his attention was not called to it.

It was proved by the appellants that it is a common practice in the trade to blend different kinds of butter, and that the process of blending adopted by the appellants was to put the butter into a churn with full cream milk and this is rechurned.

Any excess of water in the butter in question was derived solely from the milk so added during this process of blending. No water was separately added to the butter.

It was stated in evidence on behalf of the appellants that the object of blending the butter with milk in this way was to give it uniform colour and flavour and to give it freshness, but there was no evidence that the milk was so added to the butter because it was required for the preparation of the butter as an article of commerce fit for carriage or consumption.

The price of full cream milk was three farthings a pound.

In a frame on the wall behind the butter counter in the appellants' shop there was a printed notice in large letters to the same effect as the notice on the wrapper, stating that the butter sold in the establishment was blended with pure English full cream milk whereby it retained about 24 per cent. of moisture. This notice on the wall of the appellants' shop was as follows:

Notice.—Pearks' butter, as sold at this establishment, is choicest butter blended with pure English full cream milk, by new and improved machinery, whereby it retains about 20 to 24 per cent. of moisture and acquires that delicacy of flavour which has made Pearks' butter so famous.—By order, JOHN DUMFRIES, Secretary.

This notice was on the wall in the shop as above stated at the time the respondent purchased the half a pound of butter. The butter counter faces the front of the shop, and the above-mentioned notice was visible to anyone going into the shop, but the respondent did not observe it, and his attention was not called to it.

It was contended on behalf of the appellants that the inside paper wrapper, in which the butter was handed to the purchaser, was a label within the meaning of sect. 8 of the Sale of Food and Drugs Act 1875; that the printed notice in the shop was sufficient notice to the respondent apart from the label, and that there was no evidence of fraud. Also, that as such wrapper and printed notice in the shop accurately stated the nature and composition of the article sold, there was no evidence of a sale to the prejudice of the purchaser within the meaning of sect. 6 of the Sale of Food and Drugs Act 1875.

It was contended by the respondent: (1) That the sale was complete before he entered the shop, and that notice by label or otherwise was then too late; (2) that as the butter was delivered in a piece of plain opaque paper which prevented the printing on the inside wrapper being visible until removed, and as the respondent did not in fact read it and did not purposefully abstain from reading it, and his attention was not called to it, the inside wrapper did not constitute notice by label supplied at the time of delivering the article to the person receiving the same within the meaning of sect. 8 of the Act of 1875; and (3) that as he did not observe the notice on the wall in the shop and his attention was not called to it, it was no notice to him at all.

The justices were of opinion (1) that the printed matter on the inside wrapper was in its terms inaccurate and misleading, and on that ground was not a sufficient notice by label within the meaning of sect. 8, inasmuch as it stated the result of the blending to be to "retain" in the butter about 20 to 24 per cent. of "moisture,"

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whereby it acquired delicacy of flavour, whereas the true and only result was to "add" 7·8 per cent. of "water" to the extreme limit of 16 per cent. natural to the butter; (2) that for the like reasons the notice on the wall of the shop was not a sufficient notice; (3) that as the butter was delivered in a piece of plain opaque paper which until removed effectually concealed the inside wrapper and the printing thereon, and as the respondent did not in fact read the printing and did not purposely abstain from so doing, and having regard to the nature of the article asked for and to the fact that his attention was not called to the printing, the inside wrapper did not constitute a notice by label supplied at the time of delivering the article to the person receiving the same within the meaning of sect. 8 of the Act of 1875; (4) that as the respondent did not observe the printed notice on the wall in the shop, and having regard to the nature of the article asked for and the fact that his attention was not called to the notice, the same was no notice to him at all; (5) that the sale of the article was complete before the respondent entered the shop, and that notice by label or otherwise was too late; and (6) that the excess of 7·8 per cent. of water found in the butter was added fraudulently to increase its bulk and weight, and that on that ground also notice by label or otherwise was no protection to the appellants.

The justices therefore convicted the appellants.

The questions for the opinion of the court were: (1) Whether the inside wrapper in which the butter was delivered was a sufficient notice by label within the meaning of sect. 8 of the Sale of Food and Drugs Act 1875; (2) whether upon the facts stated there was sufficient notice otherwise than by label to the purchaser of what he was purchasing; and (3) whether upon the facts stated there was any evidence that the excess of water in the butter was added fraudulently to increase the bulk or weight.

If the court should be of opinion that the inside wrapper was sufficient notice by label within the meaning of sect. 8 of the Act of 1875, or that the purchaser had sufficient notice otherwise than by label of what he was purchasing, and that there was no evidence that the excess of water was intended fraudulently to increase the bulk or weight, then the conviction was to be quashed; otherwise the conviction was to stand.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), provides:

SECT. 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds; provided that an offence shall not be deemed to be committed under this section in the following cases; that is to say, (1) Where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight, or measure of the food or drug, or conceal the inferior quality thereof.

SECT. 8. Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or

conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

Asquith, K.C. (Avory, K.C. and Bonsey with him) for the appellants.—The point is whether the article sold was sold to the prejudice of the purchaser within sect. 6, and also whether there was a notice by label having regard to sect. 8. The justices were wrong in holding that there was not a sufficient notice. The only offence here is that of selling to the prejudice of the purchaser, and it is quite independent of the question which may arise under sect. 8, as the case is not made out unless it be shown that there is a sale to the prejudice of the purchaser within sect. 6. Where the seller, as in this case, brings to the knowledge of the purchaser the fact that the article sold is not of the nature, substance, and quality demanded, then the sale is not "to the prejudice of the purchaser" within sect. 6, and there is no offence:

Sandys v. Small, 39 L. T. Rep. 118; 3 Q. B. Div. 449.

Cockburn, C.J. there says: "If a man puts up in a conspicuous position a notice in large letters, and it is clear that it must have come under the observation of the customer, the 6th section would not apply." That applies here. Any customer coming into the appellants' shop had notice that what was sold was blended butter. Secondly, there was a notice by label, within sect. 8, that the article sold was blended butter. In *Jones v. Jones* (58 J. P. 653), where cocoa was packed in a tin and a label on the tin stated that the cocoa was mixed, it was held that there was a sufficient notice by label, although the label, as here, was wrapped in opaque paper. So in *Platt v. Tyler* (58 J. P. 71), where a label on a tin of milk stated the milk to be skimmed milk, it was held to be a "sufficient disclosure of the alteration" within the analogous sect. 9. The judgment of Lord Russell, C.J. in *Spiers and Pond v. Bennett* (74 L. T. Rep. 697; (1896) 2 Q. B. 65), which was also under sect. 9, shows that there was here a sufficient disclosure of the alteration. But the appellants are not bound to resort to sect. 8 at all; that section is only a second defence. They rely more strongly on sect. 6 than on sect. 8, and in the material part of sect. 6 the words "fraud" or "fraudulently" do not occur. All sect. 6 says is that the sale must not be to the prejudice of the purchaser. The real point here is that the article was a mixed or blended article, and if the vendor has given—as the appellants have done by the notice in the shop—notice to the purchaser that the article was blended, then there is no evidence that the sale is to the prejudice of the purchaser and no offence within sect. 6; but even under sect. 8 the authorities show that the label was a sufficient notice by label within that section. He also referred to

Pope v. Tearle, 30 L. T. Rep. 789; L. Rep. 9 C. P. 499.

A. Glen for the respondent.—The justices were right in holding that the notices were not sufficient notices to the purchaser and that the sale was to the prejudice of the purchaser within sect. 6. In *Pearks, Gunston, and Tee Limited v.*

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Knight (85 L. T. Rep. 379; (1901) 2 K. B. 825), the appellants were convicted under sect. 6 of selling this blended butter as butter simply without giving any notice to the purchaser that it was blended. Since that decision this notice has been adopted. There is a finding by the justices that the excess of water was added to the butter fraudulently to increase its bulk and weight. That brings the case clearly within the decision in *Liddiard v. Reece* (44 J. P. 233), where coffee was mixed with chicory and where the justices found as a fact that the mixing was done fraudulently to increase the bulk. There Lush and Manisty, J.J. held that, as there was a finding that the coffee was fraudulently mixed with intent to increase the bulk, the conviction under sect. 6 was right, and that the label did not protect the seller. *Horder v. Meddings* (44 J. P. 234) is to the same effect. What the prosecutor has to show under sect. 6 is that the sale is to the prejudice of the purchaser. He does that by establishing fraud, because if he shows fraud then the sale is to the prejudice of the purchaser, and if the seller wants to get out of that he must show that the purchaser had notice of the fraud, as if the purchaser had notice of the fraud there would be no sale to his prejudice. With regard to the notice, the suggestion is that there is some operation which is performed on the butter by which the moisture which ought to be in the butter is prevented from disappearing, whereas in fact the effect is that nearly 8 per cent. of water is added to the butter which did not belong to it originally and which ought not to be in it. There was abundant evidence of fraud, and evidence on which the justices were justified in finding as they did and in convicting the appellants.

Asquith, K.C. in reply.

LORD ALVERSTONE, C.J.—I must say that this case is not stated in a satisfactory way. If the court were satisfied that this compound had been sold as butter, and nothing else had been said about it, there would be evidence of an offence under sect. 6. I think that was practically decided in the case of *Pearks, Gunston, and Tee v. Knight* (*ubi sup.*), cited in the argument, and I should have come to the same conclusion, but certainly that is not the way in which we ought to regard this case. The purchaser asked for half a pound of 1s. butter, and the butter was purchased. If it should turn out that there were various classes of butter at Messrs. Pearks' establishment, and that this was merely butter at a different price from the other butters, notice of that ought to be given, but I understand the facts in this case to be that Messrs. Pearks are selling one sort of butter only—namely, blended butters. That is the conclusion I draw from the facts, and I do not intend anything I say now to apply to a case where different kinds of butter are being sold. There are three questions left by the justices for us to decide. With regard to the first, whether the inside wrapper delivered to the purchaser was a sufficient notice within sect. 8, speaking for myself only, I am not satisfied that, if an offence had been made out under sect. 6, this label would have protected the appellants. Sect. 8 provides that a person shall not be guilty of such an offence in respect of the sale of an article not intended fraudulently to increase the

bulk, or weight, if at the time of delivery he shall supply the purchaser receiving the same with a notice by label. If we were dealing with that section only, we should undoubtedly have to consider to a greater extent the words "intended fraudulently to increase its bulk or weight"; and we should have to say whether or not at the time of delivering such article the purchaser was supplied with notice by means of the label. Speaking for myself, I have very grave doubt whether delivering an article such as this with notice on an internal label would be delivery with notice by label to the purchaser at the time of purchase or at the time of delivery of the article. I do not think the case of *Jones v. Jones* (*ubi sup.*) is sufficient authority on the facts of this case. The second question is a most important one—namely, whether there was sufficient notice otherwise than by label. As to this, it has been found by the justices that the large notice referred to, an exact copy of the smaller notice on the wrapper, was hung in the shop behind the butter counter, and was visible to everyone going into the shop. This is a finding that an ordinary purchaser going in to buy this butter would see this notice, and that is not at all qualified by the statement that the respondent did not see it and that his attention was not called to it. The purchaser, having got the butter, went into the shop to fulfil the conditions of the Act and to tell the sellers that he was going to divide the sample; and if the finding that the respondent did not see the notice was meant to be a finding against Messrs. Pearks that the notice would not have come to the notice of an ordinary purchaser, then I cannot understand why these words were put in the finding that the "notice was visible to anyone going into the shop." Reading that notice, which was placed on the wall, I think it is quite impossible in the face of that notice to assume that it only applied to one kind of butter or article sold in that shop. I have come to the conclusion that it cannot be taken to be a sale of one of many classes of butter at different prices; but the statement in the case is as to the purchase of Messrs. Pearks' butter, meaning the same thing as the butter described in the notice. That being so, I think we are bound by the cases of *Sandys v. Small* (*ubi sup.*) and *Spiers and Pond v. Bennett* (*ubi sup.*), which I understand lay down the proposition that if a purchaser is told at the time of the purchase, and it is brought to his knowledge, that the article sold is a blended article, it cannot then be said that the article is being sold to the prejudice of the purchaser. I think no question arises here under sect. 24, and I think that the prosecutor has to prove that there is a sale to the prejudice of the purchaser. It is good law and good sense that when a person is told he is buying butter blended with something, he is not entitled to come to this court and say he was buying something which was not mixed with anything at all. As to the terms of this notice, they are not particularly happy, but I do not intend to give any guidance as to it. To the person who understands the chemistry of butter and knows it has only 16 per cent. of moisture ordinarily, I think it would be wrong to say "it retains about 20 to 24 per cent. of moisture"; but to the ordinary purchaser—who within the ruling of *Sandys v. Small* (*ubi sup.*) has to be considered—it is a statement that the butter is mixed with milk and

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has in it some 23 per cent. of moisture. I do not think that any misleading statement in that notice can do away with the broad statement that the butter sold at that shop is in accordance with the notice. I think, therefore, the answer to the second question must be in favour of the appellants, and that there was no evidence of an offence. There remains the third question, which has become immaterial. When once we get that there is no offence under sect. 6, this question of supposed fraudulent addition does not arise at all, and it is only because the justices have overlooked the true view of the law, having regard to *Sandys v. Small* (*ubi sup.*), that they have left it to us. I think this case comes within the definition of Cockburn, C.J. in *Sandys v. Small* (*ubi sup.*), and of Lord Russell, C.J. in *Spiers and Pond v. Bennett* (*ubi sup.*), and that there was no sale to the prejudice of the purchaser, and that this appeal should therefore be allowed.

DARLING, J.—I am of the same opinion; but I must say that in what the appellants have done here they have gone exceedingly close to the line. In my view they are saved only by the large notice which they had put up in the shop. If it had not been for that notice and if they had relied simply upon the label, my opinion is that they would not have brought themselves within the protection of the statute. I do not wish to say a word against the case of *Jones v. Jones* (*ubi sup.*), because I do not think what was done here comes within the rule in *Jones v. Jones* (*ubi sup.*). There the paper covering was the usual way of giving the article to the purchaser. I do not think that anyone would say that the usual way of selling butter is to put it into a piece of paper which says it is butter mixed with something else and then to wrap round it a piece of opaque paper which prevents the person reading what is on the inner wrapper. I should not think of saying there was no label; there was a label, but it was wanting in all the elements present in that case. The label was not, as I understand, put round the butter at the time of delivering the article to the purchaser. I gather that the butter was kept wrapped up in the wrapper with the print on it, and then had the thick outer wrapper put round. With regard to the large notice, I think the wording is very suspicious; but to say that it makes one suspect the article which it praises is one thing, and to say that it convinces one that it is prepared fraudulently to increase the bulk or weight of the article is another thing; and, except this, I cannot see any evidence that the preparation was made fraudulently to increase the bulk or weight. It is suspicious because it says: "Made by improved machinery whereby it retains moisture and acquires delicacy." That is not expressing the thing properly. To my mind one verb would have done for the two things, and if they had put "acquires 23 per cent. of moisture and delicacy," that would put the facts of the case properly. It much more acquires moisture than it does delicacy. I have not much doubt that that notice was not drawn by a butter merchant. It was an attempt to gain the protection of the statute, and the words, no doubt, were really used because they had been used in some reported case, and were selected by somebody with a knowledge of other things than butter.

CHANNELL, J.—The substance sold is a perfectly legitimate substance to deal in, but it is not butter, and therefore the court in the previous case of *Pearks, Gunston, and Tee v. Knight* (*ubi sup.*), where the article was sold as butter, decided that there was an offence against this 6th section of the Act for selling a thing not of the nature, substance, and quality demanded, and that selling it simply as butter, without anything further, was a sale to the prejudice of the purchaser. But it is an article which it is legitimate to sell as blended butter. Whether there is sufficient evidence of a sale to the prejudice of the purchaser seems to depend upon whether it was in fact sold as blended butter or as butter. Now, it is obvious that after the previous decision the appellants took steps intended to meet the case decided against them, and intended to protect themselves by selling this article solely as blended butter. Both these notices may be criticised, but they both begin by saying that it is choicest butter, blended, and then go on to say that it has more than the ordinary amount of moisture. Consequently, if the sale took place on these documents, it is a sale of blended butter, and not of ordinary butter. The difficulty in dealing with these cases as to sales to the prejudice of the purchaser always arises from the fact that the purchaser before the court is nearly always an inspector who is buying for the purpose of analysis and not for his own consumption, and so one has to look at the circumstances and see whether, if he had been an ordinary purchaser, he would have been prejudiced. There always arises the difficulty when there is a notice in the shop whether an ordinary purchaser would have seen it. The inspector is not likely to go about the shop searching for notices; but we have to consider what an ordinary purchaser would do. In the present case there was a large notice in a conspicuous place in the shop, so that anyone would see it. That brings this case within the case of *Spiers and Pond v. Bennett* (*ubi sup.*), which says that under such circumstances as those the sale could not be considered to be a sale to the prejudice of the purchaser. That sufficiently disposes of this case. The process was done to increase the weight, bulk, and measure, but it does not follow that it was done fraudulently. If it was done with the honest intention of selling it as what it was—namely, blended butter—there was no fraud in doing something which would increase the weight and bulk.

Appeal allowed. Conviction quashed.

Solicitors for the appellants, *Neve, Beck, and Kirby.*

Solicitor for the respondent, *T. Weeding, Kingston-upon-Thames.*

Feb. 26 and 27, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HOLLAND (app.) v. HALL (resp.). (a)

Hawker—Carrying to sell—Carrying goods to show on approval with a view to sell—Previous request to a canvasser to send goods on approval—Necessity of hawker's licence—Hawkers Act 1888 (51 & 52 Vict. c. 33), ss. 2, 6.

By sect. 2 of the *Hawkers Act 1888* "hawker" means "any person who travels with a horse . . . and goes from place to place or to other men's houses carrying to sell or exposing for sale any goods," &c.

The respondent was sent out by his employers, who were manufacturers of sewing machines, with a horse and van in which were some sewing machines, with instructions to call at certain specified houses in different places and show the machines on approval for the purpose of selling them, and he did so. None of the persons in the houses called at had bought or agreed to buy machines, but they had previously been visited by a canvasser to whom they had expressed a desire to see a machine to decide whether they would purchase it. The machines were shown at these houses on approval, and if approved of they would be sold there.

Held, that the respondent was going "from place to place carrying to sell" within the meaning of sect. 2, and was therefore a "hawker" and required a hawker's licence; and that he was none the less a hawker because he had offered the machines only to persons who had previously been visited by a canvasser.

CASE stated by justices of the peace for the West Riding of the County of York.

At a petty sessions held at Otley for the West Riding on the 16th Aug. 1901, an information was preferred by the appellant Joseph Holland, an officer of Inland Revenue, by order of the Commissioners of Inland Revenue, against the respondent William Hall and a certain Fred Poppleston, for the recovery of the penalty imposed by sect. 6 of the *Hawkers Act 1888* (51 & 52 Vict. c. 33).

The information stated that Fred Poppleston and William Hall on the 19th April 1901, at the parish of Ilkley, in the West Riding of the County of York, did trade as hawkers without having in force a proper licence as by the statute in that behalf was required, contrary to the form of the statutes in that case made and provided; whereby they had forfeited for such offence the sum of ten pounds.

The respondent (Hall) appeared before the justices to answer to the information, and, as it appeared that the summons issued had not been served upon Poppleston, the justices proceeded to hear and determine the information against the respondent alone.

The *Hawkers Act 1888* imposes, in sect. 3, a duty of two pounds upon an excise licence to be taken out by every hawker in the United Kingdom subject to certain exemptions, none of which apply to this case, and sect. 2 of the Act defines a hawker as follows:

"Hawker" means any person who travels with a horse or other beast bearing or drawing burden, and goes from place to place or to other men's houses carrying to

sell or exposing for sale any goods, wares, or merchandise, or exposing samples or patterns of any goods, wares, or merchandise to be afterwards delivered, and includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells or exposes for sale any goods, wares, or merchandise in or at any house, shop, room, booth, stall or other place whatever hired or used by him for that purpose.

Sect. 5, sub-sect. 2, provides:

A hawker shall not let to hire or lend his licence to any person: Provided that a servant may travel with his master's licence and trade for his master's benefit.

Sect. 6 (1). If any person does any act for which a licence is required by this Act—(a) Without having a proper licence in force in that behalf . . . he shall for every such offence incur a fine of ten pounds over and above any other penalty to which he may be liable.

It was proved before the justices that on the 19th April 1901 the respondent and Poppleston were in the employment of the Singer Manufacturing Company, who were makers of sewing machines. The respondent and Poppleston started from Shipley in the morning of that day with a horse drawing a covered van, in which were five sewing machines. They were first seen at Ilkley and about an hour later at Ben Rhydding. Shipley, Ilkley, and Ben Rhydding are separate and distinct places. At Ben Rhydding they were seen to go with the van to two houses known respectively as Redgarth and Fieldhurst. At Redgarth they saw a servant, and asked her if any order had been given at that house for a sewing machine. Upon receiving a reply in the negative, they asked her to buy a machine, and remained for two or three minutes trying to persuade her to do so, and offered to fetch a machine from the van, but she refused to buy one. At Fieldhurst they saw two servants. James Bailey, a canvasser employed by the Singer Manufacturing Company, had on the 17th April 1901 called at this house and had seen these two servants and asked them to buy a sewing machine. He had no machines with him on that day, and upon offering to send a machine on approval was told that he might do so. Bailey did not mention any particular kind of machine nor any price, and there was no agreement made by either of the two servants with him to purchase a machine. When the respondent and Poppleston went to Fieldhurst the two servants refused to buy a machine, and then Poppleston asked if he might leave one there till evening. He left one, and it was called for on the 22nd April by one of the company's agents.

It was also proved that when the respondent and Poppleston started on their rounds on the 19th April with the five machines they had instructions to call at eight different houses to show machines on approval. These houses included Fieldhurst, but did not include Redgarth. None of the persons in these eight houses had agreed to buy a machine, but they had previously expressed to a canvasser of the Singer Manufacturing Company a desire to see a machine in order to decide whether they would make a purchase. The five machines in the van were taken out to show to the people at these eight houses. Three of the machines were taken back in the van to Shipley at the close of the day, one had been left at Fieldhurst as above mentioned, but no evidence was given as to what had become of

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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the fifth machine. It was stated by the respondent in giving evidence on his own behalf that the machines were shown on approval, and if satisfactory they would be sold.

On behalf of the appellant it was contended that the respondent travelled with a horse drawing a burden, that he went from place to place and to other men's houses, and that the machines were carried for sale. In support of this contention the case of *O'Dea v. Crowhurst* (80 L. T. Rep. 491) was cited to the justices.

On behalf of the respondent it was contended that the Act did not apply to a large firm paying rates and taxes, but was intended to be a protection to the public against dishonest persons; that the machines were merely sent out to be taken to houses at which a canvasser had previously called; that they had been previously ordered and were not carried for sale. The following cases were cited: *Rees v. Little* (1 Burr. 609); *Rees v. Buckle* 4 East, 346; and *Johnson v. Hudson* (11 East, 180).

The justices found as a fact that none of the five sewing machines had been sold when the respondent left Shipley with the van, but upon the evidence given they were of opinion that the machines were not carried for sale within the meaning of the Act inasmuch as it was intended to offer them only to persons already visited by a canvasser, and they accordingly dismissed the information.

The question for the opinion of the court was whether upon the facts above mentioned the justices were right in point of law in holding as aforesaid that the machines had not been carried for sale.

Bowlatt (Sir Edward Carson, S.G. with him) for the appellant.—The question is whether the respondent was carrying these goods for sale within the meaning of the section. Sect. 2 defines what a "hawker" is; then sect. 3 provides for the taking out of an annual excise licence by every hawker, with certain exceptions given in sub-sect. 3, and sect. 6 imposes a penalty for acting as a hawker without having the proper licence. It does not matter whether the horse and van belonged to the respondent or not; it is sufficient to bring the case within the section if he travelled with it, though the servant could use the master's licence. There are two grounds on which the decision of the justices is wrong. In the first place, it is clearly wrong so far as the house Redgarth is concerned, as no canvasser had called there previously, and it could not be denied that there at least the respondent did carry for sale; secondly, there was a carrying for sale at the other houses, although a canvasser had previously called at the houses. The fact of the canvasser having called makes no difference, though the former case is really an *à fortiori* case. If the machines were approved, they would be sold then and there. In *O'Dea v. Crowhurst* (80 L. T. Rep. 491) it was held that taking a cask of oil round in a cart to customers in pursuance of orders to call, when the quantity required was fixed by the customer at his house, was hawking within the meaning of this section. In that case the justices were of opinion that the Act did not apply to persons calling at the houses of regular customers in compliance with previous requests from such customers; but the court (Darling and

Channell, JJ.) held that that was a wrong view of the Act. There is an exception (amongst others) in favour of persons selling fish, fruit, victuals, or coal; otherwise a milkman or baker taking round milk or bread would require a licence.

Rufus Isaacs, K.C. (*T. Bullen* with him) for the respondent.—The point raised in this case is one of very great importance, not so much to the present respondent as to manufacturers like the Singer Manufacturing Company, to whom it would mean a large yearly expenditure if this court were to decide that there ought to be a licence in this case, as the licence is not a licence merely for the firm, but is a personal licence, though a servant may travel with his master's licence: (see sect. 5, sub-sect. 2). The question really is this: Whether in carrying machines which were to be shown in pursuance of the canvasser having called and having received instructions from the persons visited to send a machine for the purpose of its being shown, the sending or taking of the machine to such person is a "carrying to sell" within the meaning of the Act; in other words, whether the person who does that is a "hawker" within the meaning of the Act. The only ground upon which it is contended he is a hawker is because it is said that he is a person who travels with a horse and cart and who is "carrying to sell." These men went to the house Redgarth by mistake, and that house must be left out of this case altogether, so that the substance of the matter is that they were to call at eight houses which the canvassers had previously visited. It is upon that that the case ought to be decided, as there is no finding with regard to Redgarth that they called there for the purpose of selling a machine, and that appears from the finding of the justices that they dismissed the information as the intention was to offer the machines only to persons already visited by a canvasser, and Redgarth had not been so visited. If the information had been with regard to Redgarth alone, there could not have been a conviction, as the authorities show that upon one sale alone a man cannot be convicted of being a hawker, as there would not be a carrying "from place to place," which is the essence of the offence. The gist of the matter is the habitual carrying from place to place:

O'Dea v. Crowhurst (*ubi sup.*).

Then, as to Fieldhurst, upon the statement in the case there is nothing except that the respondent called there and that the servants refused to buy a machine. If it stood upon that, there could be no conviction, because it would be merely one isolated instance. There was simply a carrying round of these machines to leave them on approval. In the ordinary course they would be left on approval, and there would be no sale until there was an approval. This appears quite clearly from the statement in the case that "none of the persons in these eight houses had agreed to buy a machine," &c. Persons carrying the machines in pursuance of these instructions were not carrying them for sale. He referred to

O'Dea v. Crowhurst (*ubi sup.*).

Bowlatt in reply.

Cur adv. vult.

Feb. 27.—Lord ALVERSTONE, C.J.—In this case I have felt very great difficulty, and I confess that my mind has fluctuated more than once in the

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course of the argument. If the finding of the magistrates had amounted to a finding that the machines were only taken to be offered for approval, or were only sent on approval in pursuance of a previous request made to the canvasser, I should have thought we could not interfere; but, after carefully considering this finding of the magistrates, it seems to me that they have not found that, or intended to find it. Their finding is expressed in these words: "We were of opinion that the machines were not carried for sale within the meaning of the Act inasmuch as it was intended to offer them only to persons already visited by a canvasser, and we accordingly dismissed the information." I understand that finding to be this, not that they find that they were not offered for sale, but that they were only offered for sale to persons who had been previously canvassed. Now, I think, if that is so, the magistrates were wrong in holding that this man was not going about travelling "with a horse or other beast bearing or drawing burden" and going "from place to place"—in fact, wrong in holding that he was not a hawker. I think the line of division may be clearly ascertained. If there is merely the sending of articles that people may inspect them and see them, that would not make a man who takes them a hawker, even although ultimately at some future time a sale might result. On the other hand, it does not seem to me to be less an offering for sale because the persons who are likely to be purchasers have been ascertained before the hawker visits the house. Now, in this case I think there was abundant evidence on which the magistrates could find, and I think they ought to have found, that these machines were being taken about for sale, although they were *prima facie* intended only to be offered on this occasion to persons whose names had been sent in to the head place of business by the canvasser; and I think certainly with regard to what happened on this occasion that it is quite clear that there was evidence that they were offered for sale to persons whose names had not been sent in by the canvasser. Possibly that would not be a sufficient ground for conviction in one sense, because it was only what I may call an exception and was not the general case that it was supposed was being dealt with by the magistrates. I come to the conclusion that, on these facts, the magistrates must be taken to have found that the machines were being offered for sale, and that the only reason that they thought the man was not within the section was that they were offered for sale to persons whose names had been previously mentioned. I think that that distinction is not sufficient, and therefore the appeal ought to be allowed.

DARLING, J. read the following judgment:—In my view of this case the magistrates have definitely decided that a person who carries about from place to place, by means of a horse and cart, unsold goods, and then leaves them on approval—so that they are by that means sold—does not carry them to sell within the meaning of the Hawkers Act 1888, s. 2. As a reason for this opinion they rely entirely on the fact that the persons who purchased had previously expressed to a canvasser a desire to see the goods in order to decide whether to purchase them or not. I cannot see that it makes any difference whether this desire was expressed to the person

who carried the goods or to another, his associate. If this did alter the case, then an ordinary pedlar would require no licence if he left his goods at an inn, himself went round and canvassed people, and then took his goods to those who had expressed a wish to see them. It appears to me that the fact on which the magistrates rely is really immaterial to the decision of the question. I think that the respondent is shown, on the evidence in this case, to have gone from place to place, from house to house, carrying goods to sell, and exposing them, showing them, for sale; and that the goods were shown only to those of whom it had been ascertained that they would like to see them does not, in my opinion, prevent the exhibitor from being a hawker within the meaning of the statute. Therefore I think the magistrates came to a wrong conclusion.

CHANNELL, J. read the following judgment:—I agree. I think there is abundant evidence stated in the case to justify a conviction of the respondent for trading as a hawker. The only difficulty arises as to the finding of the magistrates on that evidence. If the respondent, and the man with him, were taking the sewing machines in the van from place to place in order to sell the goods, they were hawking within the meaning of the statute. If they had been delivering goods in pursuance of previous contracts of sale, of course they would not have been hawking; and equally if they were delivering goods on approval in pursuance of previous orders to send goods on approval they would not be hawking. But if they were taking goods about in order to find customers for them, they would not escape being hawkers by having sent a person beforehand, whether an hour or so before or a day or two before, to ascertain what persons would be likely to be customers, and be willing to look at their goods, and then only calling with the cart at places ascertained to be favourable for business. Now, we have to see whether the magistrates who have refused to convict have found facts which show that the respondent was not hawking. They have found that "it was intended to offer the machines only to persons already visited by the canvasser." If that means that the goods were only sent out for delivery on approval to particular persons who had requested goods to be delivered to them on approval, it would not be hawking; but that is not expressly found, and the facts as to the number of machines and the number of houses seem to negative that view of the case. It seems to me that the finding of the magistrates only comes to this, that the respondent was carrying the goods from place to place to sell them, but he was only intending to try to sell them at certain houses where it had been ascertained that there were likely customers. I think that is hawking within the statute, and, on that view of the facts, the case of *O'Dea v. Crouhurst* (*ubi sup.*) appears to cover this case. I think the appeal must be allowed.

Appeal allowed. Case remitted to the justices with a direction to convict.

Solicitor for the appellant, *The Solicitor of Inland Revenue.*

Solicitor for the respondent, *G. D. Wansbrough.*

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SCOTT (app.) v. LOWE (resp.).

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Thursday, March 13, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

SCOTT (app.) v. LOWE (resp.). (a)

*Metropolis—Paving apportionment—Dismissal of summons on ground of street not being a new street—Fresh apportionment—Res judicata—Metropolis Management Acts 1855-1890.**On the 9th Nov. 1898 the H. Vestry resolved that R.-street be paved as a new street, and apportioned the sum of 37l. 16s. 8d. on the respondent, which he refused to pay.**On the 15th Sept. 1899 the H. Vestry summoned the respondent for that sum, but the summons was dismissed on the ground that R.-street was not a new street within the Metropolis Management Acts.**On the 13th June 1900 a resolution was passed by the H. Vestry rescinding the above apportionment, and on the 14th March 1901 the H. Borough Council resolved that R.-street be paved as a new street, and apportioned on the respondent the sum of 32l. 16s. 1d., which he refused to pay, and thereupon the present summons was issued.**The magistrate held that the adjudication of the 15th Sept. 1899 was conclusive, and he dismissed the summons.**Held, on the authority of Reg. v. Hutchins (44 L. T. Rep. 364) and Wakefield Corporation v. Cooke (ante, p. 420; 86 L. T. Rep. 198), that the decision of the 15th Sept. 1899 was not conclusive and the present case should be heard on its merits.*

CASE stated on a complaint preferred by the appellant against the respondent, who is the owner, within sect. 250 of the Metropolis Management Act 1855, of premises known as the Manor Farm Dairy, on the east side of a street known as Riseholme-street, for unlawfully neglecting and refusing to pay the sum of 32l. 16s. 1d., the sum apportioned on him in respect of the premises under the Metropolis Management Acts.

The following facts were proved:—

The appellant is the paving rate collector to the paving authority within the metropolitan borough of Hackney, which exercises all the powers of the Metropolitan Management Acts 1855 to 1890 within the district of the borough council.

The respondent is the owner of Manor Farm Dairy, Riseholme-street, within the district.

On the 9th Nov. 1898 the vestry of Hackney, predecessors of the Hackney Borough Council, in execution of their statutory powers resolved that Riseholme-street be paved as a new street and apportioned the expenses of paving Riseholme-street as a new street on the various frontagers abutting on the street, of whom the respondent was one. The sum of 37l. 16s. 8d. was the amount apportioned on the respondent as owner of the Manor Farm Dairy, which sum was demanded by the Hackney Vestry from the respondent on the 26th Nov. 1898, and which the respondent refused to pay.

On the 15th Sept. 1899 the Hackney Vestry summoned the respondent before one of the magistrates of the Metropolis at the North London Police-court for the sum of 37l. 16s. 8d., being the proportion alleged to be due from the respon-

dent as the owner of the Manor Farm Dairy of the paving expenses under the apportionment made the 9th Nov. 1898.

The respondent called no evidence, and the magistrate was of opinion, on the facts proved before him by the complainants, that the Riseholme-street was not a new street within the Metropolis Management Acts, and accordingly dismissed the summons.

On the application of the complainants, the magistrates stated a special case for the High Court under the title of the *Hackney Vestry (apps.) v. Lowe (resp.)*.

On the 5th Feb. 1900 the case came on for hearing.

The respondents then objected that a copy of the case had not been served by the appellants on the respondents personally within three days after receipt of the same from the magistrate.

The court held the objection fatal to their jurisdiction and dismissed the appeal.

Riseholme-street continued unpaved, and no work whatsoever was done upon it under the aforesaid apportionment.

On the 13th June 1900 a resolution was passed by the vestry of Hackney rescinding the aforesaid apportionment and all resolutions concerning the same.

On the 14th March 1901, the Hackney Borough Council resolved that Riseholme-street should be paved as a new street within the meaning of the Metropolis Management Act 1855 to 1890, and the surveyor apportioned a sum of 32l. 16s. 1d. upon the respondent, being the respondent's proportion of the estimated expenses of paving Riseholme-street in respect of his ownership of the Manor Farm Dairy. The dimension and cost of the paving to be done under the new apportionment differed very slightly from those under the preceding apportionment, and the apportionment was in respect of the same property in the same street.

The sum of 32l. 16s. 1d. was duly demanded by the appellants of the respondent. The respondent refused to pay the same.

On the 26th Oct. 1901 the appellant summoned the respondent for default in paying the sum of 32l. 16s. 1d.

The respondent at the hearing took a preliminary objection that the magistrate had no jurisdiction to hear the summons, and that the matter was *res judicata*, and concluded by the finding of the magistrate at the hearing on the 15th Sept. 1899, that Riseholme-street was not a new street, and that the slight alteration in the cost of the work, could not effect the substantial identity of the appellant's demand with that made by the Hackney Vestry on the former apportionment of the 9th Nov. 1898.

The appellant contended that the summons was in respect of a new apportionment and a new demand for a different sum from that adjudicated upon on the 15th Sept. 1899, and he tendered evidence as to the variation in the extent of area to be paved and the cost of the work. He contended that the decision of the magistrate on the summons of the Hackney Vestry on the 15th Sept. 1899, operated only as the dismissal of the summons for paving expenses which the Hackney Vestry had then failed to show were due, and could not conclude the status of Riseholme-street nor yet the respondent's liability save on the

(a) Reported by W. DE B. HEMSBAY, Esq., Barrister-at-Law.

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summons on which the magistrate actually adjudicated.

The magistrate was of opinion, after the admission of both parties, that the question to be decided upon this summons was whether Riseholme-street was or was not a new street within the meaning of the Metropolis Management Acts, and inasmuch as it had been proved and found as a fact by the magistrate on the summons heard by him on the 15th Sept. 1899 that Riseholme-street was not a new street within the meaning of those Acts, and inasmuch as there was on this summons no evidence on any fresh point, that the adjudication of the 15th Sept. 1899 was conclusive, and that he had no jurisdiction to hear the present summons, and he therefore dismissed it.

The question for the court was whether the adjudication of the 15th Sept. 1899 was conclusive or whether the magistrate had jurisdiction to hear and determine the summons on its merits.

Bevan for the appellant.

Eldridge for the respondent.

LORD ALVERSTONE, C.J.—We do not consider that this case is distinguishable from the cases of *Reg. v. Hutchins* (44 L. T. Rep. 364; 6 Q. B. Div. 300) or *Wakefield Corporation v. Cooke* (ante, p. 420; 86 L. T. Rep. 198; (1902) 1 K. B. 188). The consequence of holding the decision of the magistrate to be final would be too serious. The amount claimed in this case is not in respect of the same apportionment, and so is not in respect of the same proceeding. The only thing decided in the first case was that that apportionment was not recoverable.

DARLING and CHANNELL, JJ. concurred.

Appeal allowed.

Solicitors: *Williams; C. V. Young and Son.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Tuesday, Feb. 4, 1902.

(Before Sir F. JEUNE, President, and BARNES, J.)

ROWLANDS v. ROWLANDS. (a)

Husband and wife—Appeal from justices—Separation—Agreement—Bankruptcy of husband—Neglect causing wife to live separately—Time for proceedings—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), ss. 4, 8.

When a husband and wife have lived apart for several years, and the husband has agreed to pay to his wife a certain weekly allowance, his failure to pay such allowance and his subsequent filing of his petition in bankruptcy, with the object of evading the payment of arrears, do not replace the parties in the same position towards each other which they occupied before the separation actually took place. Under such circumstances a wife is not entitled to a separation order under the Summary Jurisdiction (Married Women) Act 1895, on the ground that she has been compelled to live separately and apart from

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

her husband because he has neglected to maintain her, although she commences proceedings within six months of the making of the receiving order, as she is out of time under sect 11 of the Summary Jurisdiction Act 1848.

THIS was an appeal by the husband from an order of the justices of Oswestry, in the county of Shropshire, under the Summary Jurisdiction (Married Women) Act 1895, made on the 29th Nov. 1901.

The parties were married in 1873. They lived together until 1894, when the wife took out a summons against her husband for desertion. As she did not wish to proceed to extremities, the case was withdrawn. Later in the year a second summons was taken out, but again a settlement was arrived at.

On the 23rd Jan. 1895, a deed was executed under which the husband agreed to pay to the wife a weekly allowance of 10s. The allowance was not paid with regularity, and in 1901 the arrears amounted to about 100l.

On the 1st. Aug. 1901 a receiving order was made against the husband on his own petition.

On the 25th Oct. 1901 an application was made to the justices sitting at Oswestry for a separation order on the ground of desertion, but this was amended to a charge under sect. 4 of the Summary Jurisdiction (Married Women) Act 1895, against the husband for having wilfully neglected to provide reasonable maintenance for his wife, whereby he had caused her to leave and live separately and apart from him.

After hearing the evidence the magistrates made an order against the husband of 7s. 6d. a week for her maintenance, and four guineas costs.

It was against this order that the husband now appealed.

The justices gave the following reasons for their decision: "The magistrates think that while on the one hand the applicant has compelled defendant to file his petition in bankruptcy, still it is a case in which on the evidence before them the husband is able and ought to contribute a reasonable amount towards the support of his wife, and that this is shown by the amounts which he has paid upon judgment summonses and the offer he made in June last to pay 5s. a week. There is also the fact that he was summoned in Dec. 1894 before this court for deserting the applicant when the case was struck out, and again, for the same cause, on the 25th Jan. 1895 when the case was settled, the agreement referred to as shown in the statement of defendant's affairs being dated the 23rd Jan. 1895. They further consider that the payment and offer combined with the bankruptcy proceedings bring the neglect complained of within six months from the date of the information. They further consider that the agreement which was dated prior to this act not having been proved is not before the court."

Chester Jones for the appellant.—The justices had no power to make the order. First, under sect. 11 of the Summary Jurisdiction Act 1848, it was necessary that any complaint should be made or information laid within six calendar months from the time when the matter of such complaint or information arose. The complaint against the husband in the present case was that he had neglected to maintain her. The cause of com-

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plaint arose more than six years ago. Wilful neglect was not a continuing offence:

Ellis v. Ellis, 75 L. T. Rep. 390; (1896) P. 251.

The respondent was, therefore, out of time for taking proceedings. Secondly, there was the agreement between the parties made in 1895, when the separation took place. This took away the remedy of the wife. The agreement was, in fact, before the justices as shown by the affidavit of the appellant's solicitor. Upon that agreement the justices must decide:

Medway v. Medway, 82 L. T. Rep. 627; (1900) P. 141.

In that case the wife had offered to go back to her husband, which the present respondent had not done. Thirdly, the wife admitted in cross-examination that she left her husband because he was unfaithful and neglected her. This was not neglecting to maintain her. Having allowed the summons in 1895 to be withdrawn she had put an end to the whole cause of her complaint:

Pickavance v. Pickavance, ante, p. 108; 84 L. T. Rep. 62; (1901) P. 60.

There was no evidence upon which the justices could find against the appellant.

R. V. Bankes for the respondent.—Reliance could not be placed on facts prior to 1895. The material date was the 1st Aug. 1901, when the receiving order was made. The bankruptcy proceedings were taken to avoid payment of the money ordered. A breach of the undertaking to pay under the agreement caused the parties to return to their original position. The agreement of 1895 was to pay a sum of money and not to separate. The case of *Medway v. Medway* (sup.) was not distinguishable, because in that case the wife wished to return to her husband. It was clear in the present case that the husband would not have anything more to do with her. The proceedings had been taken within six months of the bankruptcy.

The **PRESIDENT**.—I think this case is a very clear one, and it is the more so because the magistrates have stated very fully the reasons which led them to arrive at their decision. With those reasons I cannot agree. In fact I am of opinion that no specific charge was made out against the husband. The charge against him is that he wilfully neglected to provide reasonable maintenance for his wife, and that by such neglect he caused her to leave and live separately and apart from him. There are, therefore, two things which must be established—first, that the husband did neglect his wife, and secondly, that it was this neglect which caused her to leave him and live apart. Now, how is the case made out? There is no evidence at all of his neglect to maintain her. In cross-examination before the magistrates the wife distinctly stated that she left her husband because he was unfaithful and neglected her. Then there is the fact of the separation which took place in 1895 under the agreement. And the parties have lived separately ever since. It is clear, therefore, that the complaint is out of time as not having been made within the six months required by the Summary Jurisdiction Act of 1848, and on the authority of *Ellis v. Ellis* (sup.) the decision of the magistrates cannot be upheld. In the reasons given by the magistrates they have further stated that

they consider that the payment and offer combined with the bankruptcy proceedings bring the neglect complained of within six months from the date of the information. This is not failure to maintain, for the parties were living separate at the time. It is not sufficient for the magistrates to make the order because they thought that the husband was able and ought to maintain his wife. I am of opinion that the case is not made out, and the appeal will, therefore, be allowed.

BAENES, J. agreed.

Solicitors for the appellant, *Kennedy, Hughes, and Ponsonby*, for *Lloyd, Ellesmere*.

Solicitor for the respondent, *W. P. Owen*, for *Llewellyn Kenrick*, *Ruabon*.

CROWN CASES RESERVED.

Saturday, Dec. 14, 1901.

(Before Lord ALVERSTONE, C.J., LAWRENCE, WRIGHT, BRUCE, and DARLING, JJ.)

REX v. WISEMAN. (a)

Evidence—Admissibility—Bankruptcy—Not fully discovering property—Intent to defraud—Negating fraud—Debtors Act 1869 (32 & 33 Vict. c. 62), s. 11 (1) (2) (4) (6).

An intention to defraud is the essence of the offences relating to the non-disclosure of his property by a bankrupt to the trustee in bankruptcy. A bankrupt charged with offences against sect. 11 of the Debtors Act 1869 has therefore a right to call evidence negating his intention to defraud his creditors, and such evidence if tendered cannot be excluded.

THE facts in this case stated by the Assistant Recorder of Birmingham were as follows:—

The defendant, who had carried on business as a timber merchant, sold his business and his household furniture and received the proceeds. He subsequently executed a deed of assignment for the benefit of his creditors, and the execution of this deed was the act of bankruptcy on which a creditor obtained an adjudication of bankruptcy. In the statement of affairs filed by the defendant he made no mention of the receipt by him of the proceeds of the sale of his business and furniture, neither did he inform the trustee in bankruptcy of the fact of this sale. He was indicted under the Debtors Act 1869, s. 11 (1) (2) (4) (6) for the offences of not disclosing to the trustee administering his estate for the benefit of his creditors all his property, for not delivering up all his property to his trustee, for concealing part of his property, and for making material omissions in a statement relating to his affairs. At his trial his counsel proposed to prove by evidence that before the defendant was adjudicated bankrupt he had called a meeting of his creditors, and at that meeting had disclosed to the creditors and to the trustee under the deed of assignment the sale and his receipt of the proceeds, and that various creditors had questioned him as to how he had disposed of the moneys received as the proceeds of the sale, and that he had informed them that he was living on the money. Counsel for the prosecution objected to the reception of this evidence,

(a) Reported by A. A. BATHURST, Esq., Barrister-at-Law

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on the ground that it was irrelevant to the issues raised on the indictment. The learned assistant recorder upheld the objection and rejected the evidence, and the jury convicted the defendant. The question for the opinion of the court was whether the evidence was admissible.

Lawless for the defendant.—The defendant was entitled to prove that he had no intention of defrauding his creditors. If the jury was satisfied that he had no intention to defraud, he could not be convicted under the section; the evidence tendered was therefore admissible.

Stamford Hutton for the prosecution.—The evidence was not relevant. The meeting took place before the adjudication, and the fact that the defendant had made a statement to his creditors did not entitle him to omit from his statement to the trustee in bankruptcy all reference to the sale of his business and furniture. The assistant recorder was therefore right in rejecting evidence as to what took place at that meeting.

LORD ALVERSTONE, C.J.—We are all of opinion that this conviction must be quashed. A bankrupt is to be convicted of misdemeanour under sect. 11 of the Debtors Act 1869 if he does not, to the best of his knowledge and belief, fully and truly discover to the trustee for the benefit of his creditors all his property, and how and to whom and for what consideration he has disposed thereof, unless the jury is satisfied that he had no intent to defraud. Absence of intent may, of course, appear from the evidence for the prosecution, but clearly the defendant is entitled to give evidence negating the intent to defraud. Here the defendant proposed to give evidence of a meeting at which his creditors were present and at which he disclosed the transaction for the concealment of which he was indicted. Whether that evidence would have been sufficient to disprove the intent to defraud would have been a question for the jury, but the defendant was certainly entitled to give it.

LAWRANCE, WRIGHT, BRUCE, and DARLING, JJ. concurred.

Conviction quashed.

Solicitor for the prosecution, *The Solicitor to the Treasury*.

Solicitor for the defendant, *Speechly, for Rabnett*, Birmingham.

Dec. 14, 1901, and Feb. 1, 1902.

(Before **LORD ALVERSTONE, C.J., LAWRANCE, BRUCE, WRIGHT, and DARLING, JJ.**)

REX v. JAMES. (a)

Criminal law—Practice—Pleading—Indictment—Necessary averment—Negating proviso—Married woman—Larceny by wife of husband's goods—Married Women's Property Act 1882 (45 & 46 Vict. c. 75), ss. 12, 16.

Where a statute by which an offence is created contains a proviso which affords a defence to proceedings taken in respect of the offence, it is not necessary for the prosecution to negative the proviso, unless the proviso is in the nature of an exception so incorporated, directly or by

reference, with the enacting clause that the enacting clause cannot be read without the qualification introduced by the proviso.

A married woman was charged on an indictment with larceny of her husband's goods. It was not alleged in the indictment that she was the wife of the prosecutor, nor that the goods were taken by her when leaving or deserting her husband. It was objected that the indictment was bad because it did not allege circumstances which showed that the case did not come within the proviso to sect. 12 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75)—applied to wives by sect. 16—which enacts that no criminal proceedings shall be taken unless under the circumstances mentioned.

Held, on a case stated, that as the proviso to sect. 12 affords a defence merely, stating circumstances which may be pleaded in answer to an indictment founded on the section, it is not necessary that these circumstances should be negated in the indictment.

THIS was a case stated by the chairman of the Glamorganshire Quarter Sessions, and was as follows:—

Sarah Eliza James and Thomas Johnson were indicted on an indictment charging them with stealing certain goods of John Thomas James.

The offence was averred in the indictment as against the form of the statute, and there was no averment that the female prisoner was the wife of the prosecutor.

The evidence showed that Sarah Eliza James was the wife of the prosecutor, and Thomas Johnson a lodger in his house.

On the day alleged in the indictment Johnson induced the prosecutor to go to Cardiff with him, and during his absence Sarah Eliza James, the wife, removed the articles charged from the prosecutor's house and deserted the house, and shortly afterwards joined Johnson.

Some of the goods were consigned or deposited with a railway company in Johnson's name, and he took delivery of them.

The woman appeared as a witness, and stated that she was the wife of the prosecutor.

At the close of the evidence and before the case was put to the jury, counsel for the prisoners objected that the indictment was insufficient as against the wife for want of an averment that the woman was the wife of the prosecutor, and that the property alleged to be stolen was wrongly taken by her when leaving or deserting her husband so as to complete the statement of an offence under the Married Women's Property Act 1882, ss. 12, 16.

The chairman held that the allegation was not necessary to the form of the indictment, but stated a case for the opinion of the court.

Morgan for the prisoner Sarah Eliza James.—The offence is statutory; it is an offence under the Married Women's Property Act 1882, and therefore all the matters which must be proved should be averred in the indictment. The indictment should have averred that the woman was the wife of John James, and that she stole the goods when about to desert her husband. The indictment is therefore bad. He referred to

Reg. v. Streeter, 19 Mag. Cas. 687; 83 L. T. Rep. 288; (1900) 2 Q. B. 601;

Hale's Pleas of the Crown, vol. 2, ss. 169, 170.

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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Parsons for the Crown.—The offence is larceny, not an offence under the Married Women's Property Act 1882. The proviso in sect. 12 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75) merely affords a defence, and it is not necessary to negative a proviso. The *contra formam statuti* in the indictment does not refer to the Married Women's Property Act 1882. He referred to

R. v. Hall, 1 T. R. 320;

Thibault v. Gibson, 12 M. & W. 95.

Morgan in reply.

Cur. adv. vult.

The judgment of the court was delivered by

Lord ALVERSTONE, C.J.—At common law a wife could not steal her husband's goods, and now she can only be convicted of larceny by virtue of the provisions of the Married Women's Property Act 1882: (*Reg. v. Kenny* (36 L. T. Rep. 36; 2 Q. B. Div. 307; 16 Cox C. C. 397.) Sect. 12 of that Act enacts in substance that every woman, whether married before or after the Act, shall have in her own name against all persons whomsoever including her husband (subject as regards her husband to the proviso thereafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if such property belonged to her as a *feme sole*. After further provision the section contains the following proviso: "Provided always that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife." The 16th section provides in substance that a wife doing any act with respect to any property of her husband, which if done by the husband with respect to the property of the wife would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband. Criminal proceedings can only be instituted by the husband against the wife if the wife and husband are not living together at the time the criminal proceedings are taken, and even then they can only be taken concerning an act done by the wife at the time when they were not living together concerning property of her husband, unless such property shall have been wrongfully taken by the wife when leaving or deserting, or about to leave or desert her husband. We think it is clear that in the case of an indictment against the wife for stealing the goods of her husband, upon proof that the husband and wife were living together at the time when the criminal proceedings were taken, a good defence would be established; and so if the act relied upon as constituting larceny were proved to have been done by the wife while the husband and wife were living together, there could be no larceny unless it could be proved that the property had been wrongfully taken by the wife when leaving or deserting or about to leave or desert her husband. But the question to be determined is whether the conditions imposed by

the proviso contained in sect. 12 and incorporated into sect. 16 are conditions which must be proved by the prosecution to exist in order to establish the offence, or whether the offence may be established without regard to the conditions in the absence of any evidence offered by defendant of facts which would establish a defence under the proviso. If compliance with the conditions is a necessary ingredient in the offence, then we think statements alleging compliance with the conditions are an essential part of the indictment. In *Thibault v. Gibson* (12 M. & W. at p. 94) Lord Abinger, C.B. said: "I believe it is a well-established principle that in all cases where proceedings are taken against a party for the recovery of a penalty under a statute, if there be any exception in the clause exempting certain cases from its operation, the declaration or information must show that the particular case is not within the exception. But where it comes by way of proviso in a subsequent part of the Act it is not necessary to notice it in the declaration or information, but it is matter which the defendant must allege as a ground of defence." In the same case Parke, B., after quoting a passage from 1 Wm. Saund. much to the same effect as the passage cited from Lord Abinger, proceeds as follows: "In all cases of exception where it comes by way of proviso in a subsequent section, the exception must be noticed by the party who relies on it, and I have some doubt whether the same rule does not also hold even where the exception comes by way of proviso in the same section, although it will not be necessary to decide that point at present." In the case of *Res v. Jarvis*, reported in the note 1 East, 643, Lord Mansfield, C.J. says: "It is a known distinction that what comes by way of proviso must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them." In the same case Denison, J. says: "There is a known distinction between exceptions in a statute by way of proviso (which need not be set forth) and those in the purview of the Act." And in the same case Forster, J. says: "Where negatives are descriptive of the offence there they must be set forth." In Chitty on Pleading, in the chapter on the Declaration, Part 2, its Parts and Particular Requisites in Debt, vol. 1, 4th edit., p. 322, the law is thus stated: "It is material, however, in all cases that the offence or act charged to have been committed or omitted by the defendant appear to have been within the proviso of the statute, and all circumstances necessary to support its action must be alleged." . . . "Where a person is exempt from a penalty under certain circumstances by a proviso in a statute, and not in the body of it, the plaintiff need not state that the defendant is not within the exemptions, for that is merely matter of difference to be shown by the defendant; but where the exception is contained in the enacting clause, it must be negatived in the declaration; and where an Act of Parliament in the enacting clause creates an offence, and gives a penalty, and in the same section there follows a proviso containing an exception, which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative the exception: and in

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this respect there seems a material difference between a proviso and an exception." In *Steele v. Smith* (1 B. & Ald. 94) the marginal note is to the following effect: "Where an Act of Parliament in the enacting clause creates an offence and gives a penalty and in the same section there follows a proviso containing an exemption which is not incorporated with the enacting clause by any words of reference, it is not necessary for the plaintiff in suing for the penalty to negative such proviso in his declaration." In that case Bayley, J. said: "I cannot say that the proviso is part of the same sentence; for if it had been omitted the preceding sentence would have been entire." In the same case Abbott, J. said: "There is a technical distinction between a proviso and an exception which is well understood. All the cases say that if there be an exception in the enacting clause, it must be negatived, but if there be a separate proviso, it need not." It is true that the last two quotations refer to declarations in civil actions, but the principles applicable are the same, although no doubt the principles will be applied with greater strictness in criminal than in civil proceedings. In *Hawkins' Pleas of the Crown*, vol. 4, in the chapter on Indictment, chap. 25, sect. 113, p. 68, 7th edn., there is this passage: "It seems agreed that there is no need to allege in an indictment that the defendant is not within the benefit of the proviso of a statute whereon it is founded, and this hath been adjudged, even as to those statutes, which in their purview expressly take notice of the provisos; as by saying that none shall do the thing prohibited otherwise than in such special cases, &c., as are expressed in this Act." We think the substance of the authorities is this—that it is not necessary for the prosecution to negative a proviso, even though the proviso be contained in the same section of the Act of Parliament creating the offence, unless the proviso is in the nature of an exception which is incorporated directly or by reference with the enacting clause, so that the enacting clause cannot be read without the qualification introduced by the exception. Thus in an indictment on a statute which enacts that if any person shall put off any milled money whatsoever unlawfully diminished, and not cut in pieces for a lower rate than its nominal value, he shall be guilty of felony, it is necessary to state in the indictment that the money was not cut in pieces (1 Leach, 102). In the present case sects. 12 and 16 must be read together, and the enacting clause in sect. 12, when read in connection with sect. 16, makes the wife liable to criminal proceedings by her husband, subject to the proviso contained in the latter portion of sect. 12. But the conditions imposed by that proviso do not affect the quality or character of the offence. They merely introduce matters which may be pleaded by way of defence, and we think they are not matters necessary to be negatived in the indictment. For these reasons we think the indictment good, and that the conviction should be affirmed.

Conviction affirmed.

Solicitor for the Crown, *W. T. Davis*, Porth.

Solicitor for the defendants, *Colenso Jones*, Pontypridd.

Saturday, Feb. 1, 1902.

(Before Lord ALVERSTONE, C.J., WRIGHT, RIDLEY, BIGHAM, and WALTON, JJ.)

REX v. PENFOLD AND EDWARDS. (a)

Criminal law—Practice—Procedure—Evidence—Ingredients of offence—Previous conviction—Claim to be tried by jury—Trial by jury—Prevention of Crimes Act 1871—Summary Jurisdiction Act 1879 (34 & 35 Vict. c. 112), ss. 7, 9, 20—42 & 43 Vict. c. 49, s. 17.

Every ingredient of an offence charged in an indictment must be proved before the jury.

By sect. 7 of the Prevention of Crimes Act 1871 a person who has been convicted on an indictment for a crime is guilty of an offence under that Act if (inter alia) he is found in any place under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction.

On the trial of a person charged with an offence under this section, the proper practice is to prove the convictions as part of the case for the prosecution. If the defendant having claimed to be tried by a jury is indicted, the fact of the previous conviction is to be disclosed to the jury.

Rex v. Brown (65 J. P. 136) overruled.

THIS was a case stated by the deputy-chairman of the quarter sessions for the county of London, the facts being as follows:—

The prisoners were charged before one of the magistrates of the police courts of the metropolis, sitting as a Court of Summary Jurisdiction with an offence under sect. 7 of the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112); that is, that they, being persons who had been convicted of crime, were found in a place under such circumstances as would satisfy a court that they were about to commit a crime, or were waiting for an opportunity to commit an offence punishable on indictment or summary conviction.

The facts relied upon by the prosecution were that the prisoners had each been several times convicted of felony, and were on the evening of a day in December observed by the police to be loitering about certain streets and squares in which most of the houses were occupied by working jewellers; that, noticing the police, the prisoners had run away, and that being apprehended one of them was found to be armed with a revolver.

This offence is not indictable, but punishable on summary conviction.

On being brought, however, before the magistrates, the prisoners claimed to be tried by a jury, and were accordingly dealt with under sect. 17 of the Summary Jurisdiction Act 1879, as if they had been charged with an indictable offence; and an indictment in which their previous convictions were averred was preferred at the quarter sessions.

If the prisoners had been tried by the magistrate these previous convictions would have been proved before him as part of the case against the prisoners.

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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At the trial at the quarter sessions counsel for the Crown proposed to prove the previous convictions as part of his case, on the ground that the offence for which the prisoners were indicted was that they, being persons who had been convicted of felony, were found in a place under such circumstances as would justify the jury in coming to the conclusion that their intention was to commit a felony, and that the gist of the offence was the prisoners' previous conviction, it being no offence to be found in a place under suspicious circumstances.

Counsel for the prisoners objected to this evidence on the ground that the rules of procedure contained in sect. 116 of the Larceny Act 1861 (24 & 25 Vict. c. 96), which were applied to proceedings under the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112) by sect. 9 prevented the jury from inquiring into previous convictions charged in an indictment until the defendant had been found guilty of the offence which was the subject of the indictment; that in this case the offence was the intention to commit a felony, and that, therefore, until the jury had found that the prisoners had intended to commit a felony, the facts of the previous convictions must not be proved before them. He cited the case of *Rees v. Brown* (65 J. P. 136), in which the Recorder of London had decided that under similar circumstances the previous convictions should not be disclosed to the jury.

The learned deputy-chairman overruled the objection and admitted the evidence.

The jury convicted the prisoners.

H. Sutton for the Crown.—The offence is the offence specified by sect. 7 of the Prevention of Crimes Act 1871 (34 & 35 Vict. c. 112). The rules in sect. 116 of the Larceny Act 1861 are applied by sect. 9 to the procedure on the trial not for an "offence" but of an indictment for a "crime" as defined by sect. 20. The subject matter of the indictment was then an offence to which the procedure laid down by sect. 116 of the Larceny Act was not applicable. The essential ingredient of the offence was the fact of the previous convictions, and it was necessary that this should be proved, because it was an essential ingredient. The practice laid down in *Rees v. Brown* (sup.) is wrong. The intention of the Act is that the offence shall be dealt with summarily by magistrates to whom the previous convictions would be disclosed.

The prisoners were not represented.

Lord ALVERSTONE, C.J.—It appears that there has been some doubt as to the practice which should prevail on the trial of an indictment when the defendant is charged with an offence under the Prevention of Crimes Act 1871. When in an indictment a crime is charged for which different degrees of punishment are annexed, if the person charged has been previously convicted, then it is clear that the fact of the antecedent convictions should not be known to the jury until after they have found a verdict on the subsequent crime. Sect. 116 of the Larceny Act deals with mixed cases. Now in this case the prisoners were charged with something which would not have been an offence but for their previous convictions, and if they had been tried by a court of summary jurisdiction the fact of the previous con-

victions would have been before the magistrates who formed the court. But having claimed to be tried by a jury the prisoners were brought before the quarter sessions on indictment. In my opinion when an offence is merely statutory, and requires ingredients specified in the statute, it is right that every ingredient should be proved just as all the circumstances which compose an ordinary crime have to be proved. Sect. 20 of the Prevention of Crimes Act 1871 draws a distinction between "crime" and "offence," but it does not provide that the procedure at a trial before a jury is to differ from that at a trial by justices as a court of summary jurisdiction. We think, therefore, that the learned deputy-chairman was right in allowing all the circumstances which made the offence to be proved before the jury. Our decision in this case overrules *Rees v. Brown* (65 J. P. 136).

WRIGHT, RIDLEY, BIGHAM, and WALTON, JJ. concurred.

Conviction affirmed.

Solicitor: *The Solicitor to the Treasury.*
The prisoners were not represented.

Saturday, Feb. 2, 1902.

(Before Lord ALVERSTONE, C.J., WRIGHT, RIDLEY, BIGHAM, and WALTON, JJ.)

REX v. PIKE. (a)

Criminal law—Evidence—Admissibility—Statement of affairs in bankruptcy—Compulsory examination—Misappropriation by trustee—Bankruptcy Act 1883—Bankruptcy Act 1890, General Rule 217—25 & 26 Vict. c. 96, s. 80—46 & 47 Vict. c. 52, s. 16—53 & 54 Vict. c. 71, s. 27 (2).

The statement of affairs made by a bankrupt in compliance with sect. 16 of the Bankruptcy Act 1883 and rule 217 is not a statement made in a compulsory examination within the meaning of sect. 27 (2) of the Bankruptcy Act 1890. It is therefore admissible in evidence against a bankrupt charged with appropriating trust moneys to his own use.

This case, stated by Kennedy, J., was as follows:

William Good Pike was tried before me at Worcester at the autumn assizes holden for the city of Worcester on the 23rd Dec. 1901, on an indictment for misdemeanour, consisting of two counts, which it is not necessary for the purpose of this case to set out at length, whereby in substance and effect he was charged under 24 & 25 Vict. c. 96, s. 80, with having unlawfully and wilfully converted and appropriated to his own use certain sums of money of which, under the will of one William Ayre, deceased, he was trustee for the use and benefit of three children of his brother Samuel Robert Pike, with intent to defraud.

In the course of the trial, in order to prove the receipt by the prisoner of certain sums of money, counsel for the Crown tendered in evidence the debtor's statement of affairs in bankruptcy, which showed in sheet E (contingent or other liabilities) the receipt by the bankrupt of the moneys in question. The statement of affairs

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was the statutory statement of affairs prepared by the accused in the course of his bankruptcy, verified by oath by the bankrupt before the assistant official receiver at Worcester, and filed by the assistant official receiver in accordance with the provisions of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 16, and General Rules, 217.

The file of the bankruptcy proceedings will be in court so that reference to it can be made if necessary.

Counsel for the prisoner objected to the receipt of this evidence upon the ground that it was evidence which was rendered inadmissible by the operation of the provisions of 24 & 25 Vict. c. 9, s. 85, as amended by 53 & 54 Vict. c. 71, s. 27. He based his contention upon the words which are contained in sub-sect. (2) of the last cited section, which provides that a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence in any proceeding in respect of any of the misdemeanours referred to in sect. 85.

After hearing the argument of counsel for the prisoner and reply of counsel for the Crown, who pressed for the admission of the evidence, I was of opinion that the objection was not well founded, and that the statement of affairs did not constitute a compulsory examination or deposition made before a court on the hearing of a matter in bankruptcy within the meaning of the said section, and I admitted the evidence.

The accused was found guilty by the verdict of the jury.

The question for the opinion of the court is whether the evidence above mentioned was or was not properly admitted, and whether the conviction should stand.

W. R. KENNEDY.

J. B. Matthews for the prisoner.—This was a statement made in the course of a compulsory examination. A bankrupt is by rule 217 compelled to make a statement of his affairs. The examination in court is only a subsequent part of the same proceeding. The Bankruptcy Acts are penal statutes and must be construed strictly:

Fletcher v. Lord Sondes, 3 Bing 580.

He also referred to

Rs Mysore West Gold Fields, 61 L. T. Rep. 453; 42 Ch. Div. 535;

Green v. Lord Penzance, 41 L. T. Rep. 353; 6 App. Cas. 657.

A. T. Lawrence, K.C. (with him *N. G. Davidson*) for the Crown.—There is nothing in the Bankruptcy Acts which makes a statement inadmissible because it was made under compulsion. The statement or admission referred to in sect. 27 (2) of the Bankruptcy Act 1890, which is inadmissible, is a statement or admission made before a court at a "hearing." The statement in question was not made in a compulsory examination before a court. The statement of affairs to be made to the official receiver is one of the proceedings consequent on the making of a receiving order: (Bankruptcy Act 1883, s. 16); these proceedings are quite distinct from the proceedings before a court of which the public examination of the debtor is one. That examination may be dispensed with. [He was stopped by the Court.]

J. B. Matthews replied.

Lord ALVERSTONE, C.J.—We are all of opinion that the statement was admissible. The prisoner was charged with the misappropriation of a trust fund, and in order to prove that charge the statement of his affairs made by him in his bankruptcy was put in evidence. It is argued that this statement was not admissible as evidence because of the provisions of the Bankruptcy Act 1890, s. 27 (2), that a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible as evidence against that person in any proceeding against that person in respect of any of the misdemeanours referred to in sect. 85. On the other hand it is argued that this was not a statement made in the hearing of any matter in court, and was not made in a compulsory examination. We must look at the object of the section. The words are "in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy." *Prima facie* this seems to apply to the case of a man making a statement on cross-examination, when he is forced to say what he would not have said under ordinary circumstances. But we are asked to extend that provision to all statements made by a bankrupt in the course of his bankruptcy. Does the statement of affairs come within the words "compulsory examination"? We think that if that had been the intention of the Legislature other language would have been used. I come to the conclusion that the statements made by a bankrupt in his statement of affairs are not statements made by him in a compulsory examination.

WRIGHT, RIDLEY, BIGHAM, and WALTON, JJ. concurred.

Solicitors: *Solicitor to the Treasury; Dobbs and Hill, Worcester.*

Saturday, April 26, 1902.

(Before Lord ALVERSTONE, C.J., LAWRENCE, WRIGHT, BRUCE, and KENNEDY, JJ.)

REX v. WILLIAM MALLISON. (a)

Criminal law—Larceny—Fish taken at sea—Possession of owner of smack—Skipper of smack.

Fish taken at sea are in the possession of the owner of the smack by which they are taken, as soon as they are taken, and are consequently the subject of larceny.

A., who was employed as skipper of a smack used for trawling outside territorial waters, during the course of a fishing voyage put into port, sold the fish he had taken, and appropriated the proceeds to his own use.

Held, that he was properly convicted of larceny.

THIS case, stated by the Recorder of Grimsby, was, so far as is material, as follows:—

The prisoner, William Mallison, was tried before me at the quarter sessions of the peace held in and for the borough of Grimsby on the 15th April 1902 on an indictment charging him in the first count with having on the 25th Jan. 1902 feloniously stolen, taken, and carried away certain fish the property of the Grimsby and North Sea Steam Trawling Company Limited.

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

CR. CAS. RES.] REX v. FREDERICK WALTER HADWEN AND ALFRED INGHAM. [CR. CAS. RES.]

A second count charged him with having received the same fish knowing them to have been stolen.

The prisoner was in Jan. 1902 in the employment of the prosecutors, the Grimsby and North Sea Steam Trawling Company Limited, as master or "skipper" of the fishing smack *Cassiopeia*, of which the prosecutors were the owners.

The *Cassiopeia* was engaged in making voyages from the port of Grimsby to the North Sea and back for the purpose of catching fish for the prosecutors, who sold the fish on the return of the vessel after each voyage. A voyage usually lasted from about ten to fourteen days.

The prisoner's employment was for a term of six months from the commencement thereof. He had full charge and control of the vessel during the voyages, and he was paid by the prosecutors for his services by receiving at the end of every third voyage (the voyages being divided into sets of three for this purpose) a certain proportion of the net profits produced by the sale of the fish which had been sold by the prosecutors at the end of each of the three voyages.

On the 17th Jan. 1902 the *Cassiopeia*, with the prisoner in charge of her as skipper, left the port of Grimsby on the first of one of the sets of three voyages to the North Sea and back.

On the 25th Jan. she was returning to Grimsby with a cargo of fish which had been caught by the prisoner and the crew in the North Sea and deposited in the usual receptacle provided for that purpose in the hold of the vessel and called the "fish magazine."

On the same 25th Jan. the prisoner took the vessel into Bridlington Harbour and there sold the fish, the subject of the indictment. He did not account for the proceeds of the sale to his employers, and had never been authorised to sell fish during the continuance of a voyage. It was submitted by counsel for the prisoner that the fish had never been in the possession of the prosecutors, the owners of the smack, that the prisoner being captain of the smack had the fish in his possession properly and lawfully from the time when they were reduced into possession, and that therefore there was no evidence on which the prisoner could be convicted of larceny. The learned recorder overruled this objection, and directed the jury that they could convict the prisoner on the first and second counts of the indictment if they were satisfied that the prisoner took the fish from the vessel in Bridlington Harbour with a fraudulent intention to convert them to his own use and benefit and permanently to deprive the prosecutors of their property in them.

The jury convicted the prisoner.

The question for the opinion of the court was, Whether there was evidence that the prisoner took the fish which he sold at Bridlington out of the possession of the prosecutors.

Cracroft for the prisoner.—The fish never were in the possession of the prosecutors. They were in the possession of the prisoner as skipper of the smack; and consequently there was no larceny, for the possession of the servant is not the possession of the master:

Wait's case, 2 East P. C. 570;

R. v. Basely, 2 Leach 835;

Abrahatt's case, 2 East P. C. 569; 2 Leach 824.

Again a fish is *feræ naturæ*, and an animal *feræ*

naturæ must be reduced into possession before it can be the subject of larceny:

R. v. Townly, 24 L. T. Rep. 517; 12 Cox C. C. 59;

L. Rep. 1 C. C. 315;

R. v. Petch, 38 L. T. Rep. 788; 14 Cox C. C. 116.

A. Moresby White, for the prosecution, was not called upon.

LORD ALVERSTONE, C.J.—We are all of opinion that these fish were reduced into the possession of the owner of the smack, and that therefore the prisoner was properly convicted.

LAWRANCE, WRIGHT, BRUCE, and KENNEDY, JJ. concurred.

Solicitors for the prosecutors, *Hicks and Sons*, for *H. E. and R. Mason*, Great Grimsby.

Solicitors for the prisoner, *Read and Bloomer*, Great Grimsby.

Saturday, April 26, 1902.

(Before Lord ALVERSTONE, C.J., LAWRENCE, WRIGHT, BRUCE, and KENNEDY, JJ.)

REX v. FREDERICK WALTER HADWEN AND ALFRED INGHAM. (a)

Criminal law—Practice—Evidence—Cross-examination of prisoner by co-defendant—Evidence of person charged—Criminal Evidence Act 1898 (61 & 62 Vict. c. 36), s. 1.

A person charged with an offence is made, by the Criminal Evidence Act 1898 (61 & 62 Vict. c. 36), s. 1, a competent witness for the defence. The effect of this is to make him, if he gives evidence, an ordinary witness in the case, and therefore liable to be cross-examined on behalf of a person jointly indicted with him.

THIS case reserved for the opinion of the court by Ridley, J. was as follows:—

1. These two prisoners were jointly indicted before me at the assizes held for the West Riding of the County of York, at Leeds, and tried before me on the 14th and 15th March 1902 upon an indictment whereby they were jointly charged in thirty counts with the following offences: (a) Offences under the Debtors Act 1869, s. 11, sub-s. 10, in making and being privy to the making of certain false entries in a document relating to their affairs—namely, a certain balance sheet—within four months before the presentation of a bankruptcy petition by them, with intent to conceal the state of their affairs. (b) Offences under sect. 13 of the same Act by obtaining credit under false pretences in incurring a debt to the Halifax and Huddersfield Union Banking Company. (c) Conspiring together to cheat and defraud the said banking company.

2. The prisoners had for many years before their trial carried on business in co-partnership as silk spinners, under the style of Hadwen and Sons, at Triangle, near Halifax, and the banking account of the firm was kept with the Halifax and Huddersfield Union Banking Company.

3. Each prisoner pleaded "not guilty" to the whole of the indictments, and was separately defended by counsel.

4. Upon the close of the case for the Crown, each prisoner elected to give evidence upon oath, and each prisoner then gave evidence exculpating

(a) Reported by A. A. BATHURST, Esq., Barrister-at-Law.

CR. CAS. RES.] *REX v. FREDERICK WALTER HADWEN AND ALFRED INGHAM.* [CR. CAS. RES.]

himself, and also gave evidence against the other prisoner who was charged with the same offences.

5. Counsel on behalf of each prisoner then claimed the right to cross-examine the other prisoner upon the evidence given by him against his co-prisoner.

6. It was objected and contended that such cross-examination was not permissible, and I upheld that contention, and excluded all cross-examination of one prisoner on behalf of the other prisoner, but agreed to state a case for the opinion of this court.

7. The jury found both prisoners guilty upon all the counts.

8. I respited sentence and let the prisoners out on bail to appear at the next general gaol delivery for the county of York if called upon, and reserved this case for the consideration of the court.

9. The question for the opinion of this court is whether, under the above circumstances, counsel for one prisoner was (as he claimed) or was not entitled to cross-examine the other prisoner upon the evidence given by the latter upon oath against him.

If I was right in excluding such cross-examination, the conviction is to be affirmed. If I was wrong it is to be quashed.

Tindal Atkinson, K.C. (with him *Waugh*) for Hadwen.—The learned judge should have allowed the cross-examination. The Criminal Evidence Act 1898, s. 1, makes a defendant a competent witness for the defence, and being a witness he is liable to cross-examination. His position if he goes into the box is analogous to that of a respondent giving evidence in divorce proceedings, and it was held by the Court of Appeal in *Allen v. Allen and Bell* (70 L. T. Rep. 783; (1894) P. 248) that a judge was wrong in refusing to allow a co-respondent to cross-examine a respondent who had given evidence. A prisoner who gives evidence may be practically a witness for the prosecution in the case of a co-defendant. If the prisoner confines himself to giving evidence in his own defence, a prisoner jointly indicted might have no right to cross-examine. But *aliter* where the effect of the evidence is to incriminate the co-defendant. A witness called for the defence of one prisoner is liable to be cross-examined on behalf of another prisoner:

Reg. v. Burdett, 6 Cox C. C. 458; 3 C. L. R. 440; Dears. 431.

And in a case under the Prevention of Cruelty to and Protection of Children Act 1889 (52 & 53 Vict. c. 44), repealed but re-enacted by the Prevention of Cruelty to Children Act 1894 (57 & 58 Vict. c. 41), *Wills, J.* held that a wife giving evidence in her own defence must be treated as a witness in the case of her husband jointly indicted with her:

Reg. v. Martin, 17 Cox C. C. 36.

[*WRIGHT, J.*—Sect. 7 of the Act of 1889 provides that the wife may be called as "an ordinary witness in the case."] That was done to get rid of the disability of the wife, and to enable her to give evidence for or against her husband. But this is not that case, for the person charged is to be a competent witness for the defence only if he applies to be called. But his evidence may be evidence incriminating his co-defendant.

Scott-Fox, K.C. (with him *R. A. Shepherd*) for Ingham.—In *Allen v. Allen* (*sup.*) *Lopes, L.J.* applies the doctrine there discussed to the case of a co-defendant, and refers to *Lord v. Colvin* (3 Drew 222). Directly he gives evidence, a defendant becomes an ordinary witness, and may say anything against a co-defendant. A jury may be charged to disregard what one prisoner has said against another prisoner, but in practice the effect of the evidence would remain in their minds. A prisoner can only be called with his own consent, but the consent of his co-defendant is not necessary. The case of the Crown must always be that both defendants are guilty, and it is quite possible that where a prisoner inculcates his co-defendant counsel for the Crown would not cross-examine; it is, therefore, necessary that the co-defendant should be allowed to cross-examine. Sect. 1, sub-sect. (f) (iii.) of the Criminal Evidence Act 1898 points to a cross-examination.

Harold Thomas (Milvain, K.C. with him) for the Crown.—A prisoner giving evidence in his own defence is a witness for the defence, and if his evidence is against a co-defendant, that co-defendant should apply to the court for permission to cross-examine him as a hostile witness. If in giving evidence a person charged with an offence asperses the character of a co-defendant he may be cross-examined as to his own character. If he alleges that a person charged with him has committed an offence—e.g., that the person charged with him, and not he, destroyed a document—he may be cross-examined. That is the case provided for by sect. 1 (f) (iii.) But in each of these cases the cross-examination permitted is a cross-examination by the prosecution. The Criminal Law Amendment Act 1885 (48 & 49 Vict. c. 69), s. 20, makes a person charged a "competent witness," but the Criminal Evidence Act 1898, s. 1, enacts that the person to be charged is to be a "competent witness for the defence," that precludes the idea of a cross-examination by a co-defendant.

Lord ALVERSTONE, C.J.—The simple question is whether, where two persons are jointly indicted for an offence and one elects to give evidence, as he may under sect. 1 of the Criminal Evidence Act 1898, he may be cross-examined on behalf of his co-defendant. It is not disputed that he can be cross-examined by counsel for the prosecution; the only question is, Can he be cross-examined by counsel for the other prisoner? If the statute does not prevent us from holding that he can, it is obvious that it is in the interest of justice that he should be liable to cross-examination. Counsel for the prosecution might not think it his duty to cross-examine strictly, or the evidence of the co-prisoner might start quite a new point. In the interest of justice, when evidence is given before a jury, every opportunity of testing it should be given. There are cases in which the remarks of a judge, especially in a long trial, would lose their effect. In the case of *Reg. v. Woods and May* (6 Cox C. C. 224) counsel for the second prisoner had special rights given to him. He was allowed to cross-examine and to address the jury. In the case of *Reg. v. Burdett* (6 Cox C. C. 458) it was expressly decided that a defendant might cross-examine witnesses called for the defence of a co-defendant, and I think that the reasoning of *Jervis, C.J.* is especially useful,

because that learned judge said that the evidence for the prisoner became tacked, as it were, to the evidence for the prosecution. Knowing the clear mind and the learning of the judge, it is clear to me that he had in his mind the idea that evidence once given would not be disregarded. That was the state of the law at the time of the passing of the Criminal Evidence Act 1898. It is provided by that statute that the prisoner cannot be called without his own consent, but I think that it did occur to Parliament that a prisoner might give evidence which would incriminate other persons. Sect. 1 (f) (iii.) limits the liability of a person charged who has elected to give evidence, to the case where he has given evidence against another person charged with the same offence. Now, the common and ordinary case of a person giving evidence against a co-defendant is where several persons are charged together, and there is a strong temptation for each to endeavour to exculpate himself by incriminating the others. Speaking for myself, I think that if it was intended to exclude a cross-examination by a co-defendant, it would have been so expressly enacted. That does not quite dispose of the matter. If a general cross-examination is to be allowed, it is said that the cross-examination must be by the prosecution only, and not on behalf of a prisoner. But Jervis, C.J. and the whole court thought cross-examination should be allowed, because when a prisoner has given evidence he becomes a witness for the prosecution. I think that must be right not only on that principle, but because the prisoner has given evidence against another person, and should therefore be liable to cross-examination on behalf of that person.

LAWRENCE, J.—I concur.

WRIGHT, J.—The only question is whether the evidence which a prisoner has given in his own defence is legally admissible to inculpate another defendant, because, if it is, it follows that he is liable to be cross-examined by his co-defendant. I find nothing in the Act except sect. 1 (f) (iii.) that tends to abrogate the ordinary rule (see *Reg. v. Payne*, 26 L. T. Rep. 41; 12 Cox C. C. 118; L. Rep. 1 C. C. 349; *Allen v. Allen*, *sup.*) that what one defendant says should not be admissible as evidence against another defendant, founded on the obvious temptation to one co-defendant to endeavour to shift the blame on to his co-defendant. If this rule is abrogated, I agree with the judgment of my Lord.

BRUCE, J.—I concur.

KENNEDY, J.—I agree.

Solicitors: *Solicitor to the Treasury*; for the defendant Hadwen, Van Sandau and Co., for Mills and Co., Huddersfield; for the defendant Ingham, Helliwell, Harby, and Co., for Jubb, Booth, and Helliwell, Halifax.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, March 5, 1902.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

ATTORNEY-GENERAL (on the Relation of the Bromley Rural District Council) v. COPELAND. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Highway—Drainage of surface water—Discharge on to land of adjoining owner—"Drain"—Improper outlet—Presumption of legal origin—Highway Act 1835 (5 & 6 Will. 4, c. 50), s. 67.

The surface water collecting at a certain point on a highway was received in a catch-pit, from which it was carried through the hedge by the roadside by means of a pipe 6 ft. long, and was discharged on to the surface of the adjoining land. This system had lasted as long as living memory would go when the defendant purchased the adjoining land and stopped up the outlet of the pipe from which the water was discharged. The local authority claimed an injunction to restrain him from stopping up the pipe.

Held, reversing the decision of Lord Alverstone, C.J., reported ante, p. 183; 84 L. T. Rep. 562; (1901) 2 K. B. 101, that there was nothing in the manner in which the water was discharged on to the defendant's land which prevented the arrangement for getting rid of water from the highway from being a "drain" within sect. 67 of the Highway Act 1835; and that under the circumstances a legal origin for the drain ought to be presumed.

THIS was an appeal by the plaintiffs from a judgment of Lord Alverstone, C.J. at the trial of the action without a jury.

The action was brought for an injunction to restrain the defendant, who was owner of a piece of land adjoining a highway in the parish of West Wickham, in the county of Kent, of which the Bromley Rural District Council were the local authority, from stopping up a pipe by which the surface water collecting on the highway was discharged on his land.

The Highway Act 1835 (5 & 6 Will. 4, c. 50) provides as follows:

Sect. 67. The said surveyor, district surveyor, or assistant surveyor shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plate, or bridges as he shall deem necessary in and through any lands or grounds adjoining or lying near to any highway upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby, to be settled and paid in such manner as the damages for getting materials in inclosed lands or grounds are herein directed to be settled and paid.

The powers and duties of the surveyor of highways under this section were, as regards the highway in question, vested in the Bromley Rural District Council.

The highway in question was an ancient one, running north and south. There was a point in the road where the gradients rose both towards

(a) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

north and south, so that the surface water collected there.

On the west side of the road this water was collected in a catch-pit, from which it was carried by an iron pipe into another catch-pit on the east side, and from the eastern catch-pit an iron pipe 6ft. long, put through the hedge by the road side, discharged the water on to the surface of the adjoining land.

There was no evidence as to the date when this arrangement for draining the highway was first made, but in 1868 the existing catch-pits were repaired, and the pipe which the defendant had stopped up was put in its present position.

About two years before this action was brought the defendant bought the piece of land on to which the water was discharged by the pipe in question, and built some houses thereon. He then stopped up the end of the pipe, and the present action was then commenced for an injunction to restrain him from continuing this obstruction to the drain.

At the trial of the action Lord Alverstone, C.J. held that as the pipe which the defendant had obstructed was not connected with any out-fall channel, it was not a "drain" within sect. 67 of the Highway Act 1835, and he refused the injunction.

The case is reported *ante*, p. 183; 84 L. T. Rep. 562; (1901) 2 K. B. 101.

The district council appealed.

Bray, K.C. and *Clarke Williams* for the appellants.

G. B. Rashleigh (Dickens, K.C. with him), for the respondent, relied on the judgments in

Croft v. Rickmansworth Highway Board, 60 L. T. Rep 34; 39 Ch. Div. 272.

COLLINS, M.R.—The ground of these proceedings instituted by the Attorney-General on the relation of the Bromley Rural District Council is that the defendant has stopped up a pipe or drain, and has thereby caused water to accumulate on a highway. Lord Alverstone, C.J., at the trial, gave judgment for the defendant on the ground that this pipe was not a drain within the meaning of sect. 67 of the Highway Act 1835, in respect of which the local authority could acquire the right they claimed to have. It was proved that this pipe—or drain, as I will call it for the present purpose—has existed for as long as living memory will go, and therefore it must have existed before this local authority came into existence. The powers and duties of the old surveyor of highways have in recent times, so far at least as the present matter is concerned, been vested in the local authority. Where there has been a long established user it is the duty of the court to try and find a legal origin in order to explain the existence of the user. But it was said that this drain, having no proper outlet, did not come within the words of the statute, and the Lord Chief Justice has so held. Now, the road rises to the north and to the south of this drain, and the formation of the ground is such that water running down the slopes would be impounded at a certain point unless some means were provided for carrying it away. A catch-pit was therefore made on the west side of the road, and water running into it was drained away to another catch-pit on the east side from which a pipe 6ft. long was put through the hedge by the

road side, and this pipe discharged the water from the catch-pits on to the defendant's land the other side of the hedge. That arrangement has existed, as I have said, for as long as living memory will go. It is quite compatible with the evidence that a ditch had once existed on the defendant's land by which the water from the pipe would have been carried away. I can see no reason why this arrangement should not be held to be a drain within sect. 67. The user has been continuous for many years, and a legal origin ought to be presumed for it. I think that this arrangement is a drain within the section, and that the appeal ought therefore to be allowed. I wish to add that the case of *Croft v. Rickmansworth Highway Board* (*ubi sup.*) does not touch the point here because there the question was entirely confined to the consideration of a dumb well, excluding anything of the nature of a pipe to discharge the water as in the present case.

ROMER, L.J.—I am of the same opinion. There are three alternatives in this case. First, there might have been a natural drain carrying the water across the defendant's land, and the pipe may have been put there merely in order to assist the natural flow of water. If that were so the defendant would have no right to stop the water. Secondly, the work done by the surveyor of the highway in 1868 may have been done in pursuance of some legal right outside his statutory powers. Thirdly, the lapse of time would justify us in making some assumptions. This pipe, though small in itself, is part of a system of drainage, and may have been put down under the powers given by the Highway Act 1835, and I think we ought to assume that it was legally done under the Act, either with the consent of the defendant's predecessor or upon the payment of compensation. It is argued that this could not have been done because the pipe has no proper outlet. But what is a proper outlet? The water has been discharged in this way since 1868. No one knows exactly what was the previous state of affairs, and how can anyone say that there never has been a proper outlet? I think that the local authority have established their right to this drain and their right to have it kept clear, and therefore the appeal ought to be allowed.

MATHEW, L.J.—I am of the same opinion. It is clear that there must have been for a long time some means for preventing the water from accumulating at this point in the road. Under the Highway Act the surveyor had power to make necessary drains on payment of compensation. There is no evidence of any compensation ever having been paid, but it is quite possible that the landowner waived his claim. The present arrangement has existed since 1868. I think that we are bound to uphold what has been done on the assumption that it was legally done.

Appeal allowed.

Solicitors for the plaintiffs, *May, Sykes, and Co.*

Solicitor for the defendant, *Arthur Pearce.*

CT. OF APP.]

MAYOR, &C., OF BLACKBURN v. SANDERSON.

[CT. OF APP.]

March 14, 15, and 17, 1902.

(Before WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

MAYOR, &C., OF BLACKBURN v. SANDERSON. (a)
APPEAL FROM THE KING'S BENCH DIVISION.*Local government—Paving works—Recovery of expenses—Summary remedy—Action in High Court—Limitation of action—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11—Blackburn Improvement Act 1882 (45 & 46 Vict. c. cccliii.), ss. 26, 232, 247.*

An action was brought by a municipal corporation under their local Act of 1882 against the defendants to recover from them the apportioned shares of the expenses of making up and paving a certain street in Blackburn, which work had been done by the plaintiffs pursuant to sect. 26 of that Act. The street was described in the plaintiffs' notice as a "back road" only (a definition used in the Act of 1882) situate behind some houses of which the defendants were the owners.

The defendants raised two defences to the action: First, that the requisite notices calling on the defendants to do the work had not been served on them; secondly, that the proceedings were out of time, not having been commenced within six months from the date of the service of the notice of demand for payment. The latter question turned on the construction of sect. 232 of the Act of 1882, which provided that all expenses recoverable under that Act might be recovered in a summary manner, "or, if the corporation think fit, in the superior courts or any court of competent jurisdiction."

Held, that, as to the first ground of defence, proper notices had been given.

Decision of Mathew, J. affirmed.

Held, that, as to the second ground of defence, the true effect of sect. 232 of the local Act of 1882, read in conjunction with sect. 247, was to entitle the plaintiffs to recover expenses payable by an owner either by summary proceedings before the magistrates, which must be taken within six months, or by action in the superior courts or in any court of competent jurisdiction, and that the limitation of six months did not apply to the alternative proceedings in the High Court.

Decision of Mathew, J. reversed.

Tottenham Local Board v. Rowell (35 L. T. Rep. 887; 1 Ex. Div. 514) and Vestry of Hammer-smith v. Lowenfeld (75 L. T. Rep. 182; (1896) 2 Q. B. 278) distinguished.

THIS action was brought by the plaintiffs, the Mayor, Aldermen, and Burgesses of the Borough of Blackburn, against the defendants, Charles Augustus Sanderson and others, the plaintiffs' claim being for the amount of expenses (54l. 15s.) settled and apportioned against the defendants pursuant to the Blackburn Improvement Act 1882 in respect of the excavating, ballasting, paving, grouting with pitch, &c., certain streets behind the defendants' property, and for interest thereon (4l. 3s. 10d.) at the rate of 5l. per cent. per annum from the 18th Aug. 1898, payment of the amount of expenses having, the plaintiffs stated, been duly demanded of the defendants on the 18th July 1898.

The defendants, who were mortgagees in possession of the property behind which the streets in question had been made up by the plaintiffs, contended that they were not indebted to the plaintiffs in the amounts claimed in this action.

The defendants stated that by way of objection to what purported to be notices of apportionment, made by the plaintiffs' surveyor and dated the 1st July 1898, of certain expenses, including the expenses claimed in this action, the defendants, in a letter, dated the 4th July 1898, written and sent by the defendants' solicitors to the plaintiffs' surveyor, informed the plaintiffs, as the fact was, that no notice had been served upon the defendants requiring them to make up the streets in question; and that what purported to be notices of reapportionment by the plaintiffs' surveyor of the expenses, including the expenses claimed in this action, were given by the plaintiffs to the defendants on the 18th July 1898, and the writ in this action was not issued until the 28th Feb. 1900. The defendants therefore contended that this action was not commenced within the time limited by law in that behalf—namely, by the Blackburn Improvement Act 1882, ss. 232, 245, and by the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), s. 11.

It appeared that the street in question was described in the plaintiffs' notice as a "back road" only—a definition used in the Local Act of 1882.

By sect. 26 of the Blackburn Improvement Act 1882 the plaintiffs, as the Corporation of Blackburn, were empowered by notice given to the owners or occupiers of lands fronting, adjoining, or abutting upon certain streets or parts of streets as therein mentioned to require them to sewer, drain, level, pave, flag or channel, metal, and make good such streets or parts of streets, and, if the requirements of such notices were not complied with, to execute the works referred to therein; and it was thereby further enacted that "the expenses incurred by them"—that is to say, the corporation—"in so doing shall be paid by the owners in default in such proportions as shall be settled by the surveyor."

By sect. 232 of the same Act provision was made for the recovery of such expenses by summary proceedings "or, if the corporation think fit, in the superior courts or any court of competent jurisdiction."

By sect. 234 the surveyor's apportionment of expenses was made conclusive unless objected to within one month from notice thereof.

By sect. 235 provision was made with regard to payment of interest, and it was enacted that

Notice of the surveyor's apportionment shall be deemed a sufficient demand for all purposes whatsoever.

By sect. 245 it was (amongst other things) enacted that

In all summary proceedings by the corporation for the recovery of expenses incurred by them in works of private improvement the time within which such proceedings may be taken shall be reckoned from the date of service of the notice of demand.

By an order of the master, dated the 9th July 1900, it was ordered that the action should be tried in Middlesex by a judge alone instead of with a special jury, as directed in the order for directions.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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Accordingly, on the 19th Dec. 1900 the action came on for trial before Mathew, J., when the following judgment was delivered:

MATHEW, J.—Upon the first point which has been raised here I should have no doubt whatever. The notice here is ample. On the second point I cannot distinguish this case from the authorities that have been cited to me, and the construction of sect. 232 of the Blackburn Improvement Act 1882 seems to me to be governed by the cases referred to—*Tottenham Local Board v. Rowell* (35 L. T. Rep. 887; 1 Ex. Div. 514), and the more recent case of *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278). Sect. 232 in the earlier part makes expenses recoverable within six months by summary method. That is the effect of the earlier part of the section, and there follows an option—"or, if the corporation think fit, in the superior courts, or any court of competent jurisdiction." Now the two authorities that I have referred to, it seems to me perfectly reasonably, say that on the whole of the section taken together, that limitation of six months was intended to apply not merely to the summary proceedings, but to the alternative and optional proceedings given by the section. Then an argument has been suggested upon the section as to successive owners. I have no doubt it struck one at first as a singular thing that a debt should be gone as against the original owner, and should revive against the successive owner, and should further become a permanent charge upon the property and yet not be recoverable by an action in a superior court. All I can say is that the section as to successive owners applies to successive owners, and does not apply to original owners. Therefore, that section does not seem to me to control sect. 232. I think that section must be construed as contended by the defendants, and that there must be judgment for them with costs.

From the decision on the second point the plaintiffs now appealed.

Danckwerts, K.C. (with him Macmorran, K.C. and W. Mackenzie) for the appellants.—With regard to sect. 232 of the Blackburn Improvement Act 1882, it is admitted that the period of limitation is six months under sect. 11 of the Summary Jurisdiction Act 1848, if the expenses are sought to be recovered in a summary manner. But the six months' limitation has no application if the plaintiffs bring their action "in the superior courts or any court of competent jurisdiction." The defendants say that because there are alternative remedies under sect. 232 the action must be brought within the time specified. But that is, I submit, not the true construction. The plaintiffs must give a month's notice of their demand, and six months must follow, so that seven months may elapse. But the six months was not intended to be the limit of time in any event. Mathew, J. relied upon the cases of *Tottenham Local Board v. Rowell* (35 L. T. Rep. 887; 1 Ex. Div. 514), and *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278), which his Lordship considered governed the present case, and by which he felt himself bound. But those cases are, I submit, quite distinguishable. Those cases, it is true, are very like the present, but it was a wrong view to hold that they applied here, as each

was decided under a different statute. He referred also to

Huber v. Steiner, 2 Bing. N. C. 202, at p. 210;
West Ham Local Board v. Maddams, 33 L. T. Rep. 809; 40 J. P. 470;
Mayor, &c., of Leeds v. Robshaw, 51 J. P. 441.

[WILLIAMS, L.J. referred to *Vestry of St. Pancras v. Batterbury*, 2 C. B. N. S. 477.]

C. A. Russell, K.C. and S. G. Lushington for the respondents.

Danckwerts, K.C. replied.

Cur. adv. vult.

March 17.—The following written judgments were delivered:

WILLIAMS, L.J.—Upon the first point I agree with Mathew, J. The notice here is ample. In my judgment the mistake in the description of the road as a "back road" could not have misled the defendants. But I cannot agree that the construction of sect. 232 of the Blackburn Improvement Act 1882 is governed by the different cases referred to in *Tottenham Local Board v. Rowell* (35 L. T. Rep. 887; 1 Ex. Div. 514). In that case, as also in the case of *West Ham Local Board v. Maddams* (33 L. T. Rep. 809; 40 J. P. 470), the expenses recoverable were, before the passing of the Act which gave the County Court jurisdiction in proceedings for the recovery of demands below 20*l.*, recoverable only before two justices within six months and not afterwards; and the court held in each case that if the party exercised the option of proceeding in the County Court he must do so within the same limit of time. The court held, that is, that the Act giving the option to proceed in the County Court continued as long as the right to proceed before the justices existed, and no longer; but that, when the six months had elapsed, the right to proceed before the justices was gone, and therefore no option could be exercised, and the right to sue in the County Court was at an end. By the earlier Acts the period for recovery was limited to that which was incident to a summary remedy. The Legislature did not say that the six months' limitation imposed on the right of action so created was to be altered when it enacted by a later Act that the statutory right of action might be enforced in a County Court. This is the view of the meaning of those decisions which was taken by the court in *Mayor, &c., of Leeds v. Robshaw* (51 J. P. 441), and I think that it is the plain meaning. But I agree with Mr. Russell that that case is not conclusive of the present case, because in that case the right was a right which the original statute creating the right allowed to be enforced by proceedings which had no limitation like that contained in the Summary Jurisdiction Act in force in 1877; and then in 1877 an Act of that year gave a remedy by way of summary proceedings limited to one year. All that the court held in that case was that the limit to the summary proceedings allowed by the Act of 1877 did not constitute a limitation of the remedies given by the former statutes in relation to the same subject-matter. Mathew, J. goes on in his judgment to refer to the case of *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278) as a decision governing the construction of sect. 232 of the Blackburn Improvement Act 1882. But although that case comes much nearer to the present case than the cases of *West Ham Local Board v. Maddams* (*ubi sup.*) and *Tol-*

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tenham Local Board v. Rowell (*ubi sup.*) do, yet I cannot think that they govern the construction of sect. 232. The words of clause 2 of sect. 11 of the Public Health Act (London) 1891, which Cave and Wills, J.J. had to construe in that case, were "such costs and expenses and fines incurred in relation to any such nuisance may be recovered in a summary manner, or in the County Court or High Court," and the court held that this triple option ceased to exist if one of the options ceased to be available by a lapse of time by reason of a limitation applying to that option only—viz., limitation of six months in the case of summary procedure. Now I would remark, with reference to that case—first, that the words there construed are not the same as the words we have to construe in the Blackburn Act; and I would say further that, although the court held the case to be governed by the decision of *Tottenham Local Board v. Rowell* (*ubi sup.*), not only were the right and the remedies all given by one Act—unlike the cases of *Tottenham Local Board v. Rowell* (*ubi sup.*) and *West Ham Local Board v. Maddams* (*ubi sup.*), in which a right subject to a limitation was created by the original Act, and jurisdiction given by a later Act to enforce that right in the County Court—but also in the case of *Vestry of Hammersmith v. Lowenfeld* (*ubi sup.*) it seems to me that to have held the limitation in the Summary Jurisdiction Act not to apply to actions under sect. 11 of the Public Health Act would not have led to the absurdity of holding that there was a different limitation in the case of actions brought to recover sums under 20*l.* from that which was to prevail in cases above 20*l.*, which was a consideration which weighed very much with the court in the decision of both those cases. I now proceed to deal with the words of sect. 232. It runs thus: "All damages, costs, and expenses recoverable under this Act or the local Acts or any of them or under any bye-law made thereunder, and all penalties under any such Act or bye-law, shall be recoverable by the corporation either according and subject to the provisions of the Railways Clauses Consolidation Act 1845, with respect to the recovery of damages not specially provided for and penalties, and of the determination of any other matter referred to justices, and as if the word "corporation" were inserted therein instead of the word "company," or, if the corporation think fit, in the superior courts or any court of competent jurisdiction." Now, I think that there is nothing in these words, or in the decisions to which I have referred, to make the court hold that, because the summary remedy under the Railways Clauses Consolidation Act 1845 is barred by a six-months' limitation—that after that lapse of time proceedings in the superior courts or any court of competent jurisdiction are barred. Certainly the reasons upon which the *West Ham* case (*ubi sup.*) and the *Tottenham* case (*ubi sup.*) were decided are not available, and the words are different from those in sect. 11 of the Public Health Act 1891, which were construed in *Vestry of Hammersmith v. Lowenfeld* (*ubi sup.*); and I think that upon the words themselves, the meanings of sect. 232 is that the corporation during the period of six months may recover the damages by summary proceedings, and after that only by proceedings in the High Court or some other court of competent jurisdiction. But this view of the meaning of the words is much

strengthened by consideration of other sections of the Blackburn Act. In the first place, we find in sect. 247, which deals with the liability of successive owners, that these expenses shall be recoverable from successive owners in a summary manner within six calendar months of their succession, and after that period may be recovered by the corporation from the owner for the time being of land, &c., by action at law in any court of competent jurisdiction, provided that no debt shall be recovered under the provisions of this section after the expiration of six years from the completion of the works in respect of which such debt is due. It seems plain from this that the six months' limitation is not intended to be applied in the case of successive owners; and it seems most improbable that the Legislature should have intended this limitation of six months not to apply in the case of successive owners, and to apply in the case of the original owner at the time when the works were executed, the expenses of the execution of which is the subject-matter of recovery. There are many other sections of the Act of Parliament which seem to indicate that the limitation with regard to summary proceedings is applicable only to that mode of procedure; as, for instance, the last words of sect. 245. These words are: "And in all summary proceedings by the corporation for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand." Why are these words not expressed to apply to all proceedings if the limitation is to apply to all proceedings? And, again, sect. 252, under which the corporation may allow seven years for repayment of expenses due from owners, tends to negative such a limitation in proceedings other than summary proceedings. I have only to add that, in my judgment, if you find in an Act of Parliament the power to take the remedy in divers courts, that remedy will, in each court, be subject to the *lex fori* of that court, and the *lex fori* includes the limitation of actions, which goes to the remedy and not to the right. I think, therefore, that this appeal must be allowed.

STIRLING, L.J.—I am of the same opinion on both points. As to the first point on which we agree with the decision of Mathew, L.J. (then Mathew, J.) I do not desire to say anything. On the second point, with reference to which we differ from him, I desire to state very briefly the grounds on which my opinion rests. The Corporation of Blackburn, acting under sect. 26 of the Blackburn Improvement Act of 1882, have executed certain paving works, and the Act provides that the expenses incurred by them in so doing shall be settled by the surveyor and be paid by the owners in default, and in such proportion as shall be settled by the surveyor. An apportionment has duly been made, and the action is brought to recover the amount due from the defendants who are owners affected by the apportionment. Now, as regards the mode of recovery of these expenses sect. 232 applies; but it does not apply, it is to be observed, to expenses alone. It is a general clause which provides that "All damages, costs, and expenses recoverable under this Act, or the local Acts, or any of them, or under any bye-law made thereunder, and all

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penalties under any such Act or bye-law, shall be recoverable by the corporation either according and subject to the provisions of the Railways Clauses Consolidation Act 1845 with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, and as if the word 'corporation' were inserted therein instead of the word 'company,' or, if the corporation think fit, in the superior courts or any court of competent jurisdiction." Now that clause contains no express enactment as to the period of time within which proceedings are to be taken. But on reference to the provisions of the Railways Clauses Consolidation Act 1845 we find it provided by sect. 140 that: "In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount in case of dispute shall be ascertained and determined by two justices." That clause brings into operation the limitation of time which is imposed by the Summary Jurisdiction Act regulating proceedings before two justices. It is therefore contended that, inasmuch as the proceedings taken according and subject to the provisions of the Railways Clauses Consolidation Act 1845 must be brought within a certain limit of time, the proceedings in the superior courts or in any court of competent jurisdiction which the corporation are by that clause authorised to take must be brought within the same limit of time. Now I confess, speaking for myself, that if this question were free from authority, I should not arrive at that conclusion upon that language. It seems a very extraordinary and obscure mode of prescribing the limit of time which has been chosen by the Legislature, and one can see other reasons for giving such an option as here exists to the corporation. The clause is a wide one, as I have already pointed out. The "damages, costs, expenses, and penalties" there referred to vary necessarily very much in amount, and the questions which arise with reference to them may vary very much as regards their legal difficulty, and even if the section were limited to paving expenses alone such would be the case. Where the amount which is sought to be recovered is small, and no difficulty arises, it is for the benefit both of the corporation which have to enforce payment of those damages, costs, expenses, and penalties, and also for the benefit of those who are to pay them, that a cheap and speedy mode of enforcing payment should be provided. In other cases where the amount is large, and there are legal difficulties which arise, it is desirable to provide that recourse may be had to the higher courts. In those circumstances I should not myself infer from these words that it was the intention of the Legislature to impose on proceedings in the superior courts or other courts of competent jurisdiction the same limit of time as is imposed on proceedings in courts of summary jurisdiction. But it is quite possible to find in the other clause of the Act dealing with the same matter, or dealing with the special matter under consideration, language which would indicate that such was not the intention of the Legislature. Beginning with sect. 234 and going down to sect. 249, there is found a series of clauses which deal with the

question of paving expenses. I have read those sections carefully, and it seems to me that the language of those sections is so far from being favourable to the view that a limitation of time was intended to be imposed that it points in a contrary direction. That language has been pointed out to the Lord Justice, and I will merely say this, that sect. 247, which deals with the liability of successive owners of the lands, and shows plainly that the proceedings against successive owners were not limited to the time prescribed by the Summary Jurisdiction Act, appears to me to afford a strong indication that no limitation of time was intended to be imposed by sect. 232. But the matter is not free from authority, and the authorities I should desire briefly to refer to, as those were relied on by the learned judge who decided this case in the court below. The first two which were referred to are those of *West Ham Local Board v. Maddams* (33 L. T. Rep. 809; 40 J. P. 470) and *Tottenham Local Board v. Rowell* (35 L. T. Rep. 887; 1 Ex. Div. 514). Those both arose under very similar circumstances. There was in each case an Act of Parliament which gave a summary remedy before the justices alone. That was followed by the Local Government Amendment Act 1861, which provided that "Proceedings for the recovery of demands below 20*l.*, which local boards are now empowered by law to recover in a summary manner, may, at the option of the local board, be taken in the County Court as if such demands were debts within the cognisance of such courts." So that, as regards demands above 20*l.*, the summary jurisdiction was the only one which could be had recourse to, and as regards demands below 20*l.* there was an option to proceed either in a summary way or in the County Court. If the option with regard to the demands below 20*l.* were held to be an option to proceed beyond the time which was limited with reference to the proceedings in the summary jurisdiction, the result would be this: that as regards demands above 20*l.* there would be a limit of time within which the proceedings were to be taken, but as regards demands below 20*l.* there would be no limit. Now, in these two cases that circumstance was relied on, and it appears to me it was rightly relied on, as showing strongly that the intention of the Legislature must have been to impose the same limit of time whether the proceedings were taken before justices or in the County Court, and we find that Blackburn, J., as he then was, in the case of *West Ham Local Board v. Maddams* (*ubi sup.*), pointed out what he termed an absurdity and relied on it; and that Mellish, L.J., in the Court of Appeal, in *Tottenham Local Board v. Rowell* (*ubi sup.*), also pointed it out and relied upon it. I think, therefore, that those two cases do not govern the present, being dependent on special circumstances. But in the case of *Vestry of Hammersmith v. Lowenfeld* (75 L. T. Rep. 182; (1896) 2 Q. B. 278) we find, no doubt, enactments which much more closely resemble that which we find in the statute with which we have to deal. The action there was brought under sect. 11 of the Public Health Act, and the 2nd sub-section of that clause provides that the costs and expenses in question might be recovered in a summary manner or in the County Court or the High Court. A subsequent clause, sect. 117, provides by sub-sect. 1 that "All

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offences, fines, penalties, forfeitures, costs, and expenses under this Act or any bye-law made under this Act directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Act." And then sub-sect. 2 provides this: "Proceedings for the recovery of a demand not exceeding 50*l.* which a sanitary authority or any person are or is empowered to recover in a summary manner, may, at the option of the authority or person, be taken in the County Court as if such demand were a debt." Now, dealing with sect. 117 alone, it seems to me that there are circumstances which closely resemble those of the two cases of *West Ham Local Board v. Maddams* (*ubi sup.*), and *Tottenham Local Board v. Rowell* (*ubi sup.*), and it was admitted in argument, and I think rightly admitted, that if the action was brought under sect. 117 the limitation would apply. The case was decided by a Divisional Court, consisting of Cave and Wills, JJ. Cave, J. says this (at p. 281 of (1896) 2 Q. B.): "The first mode pointed out by the Act of obtaining and enforcing a nuisance order is to go before the magistrate. If the order be made, or if a fine be imposed and not paid, an option is given of recovering the costs and expenses or the fine, either by summary proceedings or by an action in the High Court or County Court. The first and most natural thing to do is to proceed summarily; and if that course be taken, the limitation of time provided by sect. 11 of the Summary Jurisdiction Act 1848 applies. The decision in *Tottenham Local Board v. Rowell* (*ubi sup.*) is that when an option is given to proceed either summarily or in the County Court, and a limitation of time is imposed with respect to proceeding summarily, that limitation applies also to the proceeding in the County Court." Now, with the utmost respect, I am unable to agree that that is the true effect of the decision in *Tottenham Local Board v. Rowell* (*ubi sup.*), though I think if the learned judge had applied that reasoning to sect. 117, it would have been quite in accordance with the actual decision. It seems to me that the learned judge there expressed the view that where an option was given to proceed either summarily or in the County Court, and a limitation of time was imposed with respect to proceeding summarily, the limitation must also apply to proceedings in other courts. With that I am unable to agree. With regard to the judgment of Wills, J. I am not sure that I differ. His reasoning appears to me to have been different. He begins with dealing with sect. 117 of Public Health (London) Act 1891, and holds that proceedings under it would be governed by the decision in *Tottenham Local Board v. Rowell* (*ubi sup.*). I agree. Then he proceeds to say: "I think it is impossible to draw a distinction between sect. 117 and sect. 11 of the Summary Jurisdiction Act 1848. The language of sect. 11 is somewhat different, but there is no difference in substance. Sect. 11 says that 'such costs and expenses may be recovered in a summary manner or in the County Court or High Court.' What is that but saying that the person entitled to recover them may at his option select either the court of summary jurisdiction or the County Court or the High Court in which to pursue his

remedy? I cannot see that the option given is any the less an option because the words 'at the option' are not used. If that view be right no real distinction can be drawn between sect. 11 and sect. 117." If the learned judge meant to lay down the same proposition of law as Cave, J., then, again, speaking with the utmost respect, I am unable to agree; but I am not sure that really he meant to do so. It may be that his view was, and I rather think it was, that whatever might be the meaning of sect. 11 standing by itself, it was possible to find in other clauses of the Act an indication of meaning on the part of the Legislature, and as to that there can be no doubt that that is perfectly possible. Wills, J. found that indication of meaning in sect. 117, and if his decision was on reading sect. 11 in the light of sect. 117, I need only say that this case is entirely distinct. In the Blackburn Improvement Act of 1882 there is not only no clause similar to sect. 117, but there is a clause which points strongly in the opposite direction—namely, the section which I have already referred to, 247. In these circumstances, I think the appeal ought to be allowed, and I think at the same time that we are really hardly differing from Mathew, J. who was bound by the case of the *Vestry of Hammersmith v. Lowenfeld* (*ubi sup.*), by which we are not bound.

COZENS-HARDY, L.J.—I agree that the appeal must succeed. Apart from authority, it seems to me that the true effect of sect. 232 of the local Act is to entitle the corporation to recover expenses payable by an owner under sect. 26 either by summary proceedings before magistrates, which must be taken within six months, or by action in the superior courts or in any court of competent jurisdiction. I can see no reason for holding that the limitation of six months must apply to the alternative proceedings in the High Court; and any doubt which might be felt is removed by reference to sect. 247. That section deals with the rights of the corporations against successive owners. It deals with a matter falling within sect. 232, and it expressly states that the expenses may be recovered from a succeeding owner in a summary manner within six months of his succession, and after that period by action at law. Reading the two sections together, it seems clear that the limitation of six months cannot apply to an action in the High Court. As to the authorities, the *Tottenham* case (*ubi sup.*) was plainly distinguishable for the reasons given by Williams and Stirling, L.J.J., and which I need not repeat. As to the *Hammersmith* case (*ubi sup.*), it may be sufficient to say that there was no such section as the present sect. 247 in that case, and thus to distinguish it. But, if necessary, I should hold that the decision of the Divisional Court in the *Hammersmith* case cannot be supported and ought not to be followed.

Appeal allowed.

Solicitors for the appellants, *Robbins, Billing, and Co.*, agents for *R. E. Fox*, Town Clerk, Blackburn.

Solicitors for the respondents, *Bower, Cotton, and Bower*, agents for *Ainsworth, Sanderson, and Howson*, Blackburn.

CT. OF APP.] PROPERTY EXCHANGE (No. 1) LIM. v. WANDSWORTH CORPORATION. [CT. OF APP.]

March 21 and 22, 1902.

(Before COLLINS, M.R., ROMER and
MATHEW, L.JJ.)

PROPERTY EXCHANGE (No. 1) LIMITED v.
WANDSWORTH CORPORATION. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Metropolis—New street—Paving expenses—New strip of land added to old street—Cost of paving new strip—Liability of frontagers—Metropolis Management Act 1855 (18 & 19 Vict. c. 120), ss. 105, 250—Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), ss. 77, 112.

An old highway, 16ft. wide, which before 1855 was a formed and made road with houses along the south side, and was repaired by the local authority, was widened in 1898 by the addition thereto of a strip of land 24ft. in width on the north side thereof, and houses were then built on that side. The local authority then resolved to pave the added part of the road as a "new street" and to apportion the expenses among the frontagers on the north side only. Upon a summons to recover the amount apportioned upon one of the frontagers, the magistrate decided that the old part of the road was an old street, and that the added part was of itself a "new street."

Held (affirming the decision of the King's Bench Division), that the part added to the old street was a "new street" within the meaning of the Metropolis Management Acts, and that the expenses of paving the added part were properly apportioned among the frontagers on that part of the street.

Richards v. Kessick (59 L. T. Rep. 318) and White v. Fulham Vestry (74 L. T. Rep. 425) approved.

APPEAL by the Property Exchange (No. 1) Limited from the decision of the Divisional Court (Lord Alverstone, C.J. and Lawrance, J.) upon a case stated by a metropolitan police magistrate.

On the 11th July 1900 a summons was issued at the instance of the Wandsworth Board of Works against the Property Exchange (No. 1) Limited to answer a claim by the board for 69l. 11s. 3d., being the sum apportioned by the board in respect of certain premises of the company, and being the proportion payable in respect of those premises towards the expense of paving a new street called Totterdown (on the north side thereof), Tooting.

The street or roadway called Totterdown had, at the time in question, buildings on both sides.

The houses on the south side were erected before 1855. The company's premises were built in 1898.

For many years prior to 1855 Totterdown was a formed road used for every description of traffic, and had been repaired by the board when repairs were necessary before and since 1855.

In 1898 Totterdown was widened from the width of 16ft. to the width of 40ft. by the addition of a strip of land on the north side. Save and except this widening, and the building of certain houses on the north side, Totterdown had not altered in any way since the houses on

the south side were erected. The neighbourhood, however, had become more thickly populated.

In or about the year 1898 the lands on the north side of Totterdown were laid out for building purposes.

In 1899 the board resolved to pave Totterdown as a "new street," under sect. 105 of the Metropolis Management Act 1855, and made an apportionment of the estimated expenses upon the owners of the houses on the south side as well as on the north side. A summons for the recovery of the amount apportioned upon the owner of a house on the south side was dismissed by the magistrate on the ground that the old part of Totterdown on the south side formed an old street, and could not be treated as a new street.

In 1900 the board made another order and apportionment for the paving of the new part on the north side of the road as a "new street," and apportioned the estimated expenses among the owners and occupiers on the north side of the road only.

The company were charged in the apportionment with the sum of 69l. 11s. 3d. in respect of their premises on the north side of the road, but refused to pay that sum when it was demanded.

Upon the hearing of the summons by the board to recover that sum, it was contended on behalf of the company: (1) That upon the true construction of sect. 105 of the Metropolis Management Act 1855 and sects. 77 and 112 of the Metropolis Management Amendment Act 1862, the portion of Totterdown now proposed to be adopted by the board—that is, the northern portion, 24ft. in width—was not a new street within the meaning of the Acts; (2) that the apportionment was invalid inasmuch as it was not within the power of the board, whilst treating Totterdown in its entirety as it existed at present, to make an apportionment for the paving of it longitudinally, and that, if Totterdown was to be regarded in its entirety for the purpose of judging whether or not it was a new street, the owners of houses on both sides (including the south side) ought to bear their due proportion of the expenses; and (3) that the decisions in the cases of *Richards v. Kessick* (59 L. T. Rep. 318) and *White v. Fulham Vestry* (74 L. T. Rep. 425) did not apply, and, in so far as any principle or doctrine covering the present case might in terms appear therein, that such principle or doctrine ought not to be applied in the circumstances appearing in the present case.

The magistrate found as a fact that Totterdown, before it was widened, was an old street, and that the new strip which had been added to the old street became a street by the building of the houses along the north side thereof, and he held that the added strip was of itself a "new street." The magistrate, therefore, held that the apportionment was valid, and that the company were liable to pay the amount claimed.

The question for the opinion of the court was whether the decision of the magistrate was right.

The material provisions of the Metropolis Management Acts are cited in the judgment of Collins, M.R.

The Divisional Court (Lord Alverstone, C.J. and Lawrance, J.) held that the magistrate had properly decided that the added part of the road

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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was a "new street," and dismissed the appeal (84 L. T. Rep. 689).

The company appealed.

W. L. Richards for the appellants.—The decision of the Divisional Court was wrong, and the appellants were not liable to pay this apportionment. The apportionment was invalid, either because the frontagers on both sides of this street ought to have been charged with these paving expenses, the whole street being a "new street," or because the whole street was an old street and the paving expenses could not be charged upon the frontagers at all. There was an old street in existence and the new strip of land which was added to that old street in order to widen it became a part of, and merged in, the old street, and the whole became an old street:

Clerkenwell Vestry v. Edmondson, ante, p. 414; 86 L. T. Rep. 187; (1902) 1 K. B. 336.

In the alternative, the whole became a new street by the addition of the new strip:

Mile End Vestry v. Whitechapel Union, 34 L. T. Rep. 178; 1 Q. B. Div. 680;

Wilson v. Vestry of St. Giles, Camberwell, 65 L. T. Rep. 790; (1892) 1 Q. B. 1;

Paddington Vestry v. North Metropolitan Railway and Canal Company, (1894) 1 Q. B. 633;

Great Clacton Local Board v. Young and Sons, 71 L. T. Rep. 877; (1895) 1 Q. B. 395.

In that case the expenses ought to have been apportioned among the frontagers on both sides of the street, and this apportionment among the frontagers on the north side only was invalid. Sect. 98 of the Metropolis Management Amendment Act 1862 provided that an existing road of a less width than 40ft. should not be laid out for building as a street unless widened to 40ft., and that a road so widened should be "deemed to be a new street." That shows that the whole of this street ought to be treated as a new street. Sect. 98 was repealed by the London Building Act 1894 (57 & 58 Vict. c. cxxiii.), but sect. 9 of the latter Act provides that a new street shall not be laid out of a less width than 40ft. without the sanction of the county council, and the new part of this road being less than 40ft. in width could not be laid out as a new street without that sanction, which has not been shown to have been obtained. The cases relied on in the court below are either distinguishable or were wrongly decided. The case of *Richards v. Kessick* (59 L. T. Rep. 318) was decided under sect. 150 of the Public Health Act 1875. That section does not deal with "new streets" at all. It provides that the local authorities may charge the expenses of paving upon the frontagers "on such parts thereof as may require to be paved"; but there are no such words in sect. 105 of the Metropolis Management Act 1855, or in sect. 77 of the Metropolis Management Amendment Act 1862. In sect. 105 of the Act of 1855 the words are, "the owners of the houses forming such street," and, in sect. 77 of the Act of 1862, "the owners of the land bounding or abutting on such street." In *White v. Fulham Vestry* (74 L. T. Rep. 425) the frontagers on the old part of the street had had to pay the expenses of paving it as a "new street," and it was only just and equitable that they should not afterwards be compelled to pay part of the expenses of paving a new piece which was added to widen the road. The deci-

sion in that case was wrong so far as it decided that the added part was itself a "new street." The case of *Wakefield Sanitary Authority v. Mander* (5 C. P. Div. 248) was decided upon sect. 150 of the Public Health Act 1875.

Mattinson, K.C. and *J. C. Earle* for the respondents.—The provisions of sect. 9 of the London Building Act 1894 are only intended to secure sufficiently wide streets, and that object is attained when the whole street is widened to 40ft. That section does not in any way affect the question whether an addition to an existing street can be treated as a "new street" for the purposes of the Metropolis Management Acts. The words of sect. 98 of the Metropolis Management Amendment Act 1862, which was repealed by the London Building Act 1894, "shall be deemed to be a new street," are omitted from sect. 9 of the London Building Act, and the widening of this road took place after the passing of that Act. [They were stopped by the Court.]

COLLINS, M.R.—This appeal raises the question whether a new strip of land, which has been added to an old highway and dedicated as a highway, can be of itself a "new street" apart from and without considering the adjoining part of the highway to which it has been added and which was an old street at that time. It has been contended that in such a case the added strip of land must receive into itself the old street, and that the result is that the two together make one new street. Then it is said that, in apportioning the expenses of paving the new part, those expenses should be distributed among the frontagers on both sides of the street. In this case it has been found as a fact that the original street was an old street before 1855; and that along that old street cottages had been erected which were a factor in constituting the old highway an old street. In that state of things the new strip of land was added and dedicated as a highway, and houses were built along that side of the street. Then the local authority thought fit to pave that new part of the street, and the question now is by whom the expenses of that paving ought to be borne. First of all, the local authority apportioned the expenses among the frontagers upon the old part of the street as well as among those upon the new part. The magistrate, however, held that that could not be done, and the apportionment was accordingly amended so as to include only the frontagers upon the new part of the street. The Divisional Court held that to be right, and that the frontagers on the north, or new, side of the street were frontagers upon a new street, which was the added strip, and that the frontagers upon the old street were not liable to pay part of the paving expenses. On this appeal the principal contention of the appellants is that the whole area of this street, the new part and the old, is one new street, so that all the frontagers upon both sides are liable to contribute to these paving expenses, although presumably the frontagers upon the old part had in one way or another paid the expenses of paving that part. The other contention of the appellants was that the new part became merged in the old street, and that there was one street only, and that an old street, and that therefore the local authority had no right to apportion the expenses

among any of the frontagers. The appellants rely upon the provisions of sect. 105 of the Metropolis Management Act 1855, which enacts that, "In case the owners of the houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry . . . in which such street is situate, be desirous of having the same paved, or if such vestry deem it necessary or expedient that the same should be so paved, then such vestry shall well and sufficiently pave the same . . . and the owners of the houses forming such street shall on demand pay to such vestry the amount of the estimated expenses of providing and laying such pavement." They say that that refers only to the whole of a street, and that the apportionment is to be among the owners of the property "forming such street," that is, the whole street. That, indeed, is the definition of the persons who are to pay the expenses given in the Act of 1855. But another Act was passed in 1862, the Metropolis Management Amendment Act 1862, which, by sect. 112, provides that, "In the construction of the recited Acts and this Act . . . the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance of the paving and roadway whereof had not previously to the passing of this Act been taken into charge and assumed by the commissioners, &c., and a part of any such street." The appellants say that the persons on both sides of the street are the owners of property abutting on the street, and that, if there is but one street, they are all frontagers on that street, and that thus the question arises whether the whole is an old street and none of the frontagers are liable, or whether the whole is a new street and all the frontagers are liable. The magistrate and the Divisional Court have held that there is a "new street," which is the new strip which has been added on the north side of the road, and that the frontagers on that side of the road are alone liable to contribute to the paving expenses, and that the frontagers on the other side are not liable. Whether that decision is right or not depends upon whether in fact a new street can be formed by adding a new strip along the side of an old street. The Divisional Court has held that that can be done, upon the authority of two cases of long standing, which seem to me to be quite in point. Whether those cases were rightly or wrongly decided, I think that it would be a dangerous thing for the Court of Appeal now to interfere with those decisions and to overrule them. Many things have been done upon the authority of those cases since they were decided a long time ago. But when those cases are examined, it seems to me that they were well decided; and I certainly have no clear view which would justify me in holding otherwise than in accordance with those decisions. If, then, those cases were rightly decided, the only question is whether they can be distinguished from the present case. It has been faintly contended for the appellants that those cases were wrongly decided, and it has been strenuously contended that, if rightly decided, they are distinguishable. The first of those cases is *Richards v. Kessick* (59 L. T. Rep. 318), which seems to me to be absolutely in point. The headnote to that case is as follows: "The owners of a field adjoining a

highway repairable by the inhabitants at large used it for building land, and threw open to the highway a strip of land in front of the houses erected on it. Held, that the houses with the strip of land in front of them together formed a 'street,' within the meaning of sect. 150 of the Public Health Act 1875, which the urban sanitary authority, within whose district it was situate, could compel the frontagers to pave, channel, and kerb to their satisfaction under the provisions of that section." That is exactly what happened in the present case, and the facts in that case are not distinguishable from the facts in this case. The facts in this case were that a row of houses was built on the south side of the road, known as Totterdown, before the year 1855, and the road was a public highway, and after the erection of those houses became a "street," as the magistrate has found. In 1898 this street was widened from the width of 16ft. to the width of 40ft. by the addition of a new strip of land on the north side, and houses have been built along that side of the road, and the new strip of land parallel with the old street has been held to be itself a new street. That case seems to me to be absolutely in point, unless there is some good distinction which can be drawn. It is said that there is a good distinction because that case was decided under sect. 150 of the Public Health Act 1875, whereas this case arises under the Metropolis Management Acts. It is contended that sect. 150 of the Public Health Act 1875 provides that when any street is not paved, &c. to the satisfaction of the local authority, "the owners and occupiers of the premises fronting or adjoining or abutting on such parts thereof" as may be required to be paved, &c., may by notice be required to do the work, and may be charged with the expenses if the local authority have to do the work, and that therefore the decision in *Richards v. Kessick* (*ubi sup.*) was justified but is quite distinct, from a case under the Metropolitan Management Acts, in which there are no words referring to a part only of a street. That contention, however, is not well founded, because the definition in sect. 112 of the Metropolis Management Amendment Act 1862 provides that "the expression 'new street' shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets the maintenance, &c. whereof had not previously to the passing of this Act, been taken in charge and assumed by . . . the authorities having control of the pavements or highways in the parish or place in which such streets are situate, and a part of any such street." Therefore in that definition we have the same words in effect as in sect. 150 of the Public Health Act 1875, and, if we substitute for "street" in the Metropolis Management Acts the words of the definition clause, the words of sect. 105 of the Act of 1855, and of sect. 77 of the Act of 1862, will be "street, or a part of any such street." Therefore the added part of this street can exist of itself as a "new street," and the frontagers upon that part can be made to bear all the paving expenses, and the case of *Richards v. Kessick* (*ubi sup.*) is an authority directly in point. There is also another authority, the case of *White v. Fulham Vestry* (74 L. T. Rep. 425), which involves the same point. The headnote to that case is as follows: "In 1870 a road, which was then an unpaved 'new

CT. OF APP.] PROPERTY EXCHANGE (No. 1) LIM. v. WANDSWORTH CORPORATION. [CT. OF APP.]

street," with houses and a footpath on the north side only, and vacant land on the south side, was paved to the satisfaction of the local authority under the provisions of sect. 105 of the Metropolis Management Act 1855. The expenses of such paving were apportioned upon and were paid wholly by the owners of the houses on the north side, and the vestry afterwards kept the whole of such pavement in repair and paid the cost out of the general rates. In 1888 the owner of the vacant land on the south side, by an arrangement with the vestry for widening the road, set back his fence 13ft. and dedicated this strip, and the vestry kerbed a new footpath 7ft. in width on the south side, and paved and metalled the remaining 6ft., making it uniform with the carriage-way already paved, and they paid the expenses of the subsequent repairs out of the general rates. The only part left unpaved was the new footpath of 7ft., and, houses having been built on the south side of this footpath, the vestry resolved in 1894 to pave this footpath, being, as they said, a "new street," and they apportioned the expenses of paving the new footpath on the owners on the north side of the road as well as on the owners on the south side"; and it was held that the apportionment was wrong because the "new street" was the strip of land which had been added as a footpath and which the vestry had resolved to pave. Those facts are exactly parallel with the facts in the present case, in which the new strip of land added to the old road corresponds to the new footpath in that case. In that case, no doubt, the provisions of sect. 105 of the Metropolis Management Act 1855 had been put into operation in respect of the whole of the roadway, which was not done in this case, and the local authority had thereby done that which prevented it being a new street. Those two cases seem to me to apply exactly to the present case. For these reasons, I think that this appeal fails and must be dismissed.

ROMER, L.J.—I am of the same opinion. The main argument of the appellants leads to this, that, if an old street is widened by a strip of land being added to it on one side, the whole becomes *ipso facto* a "new street," so as to enable the local authority to deal with it upon that footing and make the frontagers upon the old part of the street liable to pay part of the expenses of paving the new part. If the argument of the appellants is correct, it leads to this, that, if a highway becomes a new street by having houses built upon one side of it, and is paved, and the expenses of paving are paid by the owners of those houses, yet, if the street is widened on the other side, the whole becomes a "new street," and the owners of the houses on the old side of it are liable again to contribute to the expenses of paving. That cannot be so. It cannot be that if the frontagers on an old street are in a position to say that the whole of it must be paved and maintained at the expense of the general rates, they can be deprived of that right if the owners on the other side of the street choose to widen the street, which the frontagers on the old part cannot prevent. In my opinion, that result cannot be allowed to follow. On the contrary, I think that the cases which show that that result does not follow were well decided. In this case it has been found as a fact that Totterdown was an old street with houses on the south side, and that,

save and except this widening and the building of certain houses on the north side of the street, it had not altered in character or position, or in any other way since the houses on the south side were erected. Upon that finding it seems to me that it would be extravagant to say that the old street was, by the action of the owners on the north side, converted into a new street. With regard to the argument founded on sect. 98 of the Metropolis Management Amendment Act 1862, there appears to be the sufficient answer that this section was repealed by sect. 9 of the London Building Act 1894, and that this road was widened in 1898, after that repeal. For all we know the repeal of sect. 98 and the alteration of the wording in the Act of 1894 may have been for the purpose of preventing this very argument being raised. Then it was contended that, if this road was not all a new street, it was all an old street. It may have been that this strip of land which was thrown into the road could not have been utilised for the purpose of building, and that by adding it to the road the owner of the land on that side of the road could get the benefit of being able to build upon his land through having a good road in front of it. Then he says that he can throw the expense of paving his side of the road upon the general rates instead of bearing them himself. I cannot see why such a gift should be made to him. There is nothing in the Acts which requires us to hold that new land which has been added in this way to an existing road must be regarded as part of the old street. As was pointed out in the authorities which have been quoted, there is nothing to prevent the local authority treating the new strip of land, which is added to an old street, as constituting a new street of itself, especially where, as in the present case, the addition is of a substantial character, and in fact larger than the old part of the road. In my opinion that argument also fails. I agree, therefore, that this appeal fails and must be dismissed.

MATHEW, L.J.—I am of the same opinion. It is said by the appellants that there are two ways in which the road in question may be regarded; either the whole road, including any addition thereto, is an old street, or the whole is a new street because the new part is more important than the old part and has swallowed up the old part. The latter contention depended principally on sect. 98 of the Act of 1862, though that section has been repealed. That section was probably repealed for the very reason that it might work injustice, and to set the law free from the possible interpretation that an old street might become a new street. In my opinion neither contention can be accepted. The street as a whole was neither a new street nor an old street; it was both. Why then cannot a part of it be regarded as a new street? It seems to me that it would be quite just to do so. To treat the added part as a new street is to accept the authority of the two cases which have been referred to and which are both clearly in point. In the case of *White v. Fulham Vestry* (*ubi sup.*) the frontagers upon the old part of a road had been called upon to pay the expenses of paving it; the road was then widened, and it was contended that the frontagers on the old part were liable to contribute to the expenses of paving the new part. It was held that this was an unreason-

CHAN. DIV.] ATTORNEY-GENERAL v. RICKMANSWORTH URBAN DISTRICT COUNCIL. [CHAN. DIV.]

able contention, and that it could not be adopted. It is said that there is a distinction between that case and the present case. What was the principle of the decision in that case? It was that the frontagers on the old part of the street were exempt from liability to pay any part of the expenses of paving the new part because they had previously contributed to the expenses of paving the old part, and could not, therefore, be called upon to pay the expenses of paving the new part. That is really the same as the present case. I think that the principle of the decisions in those two cases applies to the present case, and I see no reason for saying that those cases were wrongly decided. This appeal, therefore, fails and must be dismissed. *Appeal dismissed.*

Solicitor for the appellants, *Frederick Du Bois*.
Solicitors for the respondents, *W. W. Young and Son*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Tuesday, March 25, 1902.

(Before KEKEWICH, J.)

ATTORNEY-GENERAL v. RICKMANSWORTH
URBAN DISTRICT COUNCIL. (a)

Local government—District council—Parliamentary opposition—Expenses of opposition—Application of district rate—Ratepayers' consent—Sanction of Local Government Board—Borough Funds Act 1872 (35 & 36 Vict. c. 91), ss. 2, 4, 8, 10—Local Authorities (Expenses) Act 1887 (50 & 51 Vict. c. 72), s. 3.

An urban district council cannot apply the district rate towards payment of the expenses of opposing a local bill not affecting their own duties, rights, or privileges, without first obtaining the consent of the ratepayers under sect. 4 of the Borough Funds Act 1872, nor is sect. 3 of the Local Authorities (Expenses) Act 1887, under which such expenses if incurred may be sanctioned by the Local Government Board, intended to prevent the court from intervening to restrain such expenses being thrown on the rate when the sanction of the Local Government Board has not been applied for.

THIS was a motion by the Attorney-General on the relation of the Rickmansworth Gas Light and Coke Company for an injunction to restrain the Rickmansworth Urban District Council from applying any part of the general district fund or rate, or any other public fund or rate under their control, to the payment of any costs or expenses incurred or to be incurred in relation to the opposing by the defendants of a Bill being promoted in Parliament by the relators unless and until the defendants first should have obtained the consent of the owners and ratepayers of the urban district of Rickmansworth to such opposition, and otherwise complied with the provisions of sect. 4 of the Borough Funds Act 1872.

Under the Rickmansworth Gas Order 1885 the Rickmansworth Gas Light and Coke Company supplied the urban district of Rickmansworth,

together with the parishes of Rickmansworth Rural and Chorleywood.

The company were promoting a Bill in the House of Lords for incorporating and conferring powers on the company which provided for the increase of the capital of the company, of its borrowing powers, and of its area of supply by including the parish of Chenies, in Buckinghamshire.

The district of supply of the company had been hitherto wholly in the county of Hertford.

The district council presented a petition in opposition, mainly on the ground that the price of gas in the urban district would be increased by the extension of the area of supply to outlying rural districts, and that the proposed increase of the share capital and borrowing powers of the company were excessive.

The company thereupon brought this action, and now moved for this injunction on the ground that the council were exceeding their powers in attempting to apply any part of the district fund in paying the expenses of opposing the bill, as they had not obtained the consent of the ratepayers as required by sect. 4 of the Borough Funds Act 1872. The council admitted they had not obtained the consent of the ratepayers, but relied on their common law powers to defend themselves, alleging that their duties with respect to lighting the district were affected, and also that the matter was left to the decision of the Local Government Board under sect. 3 of the Local Authorities Expenses Act 1887 (50 & 51 Vict. c. 71), which provides that

Expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board.

The sections of the Borough Funds Act 1872 (35 & 36 Vict. c. 91) which were referred to were as follows:—

Sect. 2. When in the judgment of a governing body in any district it is expedient for such governing body to promote or oppose any local and personal Bill or Bills in Parliament, or to prosecute or defend any legal proceedings necessary for the promotion or protection of the interests of the inhabitants of the district, it shall be lawful for such governing body to apply the borough fund, borough rate, or other public funds or rates under the control of such governing body to the payment of the costs and expenses attending the same.

Sect. 4. No expense in relation to promoting or opposing any Bill or Bills in Parliament shall be charged as aforesaid unless incurred in pursuance of a resolution of an absolute majority of the whole number of the governing body at a meeting. . . . Provided, further, that no expense in promoting or opposing any Bill in Parliament shall be charged as aforesaid unless such promotion or opposition shall have had the consent of the owners and ratepayers of that district, to be expressed by resolution in the manner provided in the Local Government Act 1858 for the adoption of that Act.

Sect. 8. Nothing in this Act shall extend or be construed to alter or affect any special provision which is or shall be contained in any other Act for the payment of the costs, charges, and expenses intended to be provided for by this Act, or to take away or diminish any rights or powers now possessed or enjoyed by any governing body, or which are or shall be vested in or exercisable by the inhabitants of any district under any general or special Act.

Sect. 10. The provisions of this Act shall not extend to applications for any Bill in Parliament for any object

(a) Reported by O. F. DUNCAN, Esq., Barrister-at-Law.

CH. DIV.] FINCHLEY ELECTRIC LIGHT CO. v. FINCHLEY URBAN DISTRICT COUNCIL. [CH. DIV.]

which would for the time being be attainable by Provisional Order.

Warrington, K.C. and R. J. Parker for the motion.—The council cannot apply the rates in opposing the Bill without the consent of the ratepayers:

Attorney-General v. Corporation of Swansea, 78 L. T. Rep. 412; (1898) 1 Ch. 602.

This case is not within the principle of *Attorney-General v. Corporation of Brecon* (40 L. T. Rep. 52; 10 Ch. Div. 204). They referred to the sections of the statutes above set out.

S. O. Buckmaster for the council.—We are properly opposing the Bill, for it affects our duties. Under sect. 3 of the Local Authorities Act 1887 the matter is placed in the discretion of the Local Government Board:

Glen on the Law of Public Health, 12th edit., p. 1322.

The cases cited do not apply to urban district councils, but only to corporations.

KEKEWICH, J.—I am of opinion that the injunction should be granted. It is of great public importance that district councils should be kept within their proper jurisdiction. They have very large powers, which are exercised for the benefit of the public, but if they show a disposition to go beyond their powers, it is equally for the benefit of the public that they should be restrained. The two cases cited on behalf of the plaintiffs, *Attorney-General v. Swansea Corporation* (*ubi sup.*) and *Attorney-General v. Brecon Corporation* (*ubi sup.*), state plainly the law which they illustrate. The sole question is whether the defendants are exceeding their common law powers, it being admitted that they have not complied with sect. 4 of the Borough Funds Act 1872, so that they cannot say that their constituents have authorised them to oppose this Bill. I have read in the petition presented by the council the clauses setting out the grounds of their opposition. It would be strange if, in a petition drawn by experienced hands, as these petitions are, and being of considerable length, there were not found some allegations of interference with their duties, properties, and privileges as a council. It is possible to point to some such allegations which, if they stood alone, might be enough to explain their opposition to the Bill. But the petition must be regarded as a whole. It sets up an opposition of an entirely different character from that of a council setting up its own interests. It seems to me that this urban district council has constituted itself a sort of representative of its district. This is an entirely false position. The council is not constituted for that purpose. Such a council has no rights of supervision over public interests as a whole, and enjoys no acts of suzerainty. Certain paragraphs in the petition are directed to show that the acts proposed by the gas company are not for the benefit of the public, and that it is not desirable, in the interests of the public, that this Bill should go through. It seems to me that in putting all these reasons forward the district council is going far beyond its duties. They are not protecting their own rights and privileges, but are endeavouring to protect the public in matters with which they are not concerned. They have brought themselves within the decision of North, J. in *Attorney-General v. Swansea Corporation* (*ubi sup.*), and the statement

of law, though not the decision given by Jessel, M.R. in *Attorney-General v. Brecon Corporation* (*ubi sup.*). And not being able to call in aid the provisions of the Borough Funds Act 1872, they are acting outside their powers and ought to be restrained. Another point has been taken on behalf of the council which, if sound, is absolutely fatal to the plaintiffs. Reference was made to sect. 3 of the Local Authorities Expenses Act 1887, which provides that: "Expenses paid by any local authority whose accounts are subject to audit by a district auditor shall not be disallowed by that auditor if they have been sanctioned by the Local Government Board." It was suggested in a note to that section in Glen on the Law of Public Health, 12th edit., p. 1322, that that enactment allows them to determine beforehand that the expenditure shall not be disallowed, and it was argued that the court should not anticipate the exercise of this discretion. In the present case the Local Government Board has not yet been applied to, and it may be that these expenses, some of which have not yet been incurred, may be submitted to them. The Act of 1887 has constituted the Local Government Board sole arbitrators in this respect, and it was argued that the court would do wrong to intervene. But it seems to me to be going far beyond the intention of the Act to say that because the Local Government Board may, when applied to, allow some or all of this expenditure, therefore the court must not intervene to prevent this expenditure being incurred when the Local Government Board has not been applied to. I cannot think that because there is an authority which, when applied to, may enable them to do that which at present they cannot do, therefore the court ought to hold its hand. An injunction must therefore go, not to prevent the council from opposing the Bill, but to prevent them from so opposing it as to throw the expenses on the rates until the consent of the ratepayers has been obtained.

Judgment for the plaintiffs.

Solicitors: Baker, Lees, and Company; R. A. Read, for H. Lomas, Rickmansworth.

March 17 and 18, 1902.

(Before FARWELL, J.)

FINCHLEY ELECTRIC LIGHT COMPANY v.
FINCHLEY URBAN DISTRICT COUNCIL. (a)

Local government—Streets—Vesting in urban authority—Disturbed road—Electric light company—Right to carry wires across such road—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 149—General Turnpike Act 1822 (3 Geo. 4, c. 126), s. 84.

A local authority in an urban district, who were the successors in title of a turnpike trust, had obtained a provisional order from the Board of Trade for lighting the district by electricity. In consequence of delay the plaintiff company was started, which, in order to supply the best part of the district, found it necessary to cross with their wires a street which had formerly been a turnpike road and was now vested in the defendants. The wires were cut by the defendants. In an

(a) Reported by A. W. CHASTER, Esq., Barrister-at-Law.

action for an injunction to restrain the defendants from interfering with such wires :

Held, that what passed to the defendants was so much of the land in question as is required for the purposes of the road, considering the nature of the particular purposes, in a given case. That here, inasmuch as the street was constructed under the General Turnpike Act and passed by purchase to the trustees for the purposes of that Act, the purchase extended usque ad cælum usque ad infernum, and that the defendants, therefore, when they took it over acquired equal rights therein, and that it was now held by them in like manner for the purposes of the street. That the claim therefore failed. But as in an earlier stage of the action, when certain facts now known were not before the court, an interlocutory injunction had been granted, the action would be dismissed without costs.

In this case the plaintiffs were an electric light company which was formed for the purpose of lighting the district of the defendant council.

The defendant council was an urban district council who were the successors of a turnpike trust in the district which had formerly owned the turnpike roads.

By 3 Geo. 4, c. 126, s. 84, these turnpike trusts were authorised to acquire lands by purchase for the purpose of improving the roads, and such lands were conveyed to the trustees in fee simple.

By the Public Health Act 1875, s. 149, where such roads had in the meantime become disturnpiked and had become streets they became vested in the local authority, in this case now represented by the defendant council.

The council had obtained a provisional order for the lighting of the district by electricity, but, as nothing practically had been done under such order for over two years, the plaintiff company was started for the like purpose.

In the course of their undertaking they placed wires across a road in the district which was formerly a turnpike road and had now become a street within the meaning of the above section of the Public Health Act.

The defendants cut the wires mainly, as the evidence showed, because they did not desire an opposition lighting scheme in the district.

The plaintiffs then brought this action to restrain the defendants from interfering with such wires, and on a motion for an injunction therein an interlocutory injunction was granted.

When the pleadings came to be delivered, the defendants set up that as regarded the street in question they were in the circumstances the owners thereof in fee simple, and were therefore justified in removing such wires, whether placed under, on, or above the street, it being a trespass.

At the hearing of the action the defendants relied on this defence, the onus being on them to establish it.

Upjohn, K.C. and Chubb for the defendants.—Under the special circumstances of this case the fee simple of the street is vested in us, and that is a sufficient defence to the action. [FARWELL, J. — When the Legislature gives powers to councils as to highways, I do not think it intends to confer those powers with a view to advance their municipal trading.] There was a conveyance to the turnpike trustees, and the council are their successors in title. They claim

the right to refuse consent to the plaintiffs to place their wires across this street because they are a rival trader.

Jenkins, K.C. and Buckmaster for the plaintiffs.—The fee simple is not vested in the defendants *usque ad cælum*. Whether that is in the surviving trustee of the turnpike trust, or in the county council under sect. 64 of the Local Government Act of 1888, or in the adjoining owners of land is not necessary to decide. The meaning of the word "street" in the Public Health Act is shown in

Tunbridge Wells (Mayor) v. Baird, 74 L. T. Rep. 385; (1896) A. C. 434;

Rolls v. Vestry of St. George the Martyr, Southwark, 43 L. T. Rep. 148; 14 Ch. Div. 785;

Wandsworth Board of Works v. United Telephone Company, 51 L. T. Rep. 148; 13 Q. B. Div. 904.

"Street" means there so much as enables the defendants to perform their statutory duty as to highways. The earliest case which dealt with the point was

Coverdale v. Charlton, 38 L. T. Rep. 687; 4 Q. B. Div. 104.

The meaning of "vesting" is discussed in the judgment. It is therefore relevant in considering in whom the whole freehold is. *Tunbridge Wells (Mayor) v. Baird* (*ubi sup.*) has really no bearing on the question. As to the council being interested, the words in sect. 64 of the Act of 1888 are "property held for public uses." See also

Sub-sects. 2 and 6 of sect. 11;

Wandsworth Board of Works v. United Telephone Company (*ubi sup.*).

The soil when the turnpike ceased must have gone back to the adjoining owners. Between 1872, when the highway board took over the road, and 1875 the legal estate must have been floating about:

Reg. v. Thomas, 7 E. & B. 399.

FARWELL, J.—This case raises the old vexed question of the meaning of the words "vest" and "street" in the Public Health Act. Now, it is settled law that something passed, and the question is what the word "street" in the property here in question passed. As a result of the authorities, the true view, I think, is that it means "so much of the land in question as is required for the purposes of the road, considering the nature of the particular purposes, in a given case." That definition, I think, reconciles all the decisions and is consistent with the decisions on which it is founded. Take, for example, the case of *Tunbridge Wells (Mayor) v. Baird* (*ubi sup.*), where Lord Halsbury says (L. Rep. at p. 437): "It is intelligible enough that Parliament should have vested the street *quâ* street, and indeed so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street." Later on, at p. 439, he says: "For that purpose it would be intelligible for any other purpose it would appear to me to be inconsistent with the language of the enactments, and contrary altogether to the policy which the Legislature has certainly always pursued of not taking private rights without compensation." To the same effect is the judgment of James, L.J. in *Rolls v. Vestry of St. George the Martyr, Southwark* (*ubi sup.*): "It seems to me very

reasonable then to interpret this enactment in a way which gives everything that is wanted to be given to the public authority for the protection of the public rights without any unnecessary violation of the rights of the landowner, and to say that according to its true construction what is to vest is not those pieces of property which have now got the name and are distinguished by the name of streets, but those things which now or at any time hereafter shall for the time being be streets and highways within the district." Now, the circumstances of this case are unlike any of those which have come before the courts, and give rise no doubt to some little difficulty. In my opinion, the duty of the court is to construe an Act of Parliament reasonably so as to give effect to the provisions, and not to cause a deadlock if it can be avoided. The "street" in question was constructed under the provisions of the Act of 3 Geo. 4, and the portion in question which is crossed by the wires of the plaintiff company passed by a purchase effected on the 7th Nov. 1828 to the trustees under that Act for the purposes of the Act, and it is conveyed to the trustees, their heirs and successors. The fee, therefore, in the entire land was vested in the trustees. Now, that conveyance was taken under the provisions of the General Turnpike Act (3 Geo. 4, c. 126), s. 84, which enacts that "It shall be lawful for the trustees or commissioners of any turnpike road to treat, contract, and agree with the owners of and persons interested in any lands, tenements, hereditaments, and premises, with their appurtenances, which they shall deem necessary to purchase for the purpose of widening, diverting, altering, and improving such road for the purchase thereof, and for the loss or damage such owners or persons may otherwise sustain." The rights the trustees therefore were empowered to purchase were very wide—in fee simple, which is *usque ad cælum usque ad infernum*, and these were conveyed to them. Now, it is said that, by virtue of various Acts of Parliament under which the road became disturnpiked in 1872 and became a main road then or shortly afterwards, the result has been according to the contention of the plaintiffs, although the language there was in accordance with the terms of the Act of Parliament, "acquired for the purposes of a road," and the land was so used, I am to construe the Acts of Parliament so as to vest in the local authority, the present defendants, not the whole of the land acquired or required for that purpose, but only so much as according to the reasoning of the courts in other cases was not acquired at all, but was dedicated to the public by the adjacent owners of the legal estate; in other words, that the portion which above is above the limits required for passengers and below is not required for the purposes of the road is vested in somebody else. It appears to me that when the Act of Parliament says the rights shall vest in the local authority it has said that so much as is required for the purposes of the road shall vest in them, and that it is impossible for the court to say that it is not so acquired or required. Consequently, what must be had regard to is what the courts in the cases which have come before them have said as to what is required for the purposes of the road. But there is something more here, because here the Act of Parliament authorises the acquisition

for the purposes of a road. Therefore I am bound to say that it is acquired and required for the purposes of a road. If it were not so, the difficulty arises as to in whom the legal estate is left. It is suggested that, somehow or other, it is in the adjacent owners and has been rededicated. But I am unable to follow that argument. The legal estate was conveyed out and out to the trustees, and the only person who could be so entitled would be the last surviving trustee or his real representative. But supposing it were so, for whose benefit would it be and against whom could he maintain ejectment? After all this lapse of years, the person in possession is the local authority, and the land was conveyed for the purposes of a road, and it was conveyed for such purposes as were necessary to the local authority. The fee, so far as it exists, is in the occupation of the local authority, and to hold that it was in a bare trustee would mean, so far as I can see, that the only conceivable *cestui que trust* was the local authority, and he could not, of course, recover from them. If it is suggested, again, that the fee is in the adjacent owners, I fail to see any resulting use. No attention was called to the language of the General Turnpike Act of George IV., to which I have referred, which reverts the legal estate in the owner from whom it was purchased in case it ceased to be a road. The only other suggestion is that it passed, somehow or other, to the county council under the Act of 1888. It seems to me that I should be wrong if I attempted to follow the reasoning of counsel so as to render an Act a failure or to be absurd. That Act by the 11th section gives the maintenance of roads—that is, main roads—to county councils. Sub-sect. 2 is: "Provided that any urban authority may within twelve months after the appointed day, or in case of a road in the district of such authority becoming a main road at any subsequent date then within twelve months after that date, claim to retain the powers and duties of maintaining and repairing a main road within the district of such authority and thereupon they shall be entitled to retain the same, and for the purpose of the maintenance, repair, improvement, and enlargement of and other dealing with such road shall have the same powers and be subject to the same duties as if such road were an ordinary road vested in them, and the council shall make to such authority an annual payment towards the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of such road. (6) A main road and the materials thereof and all drains belonging thereto shall, except where the urban authority retain the powers and duties of maintaining and repairing such road, vest in the county council, and where any sewer or other drain is used for any purpose in connection with the drainage of any main road the county council shall continue to have the right of using such sewer or drain for such purpose. . . ." So far as that is concerned there is no vesting. Sect. 64 provides: "On and after the appointed day all property of the quarter sessions of a county, or held by the clerk of the peace or any justice or justices of a county, or treasurer or commissioners or otherwise, for any public uses and purposes of a county or any division thereof, shall pass to and vest in and be held in trust for the council of the county, subject to all debts and liabilities affect-

ing it, and shall be held by the county council for the same estate, interest, and purposes, and subject to the same covenants, conditions, and restrictions for and subject to which that property is or would have been held if this Act had not passed, so far as those purposes are not modified by this Act." Sect. 68 defines the general purposes. It is contended that under these sections there is no vesting of the road, or so much of the legal estate in the land incorporated in the road as is not used for purposes of passage or repairing or otherwise as ordinary road purposes, under sect. 11 in the urban authority and under sect. 64 in the council. I think that is an extravagant result to arrive at. They must be read together, so that the property was intended to be vested under these sections and the Public Health Act in the urban authority. So far from assisting the plaintiffs' case, I think it assists the defendants'. I think that really exhausts the suggestions made as to any other possible locality to which this legal estate is gone. But I desire to point out that the reasoning on which it has gone, that the Legislature is not presumed to take away without compensation anything more than is absolutely required, is inapplicable here, because it was acquired and paid for for the purposes of the road. I agree that there is not sufficient in the case itself to enable me to give a construction to the section of the Public Health Act as to "street." But I arrive at it in the way I have pointed out as to what the courts have held—viz., as to so much as is required for the purposes of the street. I hold in the present case that the land has been acquired and is required for the purpose of the street. The plaintiffs therefore have no right to take wires across the atmosphere above what belongs to the defendant council. The application for an injunction therefore fails. But in the circumstances, and having regard to the correspondence and to the plaintiffs' rejoinder, and the fact that an injunction was originally obtained against the defendants, I think that justice will be done by saying no costs.

Solicitors: *Benham and Meyer*; *A. M. M. Forbes*.

Feb. 14, 15, 17, and March 28, 1902.

(Before JOYCE, J.)

MAYOR, &C., OF DEVONPORT v. TOZER. (a)

Local government—Bye-laws—"Laying out new street"—Penalties—Injunction—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 157.

The bye-laws of a local authority framed under sect. 157 of the Public Health Act 1875 made certain provisions with respect to the laying out and construction of new streets, as to level, width, construction, &c. Bye-law 97 provided that persons who should offend against the foregoing bye-laws should be liable to penalties; and bye-law 98 that, if any work, to which any of the bye-laws relating to new streets might apply, should be begun or done in contravention of any such bye-law, then, if such person should fail to show sufficient cause why such work should not be removed, altered, or pulled down, the sanitary authority should be empowered, subject to any

statutory provision in that behalf, to remove, alter, or pull down such work.

The defendants owned a piece of land within the jurisdiction of the local authority and abutting on two public highways, H.-lane and T.-road, the latter being a main road. On this land they erected certain houses without removing the fence on either side, but making the necessary openings here and there so as to provide means of entrance to and exit from the houses; they had not attempted to alter or interfere with H.-lane or T.-road.

On the plaintiffs seeking an injunction to restrain the defendants from erecting or continuing the erection of any building upon, and from laying out any new street intended for use as a carriage road upon or in connection with, the defendants' land in contravention of the above bye-laws; and for an order on the defendants to remove, alter, or pull down all the works begun or done by the defendants contrary to the bye-laws, or, alternatively, a declaration that the plaintiffs were entitled to remove, alter, or pull down the same:

Held, first, that the defendants were not laying out or constructing a new street within the meaning of the above bye-laws; and, secondly, that the plaintiffs could not enforce the bye-laws by an action for an injunction.

THE facts are fully set out in his Lordship's judgment.

Macmorran, K.C., Hughes, K.C., and B. J. Parker for the plaintiffs.—In *Robinson v. Local Board of Barton Eccles* (46 L. T. Rep. 193; 47 L. T. Rep. 286; 50 L. T. Rep. 57; 21 Ch. Div. 621; 8 A. C. 798) it was held that the words "new street" in sect. 157 of the Public Health Act 1875 are not confined to a street constructed for the first time, but also apply to an old highway, which, by the building of houses on each side of it, has recently become a street in the popular sense of the term. Now, the defendants plainly intend to build along the highways of Tavistock-road and Ham-lane, and are accordingly laying out "new streets." The court should then restrain the defendants from laying out such new streets otherwise than in accordance with the bye-laws. They referred to

Williams v. Powning, 48 L. T. Rep. 672;

Gossett v. Maldon Sanitary Authority, 70 L. T. Rep. 414; (1894) 1 Q. B. 327;

St. George's Local Board v. Ballard, 72 L. T. Rep. 345; (1895) 1 Q. B. 703.

This is not an unusual mode of enforcing a bye-law, and is not precluded by the fact that disobedience to the bye-laws can be punished by penalties before the justices. This is, moreover, a very proper and convenient way of trying a case of this kind. They referred to

Hendon Local Board v. Pounce, 61 L. T. Rep. 465; 42 Ch. Div. 603;

Cooper v. Whittingham, 43 L. T. Rep. 16; 15 Ch. Div. 501;

Hayward v. East London Waterworks Company, 52 L. T. Rep. 175; 28 Ch. Div. 138;

Stevens v. Chown; *Stevens v. Clark*, 84 L. T. Rep. 796; (1901) 1 Ch. 894;

Bromley Local Board v. Lloyd, 66 L. T. Rep. 463; Public Health Act 1875, s. 183.

Danckwerts, K.C. and A. Glen for the defendants.—It is true that an old highway may be converted into a "new street"; but here the defen-

(a) Reported by SYDNEY DAVY, Esq., Barrister-at-Law.

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dants are not laying out a street at all. It is plain from the case of *Robinson v. Local Board of Barton Eccles* (*ubi sup.*) that "street" refers to that along which the public have a right to pass; it applies to the footways and carriage-way only. There can be no laying out of a new street by the defendants, where they confine their building operations to their own land and keep within the lines of the highways. And this is what the defendants are doing; they are not disturbing the highways in any respect. They referred to

Baker v. Mayor, &c., of Portsmouth, 37 L. T. Rep. 381; 3 Ex. Div. 157;
Harrison v. Duke of Rutland, 68 L. T. Rep. 35; (1893) 1 Q. B. 142;
Taylor v. Metropolitan Board of Works, L. Rep. 2 Q. B. 213;
Gossett v. Maldon Sanitary Authority (*ubi sup.*);
Williams v. Powning (*ubi sup.*);
St. George's Local Board v. Ballard (*ubi sup.*);
Davis v. Board of Works for Greenwich District, 72 L. T. Rep. 674; (1895) 2 Q. B. 219.

Moreover, this court has no jurisdiction to grant an injunction, the proper remedy for an infringement of the bye-laws being by way of penalty before the justices. And this is the more so since the fact that a penalty can be recovered shows the offence to be one of a criminal nature. Certainly the court cannot grant an injunction unless the Attorney-General is made a party. They referred to

Wallasey Local Board v. Gracey, 57 L. T. Rep. 51; 36 Ch. Div. 593;
Tottenham District Council v. Williamson, 75 L. T. Rep. 238; (1896) 2 Q. B. 353;
Attorney-General v. Logan, 65 L. T. Rep. 162; (1891) 2 Q. B. 100;
Cooper v. Whittingham, 43 L. T. Rep. 16; 15 Ch. Div. 501;
North London Railway Company v. Great Northern Railway Company, 48 L. T. Rep. 695; 11 Q. B. Div. 30;
Kitte v. Moore, 71 L. T. Rep. 676; (1895) 1 Q. B. 253;
Hayward v. East London Waterworks Company, 52 L. T. Rep. 175; 28 Ch. Div. 138;
Stevens v. Chown; *Stevens v. Clark* (*ubi sup.*);
Emperor of Austria v. Day and Kossuth, 4 L. T. Rep. 494; 3 De G. F. & J. 217;
Institute of Patent Agents v. Lockwood, 71 L. T. Rep. 205; (1894) A. C. 347;
Barracklough v. Brown, 76 L. T. Rep. 797; (1897) A. C. 615;
Ward v. Duncombe, 69 L. T. Rep. 121; (1893) A. C. 369.

In the cases of *Bromley Local Board v. Lloyd* (*ubi sup.*) and *Hendon Local Board v. Pounce* (*ubi sup.*) the question as to the jurisdiction of the court was not raised; and in each case it was merely a matter of an injunction till trial. They also cited

Quinton v. Corporation of Bristol, 30 L. T. Rep. 112; L. Rep. 17 Eq. 524;
Cook v. Ipswich Local Board, 24 L. T. Rep. 579; L. Rep. 6 Q. B. 451.

Cur. adv. vult.

JOYCE, J. read the following judgment:—This is an action by the corporation of Devonport, as the urban authority for the district of the borough, against the defendants, the owners of a piece of land described in the statement of claim as a building estate and known as "Great Three Corners." This piece of land contains a little

more than three acres, and is in the shape of a triangle, one side abutting upon a public highway for all kinds of traffic, known as Ham-lane, and another side upon a similar public highway known as Tavistock-road, which last is or was prior and down to Nov. 1900 a main road leading from Devonport to Tavistock, and as such vested in the county council: (Local Government Act 1888, s. 11 (6). The roadway of Ham-lane is within the borough of Devonport, the fence of the defendants' land being, down to Nov. 1900, the boundary of the borough there. But the defendants' land, together with the portion of Tavistock-road—meaning thereby the roadway thereof—upon which the defendants' land abutted, was within the rural district of Plympton St. Mary, the land on the opposite side up to the fence of the road being, as it still is, in the borough of Plymouth. Within the rural district of Plympton St. Mary there were and are certain bye-laws, with respect to new streets, framed under sect. 157 of the Public Health Act 1875. Such bye-laws provide (*inter alia*):

1. Width, applied to a new street, means the whole extent of space intended to be used, or laid out so as to admit of being used, as a public way.

With respect to the level of new streets: 3. Every person who shall lay out a new street shall lay out such street at such level as will afford the easiest practicable gradients throughout the entire length of such street for the purpose of securing easy and convenient means of communication with any other street or intended street with which such new street may be connected or may be intended to be connected, and as will allow of compliance with the provisions of any statute or bye-law in force within the district for the regulation of new streets and buildings.

With respect to the width and construction of new streets: 4. Every person who shall lay out a new street which shall be intended for use as a carriage-road shall so lay out such street that the width thereof shall be 36ft. at the least.

5. Every person who shall construct a new street which shall exceed 100ft. in length shall construct such street for use as a carriage-road, and shall, as regards such street, comply with the requirements of every bye-law relating to a new street intended for use as a carriage-road.

7. Every person who shall construct a new street for use as a carriage-road shall comply with the following requirements.

Then follow specifications as to the mode of construction, levels, and so on. Then bye-law 90 provides that every person who shall intend to lay out a street shall give to the sanitary authority certain notices and deliver plans and sections of such intended street, and bye-law 97 provides that—

Every person who shall offend against any of the foregoing bye-laws shall be liable for every such offence to a penalty of 5*l.*, and in the case of a continuing offence to a further penalty of 40*s.* for each day after written notice of the offence from the sanitary authority. Provided nevertheless that the justices or court before whom any complaint may be made or any proceedings may be taken in respect of any such offence may, if they think fit, adjudge the payment as a penalty of any sum less than the full amount of the penalty imposed by this bye-law.

And 98—

If any work to which any of the bye-laws relating to new streets and buildings may apply be begun or done in contravention of any such bye-law the person

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by whom such work shall be so begun or done, by a notice in writing, which shall be signed by the clerk of the sanitary authority, and shall be duly served upon or delivered to such person, shall be required on or before such day as shall be specified in such notice by a statement in writing under his hand or under the hand of an agent duly authorised in that behalf and addressed to and duly served upon the sanitary authority to show sufficient cause why such work shall not be removed, altered, or pulled down; or shall be required on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorised in that behalf before the sanitary authority and show sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to show sufficient cause why such work shall not be removed, altered, or pulled down, the sanitary authority shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work; the statutory provision there referred to being, as I understand, sect. 158 of the Public Health Act 1875. By part 5 of the Devonport Corporation Act 1900 it was in effect enacted that as from the 9th Nov. 1900—the date of the commencement of that part of the Act—the boundaries of the borough and parish of Devonport should be extended so as to comprise the piece of land in question—that is to say, “Great Three Corners,” belonging to the defendants, and the portion of Tavistock-road adjoining thereto, the land on the opposite side of that road remaining, as it previously was, in the borough of Plymouth. Sect. 43 of the Act incorporated (*inter alia*) art. 12 of the Devonport Extension Order 1898, which order was confirmed by the Local Government Board’s Provisional Order Confirmation (No. 10) Act 1898. The combined effect of the said sect. 43 and of the said art. 12 was to provide that all bye-laws and regulations and any list of tolls and table of fees made by the corporation which at the commencement of the Devonport Corporation Act 1900 should be in force in the existing borough should thenceforth apply to the borough as extended by the said last-mentioned Act until or except in so far as any such bye-laws or regulations or list of tolls or tables of fees might be altered or repealed, and all bye-laws and regulations made by the council of the said rural district should on that date cease to be in force or have any effect in any part of the added area, but without prejudice to anything duly done thereunder, provided that any proceedings which might have been taken by the council of the said rural district against any person for any offence against such last-mentioned bye-laws and regulations committed before the commencement of part 5 of the Devonport Corporation Act 1900 might be taken by the plaintiffs as if those bye-laws and regulations had remained in force and the plaintiffs had been substituted therein for the local authority of the added area. The defendants’ land, though now within the borough of Devonport, is at a considerable distance from any town. The bye-laws of the borough of Devonport, though differently numbered, are, so far as material to this case, for all practical purposes, to the same effect as the bye-laws of Plympton. Now, it is alleged that the defendants prior to the 9th Nov. 1900 had commenced to lay out and construct, and were then laying out and constructing, Ham-lane and Tavistock-road as “new streets” in a manner which contravened the bye-laws of Plympton and also of the borough of Devonport. What

they had really done and were doing was to erect certain houses upon their own land without removing the fence on either side, but making the necessary openings here and there so as to provide means of entrance to and exit from the houses that were being built. They have done nothing more than this. In particular, they have not attempted to alter or interfere with the roadway either of Ham-lane or Tavistock-road; and, as it appears to me, they would have been liable to be indicted, and to an action for an injunction, if they had done so, or had in any way intermeddled with the laying out or construction of either of these highways. In reference to the erection of the defendants’ houses, considered merely as houses, proper plans had been deposited with and all necessary notices, if any, given to the rural authority under the bye-laws relating thereto. Such authority, in fact, did not formally either approve or disapprove of these plans, but they instituted no proceedings for penalties under the bye-laws, nor did they do anything under the 98th bye-law and sect. 158 of the Public Health Act 1875. Upon the transfer effected by the Act of 1900, the previous right, if any, of the rural authority to take proceedings for penalties under the bye-laws was transferred to the corporation of Devonport, the plaintiffs in this action. They have not taken any proceedings before the justices for penalties, but have instituted this action, seeking thereby (1) an injunction to restrain the defendants from erecting or continuing the erection of any building upon and from laying out any new street intended for use as a carriage-road upon or in connection with the defendants’ said estate without having previously delivered to the plaintiffs, in accordance with the said bye-laws, and obtained their approval to proper plans and sections of such building and street respectively, and from laying out or constructing any such street as aforesaid so that the width thereof shall be less than 36ft., or being a street exceeding 200ft. in length and intended to form the principal approach or means of access to any domestic building, public building, or building of the warehouse class with a carriage-road of less than 24ft. in width or without a footway on each side thereof of a width not less than one-sixth of the entire width of such street, or otherwise in contravention of any of the provisions of the said bye-laws; (2) an order on the defendants to remove, alter, or pull down all works begun or done by the defendants as aforesaid contrary to the said bye-laws or any of them; (3) alternatively a declaration that the plaintiffs are entitled to remove, alter, pull down, or otherwise deal with any works begun or done by the defendants as aforesaid contrary to the provisions of the said bye-laws or any of them. It was admitted in the course of the argument that there was no case for an injunction as to building, except if and so far as the buildings might contravene the bye-laws as to the laying out of a new street. I may therefore treat par. 1 of the claim as a claim to an injunction to restrain the defendants from laying out Ham-lane and Tavistock-road, or either of them, as new streets or a new street in contravention of the bye-laws, and the question is whether the defendants have commenced or threatened or intended to do this. Now, were the defendants laying out or constructing Ham-lane and Tavistock-road, or either

of them, or any part thereof, as new streets or a new street within the meaning of the bye-laws in reference to the laying out or constructing of new streets? It is clear that there has not been any laying out or constructing by the defendants of a new street in the ordinary, popular, and natural sense of the words, and that the defendants never intended to do anything of the kind. In fact, it was the one thing of all others which they intended not to do. They have not done, and had no power to do, anything outside the fence of their own land. They have simply begun to build within their own boundary. No ordinary person would think of saying that what they were doing was laying out or constructing a new street, although for anything I know the effect of what the defendants are doing, in conjunction with what other people are doing or may do on the opposite side of Tavistock-road, may be that at some future time the portion of Tavistock-road adjoining the defendants' property may be or become a street or even a "new street" within the meaning of that term in some Act of Parliament or statutory bye-law. The word "street" has various significations in different Acts of Parliament, but, *prima facie*, the meaning of the word "street" in the bye-laws, as well of Plympton as of Devonport, with respect to the laying out and construction of new streets is, in my opinion, limited to what is used or intended to be used as a roadway; and my reasons for this view are those stated by Lord Selborne, L.C. in *Robinson v. Barton-Eccles Local Board* (50 L. T. Rep. 57; 8 App. Cas. 798). I am unable to see how what the defendants have done or are doing is laying out or constructing a new street or anything of the kind within the meaning of the bye-laws, unless there be some judicial decision which compels me so to hold. I do not think there is any such decision. On the contrary, *Williams v. Powning* (48 L. T. Rep. 672), *Gozett v. Maldon Sanitary Authority* (70 L. T. Rep. 414; (1894) 1 Q. B. 327), and *St. George's Local Board v. Ballard* (72 L. T. Rep. 345; (1895) 1 Q. B. 703) appear to me to support the conclusion which I have stated. As to par. 1, therefore, of the relief claimed, the case of the plaintiffs in my opinion fails upon the merits; and as to pars. 2 and 3, which are in very general terms, it would suffice for me to say that the defendants have not been shown to have contravened any bye-law. But an objection was raised and it is contended on behalf of the defendants that the bye-laws in question and any similar bye-laws cannot be enforced in this court by an action on the part of the authority for an injunction, but only by the special remedies, viz., proceedings for penalties, provided by the statute and bye-laws, or otherwise by an action formerly called an information by the Attorney-General. It is obvious that by any breach of these bye-laws the authority, as such, does not sustain any damage, none of its rights of property are interfered with, and the public alone are injured if at all. It appears, however, that in various cases injunctions have been granted at the instance of local authorities to restrain an infringement or contravention of bye-laws; and I may mention particularly *Hendon Local Board v. Pounce* (61 L. T. Rep. 465; 42 Ch. Div. 603) and *Bromley Local Board v. Lloyd* (66 L. T. Rep. 462). The action of *St. George's Local Board v. Ballard* (*ubi*

sup) previously mentioned, which was for an injunction to restrain the defendant from laying out or constructing a new street of less width than 36ft., contrary to the bye-laws of the plaintiffs, was dismissed on the merits. In none of the cases, however, does any such objection appear to have been taken to the right of the plaintiffs to maintain the action as is now insisted upon. In the first place it is clear, I think, that no breach of the bye-laws constituted an offence or gave a right of action at common law. But any breach of the bye-laws is a criminal matter, as was held in *Mellor v. Denham* (40 L. T. Rep. 395; 5 Q. B. Div. 467) in reference to the contravention of the bye-laws of a school constituted under the Elementary Education Act 1874. In *Doe v. Bridges* (1 B. & Ad. 847, at p. 859) it is laid down by Tenterden, C.J. at p. 859, that "when an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." This was cited and approved by Lord Halsbury and Lord Macnaghten in *Pasmore v. Oswaldtwistle Urban Council* (78 L. T. Rep. 569; (1898) A. C. 394). In *Wolverhampton New Waterworks Company v. Hawkesford* (6 C. B. N. S. 336) the judgment of Willes, J. contains the following passage: "There are three classes of cases in which a liability may be established founded upon a statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the statute gives the right to one merely, but provides no particular form of remedy; then the party can only proceed by action at common law. But there is a third class—viz., when a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present case falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue." In *Cooper v. Whittingham* (43 L. T. Rep. 16; 15 Ch. Div. 501) Jessel, M.R., says at p. 506: "There was a point not insisted upon but mentioned during the course of the argument. It was said that the 17th section of the Act created a new offence of importation, and enacted a particular penalty, and it was argued that where a new offence and a penalty for it had been created by statute, a person proceeding under the statute was confined to the recovery of the penalty, and that nothing else could be asked for. That is true as a general rule of law, but there are two exceptions. The first of the exceptions is the ancillary remedy in equity by injunction to protect a right. That is a mode of preventing that being done which, if done, would be an offence. Wherever an act is illegal and is threatened, the court will interfere and prevent

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the act being done—and, as regards the mode of granting an injunction, the court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated. The second exception is that created by the Judicature Act, s. 25, sub-s. 8, which enables the court to grant an injunction in all cases in which it shall appear to the court to be just or convenient. This section may be said to be a general supplement to all Acts of Parliament. I think that in this particular case an injunction can issue on both those general grounds." But after the decision in *North London Railway Company v. Great Northern Railway Company* (48 L. T. Rep. 695; 11 Q. B. Div. 30) I do not think that *Cooper v. Whittingham* is any authority for granting an injunction in such a case as the present. At all events it would not be just or convenient. In *Grand Junction Waterworks Company v. Hampton Urban Council* (78 L. T. Rep. 673, at p. 679; (1898) 2 Ch. 331, at p. 345) Stirling, J. said: "Now, whether or no there be jurisdiction in the court to restrain by injunction such an application, it seems to me that the granting of an injunction in such a case is a matter which ought to be done with the greatest possible caution, and I respectfully adopt the language of the Master of the Rolls in that case: 'Where the Legislature has pointed out a mode of proceeding before a magistrate, it is not, as a general rule, for another court to interfere to stop that proceeding by injunction.' I desire to add that in contests between local authorities and private owners it seems to me that that rule ought to be adhered to somewhat strictly. In these matters as to building lines the Legislature has provided a cheap and short mode of obtaining a decision on the point in question, and it would be a matter of regret if a different and more expensive mode of obtaining a decision were to be habitually resorted to, or resorted to in the absence of very special circumstances. I confess my own experience, sitting here as a judge, leads me to believe that vestries and other local authorities are sometimes too ready to embark in costly litigation without any equivalent benefit to the public or the ratepayers whom they represent; and I should be sorry if either private individuals or public authorities were, when a cheap and speedy mode of settling a dispute is provided by the Legislature, to resort to a more expensive one. I think, therefore, that in the exercise of the discretion which is vested in the court, it ought, even as regards the granting of an injunction, to be very slow to grant an injunction against taking proceedings before the magistrate when the Legislature has pointed out that as the proper mode of proceeding" (of course that is not exactly the same as this); "and *a fortiori* it seems to me that when the court is simply asked to make a declaration of right without giving any consequential relief, the court ought to be extremely cautious in making such a declaration, and ought not to do it in the absence of any very special circumstances." And Lord Herschell, L.C. in *Institute of Patent Agents v. Lockwood* (71 L. T. Rep. 205, at p. 208; (1894) A. C. 347, at p. 361), says: "You have here for the first time a new offence created—the offence of practising as a patent agent without being on the register. But for the enactment creating that offence, the

defender has nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature, having created that new offence, has prescribed the punishment for it—namely, a penalty of 20l. Can it possibly under these circumstances be open to bring the individual, not before the summary court at small expense to determine the question of his liability to a 20l. penalty, but to bring him before the Court of Session with its attendant expense and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the 20l. penalty, but would be liable to imprisonment for breach of the interdict? My Lords, it seems to me, I confess, scarcely necessary to do more than state the contention to show that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from sanctioning a procedure of that description. The mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that a party committing a breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description which might result in a committal to prison"—all of which seems to me to apply to the present case. Upon the whole, then, I am of opinion that this action could not have been maintained by the urban authority even if it had been right upon the merits. In regard to the 3rd paragraph of the claim for relief, *Barraclough v. Brown* (76 L. T. Rep. 797; (1897) A. C. 615) is an authority that no such declaration ought to be made, and I have already read what Stirling, J. said in the case of *Grand Junction Waterworks Company v. Hampton Urban Council* (*ubi sup.*) in reference to making declarations of right under similar circumstances. The result is, in my opinion, that this action is misconceived and must be dismissed with costs.

Solicitors for the plaintiffs, *Cunliffe and Davenport*, for *A. B. Pilling*, Devonport.

Solicitors for the defendants, *Surr, Gribble, and Oliver*, for *Jno. Walter Wilson*, Plymouth.

KING'S BENCH DIVISION.

Tuesday, Feb. 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

COX (app.) v. BLEINES (resp.). (a)

Bread—Sale of—Otherwise than by weight—London Bread Act 1822 (3 Geo. 4, c. cvi.), s. 4.

Where a person asked to be supplied with a half-quartern loaf, and the baker's assistant placed the loaf with two rolls in the scale pan, a 2lb.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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weight being in the other scale, but the beam of the scales did not move owing to the fact that the bread so sold was less than 2lb.:

Held, that this was not a sale by weight within the meaning of sect. 4 of the London Bread Act 1822.

CASE STATED.

On the 12th July 1901 an information was laid by the appellant for that on the 11th July 1901 the respondent, at No. 64, Hackney-road, did unlawfully sell or cause to be sold bread in other manner than by weight, contrary to 3 Geo. 4, c. cvi.

By sect. 4 of that Act (hereinafter referred to as the London Bread Act 1822) it was provided as follows:

And be it further enacted that from and after the commencement of this Act all bread sold within the limits aforesaid shall be sold by the several bakers or sellers of bread respectively within the said limits by weight, and in case any baker or seller of bread within the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted shall order or direct: Provided always that nothing in this Act contained shall extend, or be construed to extend, to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same.

At the hearing of the information the following facts were proved:—

On the date charged in the information the respondent was carrying on at the shop and premises, No. 64, Hackney-road, the business of a baker and seller of bread.

By the direction of the appellant, who is the inspector of weights and measures for the district, one Charles James Murrell, on the date aforesaid, went into the shop and asked Alice Culham, who was then in the respondent's employment and was serving his customers there, for a half-quartern loaf.

She thereupon supplied him with a loaf and two rolls, for which he paid the sum of 2d.

Before handing such loaf and rolls to Charles James Murrell, Alice Culham placed them in the pan of the shop scales, the loaf first and the two rolls afterwards on the top of it.

The loaf and rolls did not carry the scale down, though they would have done so if they had weighed more than the 2lb. weight which was already in the other scale.

The beam of the weighing machine did not move at all, and the weight of the loaf and rolls was not nor had been ascertained at the time of such sale to Murrell, except that it was clearly apparent that the total quantity of bread on the scale weighed less than 2lb.

The loaf and rolls were then taken away from the shop by Murrell and weighed by the appellant, who found their aggregate weight to be 5oz. short of 2lb.

The appellant contended that the bread had been sold in other manner than by weight, especially as the actual weight of the bread had not been in any other way ascertained either at the time of or before the sale.

The magistrate was of opinion that the bread was not sold otherwise than by weight. It was sold neither by denomination nor by measure, as two additional rolls were sold with the half-quartern loaf. The appellant did not suggest what mode of sale there could possibly be in this case other than by weight. It seemed to him that directly the bread was placed on the scales it was recognised by both parties to the contract that the sale was to be by weight, and it made no difference even if the bread was afterwards imperfectly or fraudulently weighed.

He was, however, further of opinion that not only was the bread in question thus sold by weight, but that it was actually weighed, and it was weighed in the balance and found wanting. It was not necessary that the beam should be disturbed in order that the process of weighing should be complete. If more than 2lb. of bread is first placed upon the scale and a 2lb. weight is afterwards put upon the other scale, the beam would not be disturbed, yet it could not be said then that the bread had not been weighed. It is sufficient, in a transaction of this sort, to ascertain whether the bread is above or below a certain weight without determining the exact number of ounces or grains. If the respondent's servant in weighing this bread had committed a fraud, she could have been prosecuted under the Weights and Measures Act 1878, s. 26; but he was clearly of opinion that the offence charged had not been committed, so he dismissed the summons.

The question of law for the opinion of the court was whether the sale above described was a sale in other manner than by weight within the meaning of sect. 4 of the London Bread Act 1822.

Daddy for the appellant.—He referred to the London Bread Act 1822 (3 Geo. 4, c. cvi., ss. 4, 6). [Lord ALVERSTONE, C.J.—Is not the offence here selling by false weight, and not, not selling by weight?] I submit not. In *Jones v. Huatable* (16 L. T. Rep. 381; L. Rep. 2 Q. B. 460) the loaf was not weighed at the time of the sale, nor did the purchaser require that it should be weighed. The practice followed by the baker in that case was to weigh the dough before it was put in the oven, allowing for shrinkage, but not to weigh after baking unless at the request of the purchaser. That was held to be a sale otherwise than by weight. Again, in *Williams v. Deggan* (16 L. T. Rep. 492) Cockburn, C.J. said: "I think this case is not distinguishable from *Jones v. Huatable*, which I consider was rightly decided. To sell bread by weight it must be weighed, and here there is no evidence that it was ever weighed." In *Mitton v. Troke* (20 L. T. Rep. 563) Cockburn, C.J. again said: "The statute says that the baker is to sell by weight. Now, by general understanding, a quartern loaf is taken to mean a 4lb. loaf. In this case a party goes into the appellant's shop and asks for a quart loaf, meaning a quartern loaf, and a loaf is handed to him which is found to be short in weight. Now, is not that *prima facie* evidence that the bread has not been weighed? I am of opinion that it is." Under this statute the weight, and the correct weight, must be ascertained before the sale takes place or when it takes place. In *London County Council v. Read* (81 L. T. Rep. 452; (1900) 1 Q. B. 288) the respondent was asked for a twopenny

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loaf, for which he received 2d. This was not weighed in the presence of the customer and nothing was said to him as to its weight, and there was no evidence that it had ever been weighed. This was held to be a sale otherwise than by weight within sect. 4 of 3 Geo. 4, c. cvi. The facts in the present case show that there was no sale by weight. The price was not regulated by the weight of the bread at all. The magistrate should have convicted.

The respondent did not appear.

LORD ALVERSTONE, C.J.—It certainly is unfortunate in this case, as in the case before my brothers Ridley and Channell, that the other side of the case has not been argued. Now, it seems to me that Mr. Daldy is right, and that there was no evidence that there was a sale by weight within the construction that has been put upon the statute in question by the various cases. I think also that the view which I expressed in the course of the argument was a wrong view. I think the statute is open to the construction and intends to distinguish between selling or carrying on the trade of selling by weight and carrying on the trade of selling by any other means. I think the decisions amount to this: that the particular quantity of bread sold for any particular price must be weighed—that is to say, either weighed beforehand by the baker, or, if necessary, weighed in the presence of the customer on demand. In this case all that appears to have been done was that the bread, which could not have weighed 2lb., was put into the scale and had no effect upon the scale, and did not move the beam, and therefore the weight was never ascertained at all. I think, under these circumstances, that there was no evidence upon which the magistrate could properly come to the conclusion that this quantity of bread was weighed at all, or that its weight was ascertained, or that it was sold by its weight; it being a case in which the person was asking for a 2lb. loaf and something else was delivered, when what ought to have been delivered was bread which had been weighed, or the weight of which had been ascertained, so that it was sold by weight. I was at first impressed, as I said before, with the idea that the magistrate's view that the real offence here was selling as or representing the weight of the loaf to be 2lb., when it was not 2lb., was an answer, and showed that this sale might be a sale by weight. I think I was wrong in taking that view, and that this statute, interpreted by the subsequent decisions, means that the weight of the parcel of bread sold is to be ascertained. That being so, in this case, I am of opinion that there is no evidence that the weight of the parcel of bread sold was ascertained at all. The case must therefore go back to the magistrate.

DARLING, J.—I am of the same opinion, and, if I add a word to the judgment of my Lord, it is only because I think it necessary to guard against this: that I do not think our decision means that, in order that there should be a sale by weight, it is absolutely necessary that there should be an ascertainment of the true weight; because, if we held that, then someone who might be prosecuted for not having sold by weight might escape the penalty for the offence by saying, "Oh! yes, I weighed it; but I weighed it with false scales or

false weights." It seems to me that it is necessary, in order to decide this point, to decide what "to weigh" means. I think that "to weigh" means to affect to ascertain weight by means of balancing—using what may be properly called a balance—although the instrument be fraudulently used. Still one might weigh a thing and sell it, and yet not sell it by its weight. There would be a weighing, and then a selling otherwise than by weight.

CHANNELL, J.—I agree that the appeal must be allowed. It seems to me, looking at the old statute of George IV. and looking at those words in the enactment of sale by weight, perfectly possible to put two different meanings upon them. It might be held that selling by weight meant merely selling by weight as distinguished from selling by measures, or selling by a supposed measure, or by the particular loaf, or anything of that sort; that is to say, that it went to the mode in which the person was carrying on his business. I am allowed to sell this or that loaf, and to say the price of that is 2d. and of that 3d., and you can look at them and take whichever you like, according to the price. It might be held that it was merely intended to prevent that, and, if the man professed to sell his bread according to weight, and not according to some other mode of pricing it, he was complying with the statute, and so it did not really involve the consideration of whether the weight which was purported to be sold was a true or a false weight. Of course, if he purported to sell as a 4lb. loaf a loaf which did not weigh 4lb., he might be proceeded against on a penalty under some other section of the Act. I was under the impression it might have been possible to take that view, unless the cases showed anything to the contrary, but now that they have been quoted to us by Mr. Daldy, I think it is quite clear that they do show to the contrary. The first case he referred to, the case of *Jones v. Huatable* (16 L. T. Rep. 381; L. Rep. 2 Q. B. 460), clearly involves the contrary. It shows that what is meant by this statute as interpreted is that each particular loaf must be sold according to the weight of that particular loaf. It was held that it was a contravention of that enactment to do what was done in this case, even if it was a fraud, or an accident, or carelessness, on the part of the person, because he did not sell this loaf according to the true weight of it, but sold it as being a 2lb. loaf when it in fact weighed something less—I forget what. I think that what the magistrate held by his judgment shows that he took the first of those two views which I have endeavoured to express as being the meaning of this Act of Parliament. I think that the cases show that the view he took was the wrong view, and that, if there were no authority on the point, the magistrate's decision would require very careful consideration, but, having regard to the authorities which have been cited to us, I have no doubt that his decision is wrong.

Appeal allowed. Case remitted.

Solicitor: W. A. Blaxland.

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DAVIES (app.) v. BURNETT (resp.).

[K.B. Div.]

Tuesday, Feb. 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

DAVIES (app.) v. BURNETT (resp.) (a)

Licensing—Bonâ fide club—Intoxicating liquors—Delivery to wife of member for his consumption off the premises—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 3.

A member of a bonâ fide club not licensed for the sale of intoxicating liquor sent his wife to buy intoxicating liquor at the club for his consumption off the premises, having given her for that purpose a written order addressed to the steward of such club. The appellant served the wife with such liquor, and she handed over to the appellant on behalf of the club the price of the liquor.

Held, that no offence had been committed by the appellant, under sect. 3 of the Licensing Act 1872, of selling intoxicating liquor without a licence.

CASE stated on an information preferred by the respondent against the appellant, under sect. 3 of 35 & 36 Vict. c. 94, charging the appellant with, on the 9th Aug. 1901, unlawfully selling by retail intoxicating liquor—to wit, stout—which he was not then licensed to sell by retail.

On the hearing of the information the following facts were proved or admitted:—

The appellant was a waiter employed at the North Wolverhampton Working Men's Club, a bonâ fide club, duly registered under the Friendly Society Acts 1875, whose registered office and place of business were at No. 72, North-road, in the borough of Wolverhampton.

About 8.35 p.m. on Friday, the 9th Aug. 1901, Elizabeth Hickman, the wife of George Hickman, went to the club, asked appellant for a bottle of stout for her husband, and handed to him the following ticket:

TO THE STEWARD
NORTH WOLVERHAMPTON WORKING
MEN'S CLUB.

Aug. 9th, 1901.

Please supply bearer with 1 stout
for

Member's }
Signature) G. HICKMAN.

Member's No. 355.

The appellant thereupon, for and on behalf of the club, sold or transferred to Elizabeth Hickman from the stock of intoxicating liquors, the property of the club, a bottle containing stout, in exchange for which she paid or handed over to him, on behalf of the club, the sum of 2d.

The ticket had been filled in by and was signed by George Hickman, husband of Elizabeth Hickman, who was then at his home, and Elizabeth Hickman on receiving the stout from the appellant returned home with it and handed it to her husband, who drank it.

George Hickman was a duly elected member of the club, but Elizabeth Hickman was not a member.

It was contended on behalf of the appellant, that, inasmuch as the woman Elizabeth Hickman was acting as agent for her husband George Hickman, a bonâ fide member of the club, there was in consequence no sale to a non-member, but merely a transfer of the special property in the goods of the club to one of the members, and that therefore no licence was required by the appellant for the sale of intoxicating liquor.

It was contended on behalf of the respondent that the principal objects of the club were "to afford to its members a means of social intercourse, mutual helpfulness, mental and moral improvement, and rational recreation"; and that if a member not being on the premises could send any person, not being a member, to such a club to purchase intoxicating liquor, the objects of such club would be entirely defeated and the licensing laws evaded.

The justices found upon the above-stated facts that there had been a sale to a non-member, and convicted the appellant.

The question of law arising was whether, upon the facts stated, the appellant committed an offence against sect. 3 of the Licensing Act 1872 and was rightly convicted.

Hobson for the appellant.—Under the circumstances set out in the case, there was no sale of intoxicating liquors by the appellant contrary to sect. 3 of the Licensing Act 1872. It was decided in *Graff v. Evans* (46 L. T. Rep. 347; 8 Q. B. Div. 373) that a member of a bonâ fide club was entitled to buy intoxicating liquors at his club and to take them home for consumption. It can make no difference that the sale to the member takes place by means of an agent, and here the wife was undoubtedly the bonâ fide agent for her husband. In *Woodley v. Simmonds* (60 J. P. 150) a conviction was upheld where liquor was fetched from the club for the husband by the wife, but, on looking at the report of that case, it is clear that the evidence for the defence was not believed, and bona fides was not found. The question of agency where bona fides exists was not discussed, and in the present case that being found to exist makes it quite different from that one.

Arthur Powell for the respondent.—There is no power on the part of a member to send an agent to fetch his intoxicating liquors, even assuming that the club is a bonâ fide one; the member must act personally, and cannot act by deputy. He referred to

Graff v. Evans (sup.);

Woodley v. Simmonds (sup.).

Lord ALVERSTONE, C.J.—With great reluctance we have come to the conclusion that this appeal must be successful, but I think that this practice of delivering liquors to be consumed by a member of the club off the premises is one that ought to be discouraged and discountenanced. The privileges and advantages which are given by these clubs should be kept for enjoyment on the club premises. But here all we have to decide is a question of law, and in all these cases, when considering whether or not the club is a bonâ fide one, it is very important to find out whether there is a practice of delivering liquors for consumption

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off the premises to non-members as well as to members. It is, however, found here that the club was a *bonâ fide* one; that the wife went for her husband, who was a member and who handed her the ticket which he had signed; and that in fact the husband had the bottle of stout. It is agreed that the wife was the agent for her husband. Under those circumstances it is impossible for us to say that a member of a club which is *bonâ fide* may not by his lawful agent carry out a transaction which was held to be lawful in *Graff v. Evans* (46 L. T. Rep. 347; 8 Q. B. Div. 373). This was a transfer of property authorised by law—namely, a transfer by means of an agent. The case of *Woodley v. Simmonds* (60 J. P. 150) is not against this view. In that case the sale was not a *bonâ fide* one. I think this appeal must be allowed.

DARLING, J.—I agree, though I come to that conclusion with reluctance. This case assumes that the wife was the agent of her husband, and, that being so, there was no offence committed.

CHANNELL, J.—I agree that on the findings in this case the appellant must succeed. If, however, I had a case before me of a club allowing liquor to be taken and consumed off the premises, that would go very far to induce me to hold that such a club was not a *bonâ fide* one.

Appeal allowed.

Solicitors: *Harrison and Davies*, for *Hooper and Ryland*, Birmingham; *Indermaur and Brown*, for *A. Turton*, Wolverhampton.

Thursday, Feb. 27, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

JONES AND OTHERS (apps.) v. DAVIES (resp.). (a)
Fishery—Lease of land including stream—No reservation of fishery rights to landlord—Passing of fishery rights under lease to tenant—Right of landlord to prosecute for taking fish—Larceny Act 1861 (24 & 25 Vict. c. 96), s. 24.

By a lease of land, whether agricultural or other land, through which a river flows, the right of fishing in the river, unless expressly reserved to the lessor in the lease, passes to the tenant, and the lessor cannot prosecute persons for unlawfully taking fish in the river.

CASE stated by justices in and for the county of Denbigh.

At a petty sessions in and for the petty sessional division Uwhaled, in the county of Denbigh, on the 26th Aug. 1901, an information was preferred by Richard Davies (the informant and present respondent) against Robert Jones and four other persons (the defendants and present appellants), alleging that the defendants on the 18th July 1901, at the parish of Pentrevoelas, in the county of Denbigh, between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully and wilfully did take fish called trout, then being found in a certain stream of water there wherein Colonel Wynne Finch then had a private right of fishery, and not running through or being in any land adjoining or belonging to the dwelling-house of

any person being the owner of the water or having the right of fishing therein contrary to the form of the statute in such case made and provided.

The justices, after hearing the evidence and the parties, adjudged that each of the defendants for his offence should pay the sum of 5s., and to the informant 3s. 1d. for costs.

The following facts were proved by the informant's evidence:

That the informant had been a gamekeeper in the employ of Colonel Wynne Finch for over twenty-one years, and that Colonel Finch claimed a right of fishery in the river Cadnant which flows through a certain farm called Maesmerddyn, belonging to Colonel Finch, and in the occupation of one David Jones, in whose employ all the defendants were on the date in question; that the defendants (except Hugh Jones) caught with their hands certain trout in the river; that the defendant Hugh Jones did not fish at all, but took part by carrying fish caught and the coats of the other defendants; that Colonel Finch had given David Jones, the tenant of the farm, permission to fish in certain waters on the farm, but not those by which the defendants were seen.

It was contended on behalf of the defendants that Colonel Wynne Finch was not the owner of the fishery rights, and the agreement signed by Colonel Wynne Finch's agent and David Jones, the tenant of the farm, was produced and admitted by the informant, from which it appeared that the game rights were reserved to Colonel Wynne Finch, but no mention was made of the fishery rights, and it was submitted on behalf of the defendants that the informant's statement of opinion that the fishery right belonged to the landlord was no evidence of the fact.

The defendant's solicitor, after the close of the case for the prosecution, having addressed the court, desired to call Hugh Jones, one of the defendants, but on the advice of their clerk the justices declined to hear him, the five defendants having been summoned jointly, and no application having been made to the court at the commencement of the hearing.

The defendant's solicitor stated he was the only witness he proposed to call, although he had subpoenaed David Jones, the tenant of the farm whose agreement of tenancy had been admitted by the informant on behalf of the prosecution. The landlord's agreement of tenancy was proved by the defendants' solicitor in cross-examination of the informant.

The question for the opinion of the court was whether upon the facts of the case above stated the decision of the justices was erroneous in point of law.

Sect. 24 of the Larceny Act 1861 (24 & 25 Vict. c. 96), provides:

Whoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanour; and whoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five

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pounds, as to the justices shall seem meet; Provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset unlawfully and wilfully take or destroy, any fish in any such water as first-mentioned, shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding five pounds, and if in any such water as last-mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding two pounds as to the justice shall seem meet.

B. M. Montgomery for the appellants.—The conviction, which was under sect. 24 of the Larceny Act 1861, was wrong upon four grounds. First, there was no evidence of the private right of fishery in Colonel Finch as laid in the information; on the contrary, the evidence showed that the right of fishery was in the tenant of the farm, in whose employment all the appellants were, and not in the landlord. Secondly, there was no evidence of *mens rea* on the part of the appellants, and no evidence that the appellants in taking the fish had any intention of doing any wrong. Thirdly, the facts as proved disclosed a *bonâ fide* claim of right, which ousted the jurisdiction of the magistrates; and fourthly, the evidence of one of the appellants was improperly rejected. The fishing rights passed to the tenant under the lease. The law is thus stated in Paterson's Fishery Laws, p. 67: "In the ordinary case of a lease of lands including waters or streams, the right of fishery is necessarily implied as part of the general right to the soil and water, unless the lessor specially reserve it. If, therefore, there is no special reservation of the right of fishery, the tenant and not the landlord will be the party entitled to the fishery. Properly speaking, the right cannot be reserved by the lease; but, what is practically the same thing, the reservation is construed as a re-grant by the tenant to the landlord." That correctly states the law on the subject, and is borne out by the case which is there cited as an authority for it, the case of *Ewart v. Graham* (33 L. T. Rep. O. S. 349; 7 H. L. Cas. 331). *Halse v. Alder* (38 J. P. 407), also shows that the right of fishery is in the tenant under the lease, and it also shows that as there was no evidence of any *mens rea* on the part of the appellants, the conviction under sect. 24 of the Larceny Act was wrong.

Ellis Griffith for the respondent.—The real point is whether in the case of an agricultural tenancy, where there are no words of any kind in the lease as to the fishing, the right to fish remains in the landlord, or passes to the tenant under the lease. Upon this point there is no direct authority. [Lord ALVERSTONE, C.J.—How could the landlord go on to the lands and fish, unless the right was given to him or reserved to him by the lease?] He could do so in the same way as he could go on to the land to dig for minerals. Although I can find no authority to show that the passage cited from Paterson's Fishery Laws is not good law, yet there is no authority to show that it is good law. The fishery rights are still in the landlord; and there is no case which goes so far as to say that where a lease of land for agricultural purposes says nothing about the right of fishing such right passes to the tenant. The text-books are against this conten-

tion, but there is no authority to support the statements in the text-books. The right view to take of this tenancy is that the tenancy was for agricultural purposes, and that the tenant had no rights over this stream except for agricultural purposes, and therefore no fishing rights. A guilty intention is not necessary to constitute an offence under this section, and the fact that the appellants acted under the *bonâ fide* belief that they had a right to take the fish is no defence:

Hudson v. Macrea, 9 L. T. Rep. 678; 4 B. & S. 585.

He referred to

Moore v. Earl of Plymouth, 7 Taunt. 614;

Halse v. Alder (*ubi sup.*)

Lord ALVERSTONE, C.J.—The appellants in this case were convicted under sect. 24 of the Larceny Act 1861, of unlawfully and wilfully taking fish in a certain stream, which fish were alleged to be in a fishery belonging to Col. Wynne Finch. There was no evidence of any previous grant or of any reservation of this fishery. I think the law on the point is correctly stated in Paterson's Fishery Laws in the passage that has been read—namely, that the right of fishery goes to the tenant under the lease, and for the very good reason given by Paterson that the lessor could not, without express power being reserved, come on the lands or to the banks of the stream to exercise the rights of fishing. That being so, it seems to me that there is an end of the case, and I think it right to say that these men seem to have been fishing with the leave and licence of the tenant. It is, however, enough to say that there was no evidence of any unlawful taking of the fish on which to convict the appellants. This conviction must therefore be quashed.

DARLING, J.—The evidence in this case showed that the right of fishing was in the tenant of the farm. There was no evidence to show that it was in Colonel Wynne Finch, and therefore on that ground the summons must have failed. The evidence also went to show that the appellants thought that they were not doing any wrong. The presumption was that they were not doing anything unlawful, and there was no evidence to rebut that presumption.

CHANNELL, J.—I also think that the right of fishing in this stream was in the tenant of the farm; but, supposing there is a doubt about that, it clearly was not in the landlord. By an ordinary lease of land the soil and banks of a river clearly pass to the tenant, and that prevents the landlord going there for the purpose of fishing unless there were a reservation in the lease permitting him to go there, and therefore that prevents the landlord from taking the fish. The right to take the fish depends entirely on the possession of the soil, and therefore it is quite clear that it is not the fishery of the landlord, because he has no right to go there at all unless he reserves it.

Appeal allowed. Conviction quashed.

Solicitors for the appellants, *Lloyd-George, Roberts, and Co.*, for *Lloyd-George and George, Criccieth*.

Solicitors for the respondent, *Paterson, Snow, Bloxham, and Kinder*, for *James and Humphreys, Llanrwst*.

K.B. DIV.] PARKER v. MAYOR, ALDERMEN, AND BURGESSES OF BOURNEMOUTH. [K.B. DIV.]

Friday, Feb. 28, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PARKER (app.) v. MAYOR, ALDERMEN, AND BURGESSES OF BOURNEMOUTH. (a)

Bye-laws—Power to make bye-laws for regulating sale of articles on beach—Bye-law forbidding sale except under agreement—Validity—Local Government Board's Provisional Orders Confirmation (No. 10) Act 1890 (53 & 54 Vict. c. clxxix.), s. 1, and schedule.

Under statutory powers enabling a corporation to make bye-laws for regulating the selling or hawking of any article on their beach and foreshore, the corporation made a bye-law that: "A person shall not on the said beach or foreshore sell or hawk or offer or expose for sale any article, commodity, or thing, except in pursuance of an agreement with the corporation, and in such part or parts of the beach and foreshore as the corporation shall by notice affixed or set up thereon from time to time appoint for the purpose."

Held, that the bye-law was unreasonable and bad on the ground that it gave the corporation power to make any agreement they chose without reference to the question of the reasonableness or unreasonableness of such agreement, and that it reserved to them a right to refuse to give a licence to any particular person.

CASE stated by justices of the peace for the county borough of Bournemouth in the county of Southampton.

At a petty sessions held at Bournemouth on the 6th Sept. 1901, an information was preferred by the mayor, aldermen, and burgesses of Bournemouth (the respondents) against Henry Parker of Poole in the county of Dorset, hawker (the appellant) charging the appellant "that he, on the 5th Aug. 1901 within the borough of Bournemouth, did unlawfully sell, hawk, offer, and expose for sale upon the beach and foreshore then in the possession and occupation of the corporation of the said borough certain articles and things—to wit, cockles and winkles—otherwise than in pursuance of an agreement with the said corporation."

This information was heard and determined by the justices, and upon such hearing they convicted the appellant.

The information was laid under No. 3 of the Bye-laws made by the corporation of Bournemouth "for the regulation of the beach and foreshore under the powers given by the Local Government Board's Provisional Orders Confirmation (No. 10) Act 1890 (53 & 54 Vict. c. clxxix.)," which in the schedule provided with regard to Bournemouth:

The commissioners may from time to time make bye-laws for all or any of the following purposes (that is to say): For regulating the erection or placing on the beach and foreshore within the district for the time being in their possession or occupation of any booth, tent, shed, stand, stall, show, exhibition, swing, roundabout, or other similar erection . . . and generally for regulating the user of the said beach and foreshore or any part thereof. For regulating the selling and hawking of any article, commodity, or thing on the said beach and foreshore. For the preservation of order and good conduct among persons frequenting the said beach and foreshore.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

Bye-law No. 3 was "for regulating the selling and hawking of any article, commodity, or thing on the said beach and foreshore," and provided:

A person shall not on the said beach or foreshore sell or hawk, or offer, or expose for sale any article, commodity, or thing except in pursuance of an agreement with the corporation, and in such part or parts of the beach and foreshore as the corporation shall by notice affixed or set up thereon from time to time appoint for the purpose.

For the respondents the beach keeper in the employment of the respondents and a police constable gave evidence.

The beach keeper stated that he was in the employment of the corporation, and that his duty was to take charge of the beach near the pier; that on Monday the 5th Aug. last (being a bank holiday) he had a portion of the beach allotted for stalls about 300 yards west of the pier; that about noon, after regulating the stalls, he saw the appellant near the refreshment rooms on the beach east of the pier, and that he had a barrow on which were cockles and winkles; that he asked the appellant to remove his barrow to the proper place along the shore where the other stalls were; that the appellant said he would remain where he was, and that he would give his name and address, and that the beach keeper could summon him; that he (the beach keeper) saw him in the evening with his barrow in the same position as the morning, and that he saw him selling cockles there. He further stated that there was a place set apart for stalls; that no notice was put up, but he thought they all knew it; that several persons close to where the appellant was standing had corporation licences; and that he should not have objected if the appellant had had a licence; that a difference was made on bank holiday, and freer access was allowed on other days, and that no one was allowed to stand between the refreshment rooms and the pier where the appellant was. The constable gave similar evidence.

The appellant stated that he was a fish hawker, and that he had carried on the same business for some four or five times each year for twenty years on the same spot on the beach as he did on the day in question, and that he was selling winkles and cockles on that day, and that he had applied for a licence to the Bournemouth Corporation, but was refused.

Another witness stated that he had for twenty-five years sold on the same spot where the appellant was charged with selling on, and that he had never applied for a licence.

It was contended for the appellant (1) that the bye-law was bad as being beyond the powers conferred upon the respondents and was unreasonable, and that the bye-law, if good, could not be enforced unless and until some part or parts of the beach and foreshore had been apportioned by the respondents for the purpose of persons selling or hawking, or offering or exposing for sale any article, commodity, or thing, and notice thereof had been affixed or set up on the beach and foreshore, as provided by the bye-law; (2) that the information did not disclose any offence; (3) that there being no evidence that any part of the beach or foreshore had in fact been set aside by the respondents, or that notice of such setting aside had been affixed and set up, the appellant could not be convicted under the bye-law; and (4) that the appellant had in good faith claimed a right to

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do the act complained of, and that therefore, the justices had no jurisdiction.

The justices overruled the appellant's contentions, and held that the bye-law was reasonable and valid; that the offence was sufficiently set out in the information, which disclosed an offence—namely, a breach of the third bye-law; that the appellant did, as alleged in the information, sell, hawk, offer, and expose for sale upon the beach and foreshore certain articles and things otherwise than in pursuance of an agreement with the corporation, and that the claim of right set up by the appellant was unreasonable, and such as could not exist in law.

They therefore convicted the appellant and imposed a fine of 2s. 6d. and 14s. costs, and in default of distress fourteen days imprisonment.

The question for the opinion of the court was whether the justices came to a correct determination and decision in point of law.

S. H. Emanuel for the appellant.—The point is as to the right to sell and hawk articles on the beach, and raises the question as to the validity of bye-law No. 3, which was made under sect. 1 of the provisional order 1890. The bye-law is invalid, as it gives the corporation power to make any agreement they please—reasonable or unreasonable. The bye-law was made under a power for regulating the sale on the beach, and not for prohibiting it altogether, and until the corporation have put up a notice they cannot prevent the appellant from selling on any part of the beach. If the view of the corporation were correct the bye-law would be one for prohibiting the sale altogether, and not merely for regulating it. The corporation never set up any notice at all, and never set apart any part of the foreshore as mentioned in the bye-law, so that the appellant was summoned for that which is not an offence under the bye-law, unless and until there has been a place set apart by notice. The bye-law is *ultra vires* and bad, and the conviction under it ought to be quashed.

Clavell Salter for the respondents.—A very similar bye-law was considered in *Gray v. Silvester* (61 J. P. 724), and was held to be valid. [Lord ALVERSTONE, C.J.—That is a very different case. There seems to be nothing there as to the making of an agreement.] The provision requiring an agreement is nothing more than a provision for the regulation of the sale. The corporation had power under the provisional order to regulate the selling of any article on the beach, and under that power they would be entitled to make a bye-law regulating not only the places where the selling might be carried on, but also the persons who might be allowed to sell, so that the requiring an agreement from such persons would be in accordance with the powers conferred upon the corporation. [CHANNELL, J.—The bye-law does not merely regulate the sale; it says that a person who has not made an agreement with the corporation shall not sell. It does not say what the agreement is; if the agreement were set out in the bye-law, and were unreasonable then the bye-law would be invalid, and it would seem to be equally so if it required an agreement, and left it to the corporation to say what the agreement should be.] It must be assumed that any agreement required by the corporation, who are owners of the beach, would be reasonable, and

therefore the bye-law is not rendered invalid by that provision requiring an agreement.

Lord ALVERSTONE, C.J.—We are clearly of opinion that this conviction cannot be supported. The appellant was summoned because he sold cookies on the beach without having an agreement with the corporation. I express no opinion as to the last point raised by counsel for the appellant, whether, before any person could be summoned under the bye-law, a part of the beach or foreshore must be marked out by the corporation by a notice affixed thereon. The appellant was not summoned under that part of the bye-law; he was summoned for selling otherwise than in pursuance of an agreement with the corporation. I think that the bye-law under which the appellant was summoned is bad for the reason that it withdraws altogether from those who may have to interpret it and consider its validity any question as to whether the agreement referred to in it is a reasonable agreement or not. It puts it in the power of the corporation to make any agreement they like; and the question which we have to consider is whether a bye-law which reserves to the corporation the right to refuse any particular person is on the face of it a good bye-law. I think it is not. The corporation can, of course, deal with the matter by altering the bye-law. I think that this bye-law was not warranted by the Provisional Order, and that this conviction ought therefore to be quashed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion.

Appeal allowed. Conviction quashed.

Solicitors for the appellant, *Speechly, Mumford, Rodgers, and Craig*, for Lamport and Bassitt, Southampton.

Solicitors for the respondents, *Lovell, Son, and Pitfield*, for J. and W. H. Druitt, Bournemouth.

Feb. 28 and March 3, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

LONDON AND INDIA DOCKS COMPANY (apps.) v. MAYOR, ALDERMEN, AND COUNCILLORS OF THE BOROUGH OF WOOLWICH (resps.) (a)

Rating—Metropolis—Woolwich—Partial exemption of land covered with water—Continuation of exemption under London Government Act 1899—Land covered with water not separately assessed in valuation list—Appeal to quarter sessions against rate—Right to appeal without objecting before assessment committee to valuation list—London Government Act 1899 (62 & 63 Vict. c. 14), ss. 10, 19—Poor Relief Act 1743 (17 Geo. 2, c. 38), s. 4.

Prior to the London Government Act 1899 the district of Woolwich was subject as to rating to the Public Health Act 1875, and general district rates therein were made under sect. 211 of that Act, under which the occupiers of land covered with water were assessed to general district rates at one-fourth only of the net annual value of such lands. The London Government Act 1899, in sect. 19, sub-sect. 1, provided that a scheme under the Act should provide for

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

placing Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the Public Health Acts; and in sect. 10, sub-sect. 1, that a scheme under the Act should make provision for protecting the interests of owners and occupiers of any hereditament exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments; and a scheme was made and confirmed accordingly. The owners and occupiers of certain lands in Woolwich, part of which was land covered with water, and was, as such, prior to the Act of 1899, assessed at one-fourth of its net annual value only, were in 1900 assessed in one assessment for the whole hereditament, and in 1901 were rated to the full amount of the rate. They appealed to quarter sessions against the rate without having made any objection before the assessment committee against the valuation list as to the description of the hereditaments appearing therein, and without having asked for a division of the property, so as to show the part which was exempt.

Held, that the partial exemption of land covered with water was preserved in Woolwich, so far as existing hereditaments were concerned, and that the occupiers of such lands were assessable only at one-fourth the net annual value of the lands.

Held, also, that the occupiers were entitled to appeal to quarter sessions against the rate without having first objected before the assessment committee against the valuation list that the hereditaments ought to have been divided.

CASE stated by the Quarter Sessions for the County of London under sect. 11 of the Quarter Sessions Act 1849 (12 & 13 Vict. c. 45).

The appellants on the 23rd May 1901 gave notice of appeal to the next General or Quarter Sessions for the County of London against a general rate made by the respondents for the metropolitan borough of Woolwich, and allowed by the justices on the 1st May 1901, and afterwards by consent of the parties and by order of Channell, J., the following special case was stated for the opinion of the King's Bench Division. The parties agreeing that a judgment in conformity with the decision of the King's Bench Division should be entered on motion by either party at the sessions next or next but one after such decision.

The appellants were the owners and occupiers of certain hereditaments in the metropolitan borough of Woolwich, and in a general rate for the borough made by the respondents under the London Government Act 1899 on the 21st March 1901, and allowed by the justices on the 1st May 1901, the appellants were rated as the occupiers of the hereditaments under two entries in the rate. In these entries the appellants were entered as the owners and occupiers of the hereditaments. The description of the property rated was in the first entry: "Royal Albert Dock (part of) with tidal basin, quays, buildings, and machinery," and in the second entry: "Old and New Dock entrances, Galleons Reach, and appurtenances." The rateable value in the first entry was 15,000*l.* and the amount of the rate at 3*s.* 6*d.* in the pound was 2625*l.*; and in the second entry the rateable value was 5000*l.* and the rate 875*l.* The property

was stated to be in North Woolwich. The appellants were rated in respect of the hereditaments upon the full net annual value thereof, to the full amount of the rate.

The hereditaments included in and intended to be rated under each of the two entries appearing in the rate consisted in part of land covered with water, and under and by virtue of the Acts herein-after referred to, before the 1st April 1901, the appellants were liable to be assessed and were in fact assessed to general district rates for the parish of Woolwich made under the Public Health Act 1875 as the occupiers of such land covered with water upon one-fourth part only of the net annual value thereof, in pursuance of sect. 211 of that Act.

The appellants in Oct. 1900, being aggrieved by the unfairness or incorrectness of the valuations of the hereditaments in the valuation list for the parish of Woolwich made on the 22nd June 1900, duly gave notice of their objections to the same to the overseers of the parish of Woolwich and to the assessment committee of the Woolwich Union, and specified the corrections which they desired to be made, and the committee on the 26th Oct. 1900 heard and decided such objections on the basis of an alteration in the amounts of the assessments. No objection was made by the appellants to the description of the hereditaments in the valuation list. The notice of objection to the valuation list was on the grounds that the appellants were in the valuation list over assessed in respect of the gross value and the rateable value of the dock and premises, and (2) that sufficient deduction had not been made in the list from the gross value to arrive at the rateable value.

By the Public Health Supplemental Act 1852 (No. 2) (15 & 16 Vict. c. 69), s. 8, the Public Health Act 1848 (11 & 12 Vict. c. 63) was made applicable to Woolwich.

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) Woolwich was included in the metropolis as one of the parishes mentioned in sched. A to that Act; but by sect. 238 the application of that Act to Woolwich was limited, so that general district rates continued to be made in Woolwich under the Public Health Act 1848, and not under sects. 158-169 (the rating sections) of the Metropolis Management Act 1855.

The Public Health Act 1848 was as to other places repealed by sect. 343 of the Public Health Act 1875 (38 & 39 Vict. c. 55), but as by sect. 2 of the last-mentioned Act, that Act did not extend to the metropolis "save as by this Act is expressly provided," it followed that as Woolwich was within the metropolis and was not specially mentioned in the repealing sections, the repeal of the Public Health Act 1848 did not apply to Woolwich. Consequently the Public Health Act 1848 continued in force in Woolwich after 1875, and was expressly declared so to be in force by the Local Government Board's Provisional Orders Confirmation (Amersham Union, &c) Act 1880 (43 & 44 Vict. c. lix.), s. 2.

The Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 102, applied to Woolwich certain provisions of the Public Health Act 1875, including (*inter alia*) sects. 209-227 of that Act, which relate to the making of rates.

The effect of the enactments above cited was that general district rates were made by the

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Local Board of Health in Woolwich from 1852 to 1891 under the Public Health Act 1848, and after 1891 under the Public Health Act 1875.

By sect. 88 of the Public Health Act 1848, general district rates are to be made and levied upon the occupier

Of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property. . . . Provided also that the occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered with water, or used only as a canal or towing-path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof. . . .

The material words of the section set out in the preceding paragraph are repeated verbatim in sect. 211 of the Public Health Act 1875, under which general district rates under that Act are made.

Under sects. 15 and 16 of the London Government Act 1899 a committee of the Privy Council may make orders and schemes for carrying the Act into effect. The orders and schemes herein-after mentioned have been made under the Act.

By sect. 19 of the London Government Act 1899 it was enacted as follows:

(1) A scheme under this Act shall provide for placing Woolwich under the general law applying to metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts and other enactments not applying to London, and for the application thereto of the Metropolitan Management Acts 1855 to 1893, and other enactments applying to London. (2) Subject to the provisions of any such scheme, this Act shall apply to Woolwich in like manner as if the Local Board of Health thereof were an administrative vestry.

By sect. 4 of the London Government Act 1899 the powers and duties of the vestry were transferred to the borough council, and by sect. 10 (1) of that Act it is provided that "A scheme under this Act shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments."

By the London (Woolwich) Scheme 1900, which was confirmed by an order in council on the 7th Aug. 1900, it was provided as follows:

1 (2). This scheme shall have effect subject to the provisions of any future scheme made under the Act, and in particular to the provisions of any such scheme making provision for the protecting the interests of owners and occupiers of any hereditaments which are exempt from any rate, or liable to be assessed thereto at a less amount than other hereditaments.

2. Subject to the provisions of this scheme the general law applying to metropolitan boroughs shall, as from the day on which the first borough councillors elected under the Act come into office, apply within the parish of Woolwich in like manner as it applies to the rest of London, and accordingly the Public Health Acts and the

other enactments not applying to London shall, as from that date, and so far as they apply to the parish of Woolwich, be repealed, and the Metropolitan Management Acts 1855 to 1893, and the other Acts applying to London, so far as they do not before that date apply to the parish of Woolwich, shall apply to that parish in like manner as they apply to the rest of London. Provided that (a) Nothing in this section shall affect the nature of any rate to be levied in the parish of Woolwich between the said day and the 31st day of March 1901, and in the meantime sects. 207 and 209 to 227 of the Public Health Act 1875 shall continue to apply to Woolwich as if the council of the metropolitan borough of Woolwich was the council of an urban district outside London, and the parish of Woolwich was a parish in that district.

By the London (Rating) Scheme 1901, which was confirmed by an order in council on the 9th March 1901, it was provided as follows:

2 (1). In levying the general rate after the first day of April, one thousand nine hundred and one, effect shall be given to any exemption from any existing rate (whether that exemption is given by way of reduced assessment or by levying a differential rate in the pound or in any other manner) by means of the deduction from the total amount of the general rate which would otherwise be payable in respect of any hereditament to which the exemption applies of a proportionate part (corresponding to the exemption) of the amount produced by the rate in the pound which is treated as levied for the purposes in respect of which the exemption exists or in the case of a total exemption equal to the whole amount so produced. . . . (2) Where in any metropolitan borough the owners or occupiers of any hereditaments or any class of hereditaments are entitled to any exemption, the council of that borough shall apportion the total rate in the pound amongst the various purposes for which the general rate is levied, so as to show approximately the rate in the pound required for any purpose or any number of purposes in respect of which there is such an exemption, and shall enter the rates in the pound so apportioned in the heading of the rate, and the rates in the pound so apportioned and entered shall be treated as levied for the purposes in respect of which the exemption exists.

6. For the purposes of this scheme the expression "existing rate" means any rate leviable in a metropolitan borough before the 1st day of April 1901.

7 (1). This scheme may be cited as the London (Rating) Scheme 1901 and shall have effect subject to the provisions of any future scheme and to the provisions of any scheme dealing with any particular exemption from rates or liability to be assessed.

The appellants contended: (a) That the combined effect of the London Government Act 1899 and the orders and schemes made thereunder was that the partial exemption of land covered with water from the general district rate formerly levied in Woolwich was preserved. (b) That the general rate against which the appellants appealed should be apportioned among the various purposes for which the general rate is levied so as to show approximately the rate in the pound required for any purpose or any number of purposes in respect of which the partial exemption of land covered with water existed. (c) That the appellants in respect of land covered with water were entitled to a partial exemption, as to so much of the general rate as was made for the purposes for which the general district rate was made before the commencement of the operation of the London Government Act 1899 and the orders and schemes, and that a proportionate part

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(corresponding to the partial exemption) should be deducted from the total amount of the general rate which would otherwise be payable by the appellants in respect of the hereditaments, or, alternatively, that the rate should be amended by striking out the entries relating to the hereditaments or that the rate should be quashed.

The respondents contended: (1) That the appellants, having objected before the assessment committee of the union only to the amounts of the assessments, were not aggrieved by any decision of the assessment committee, and were not therefore entitled to appeal to the Court of Assessment Sessions. (2) That the appellants were liable to be assessed to the general rate in respect of the land covered with water upon the full net annual value thereof for the following amongst other reasons—(a) Because sect. 211 of the Public Health Act 1875, under which such partial exemption was claimed, had been as from the 1st Nov. 1900 repealed in its application to the parish of Woolwich by sect. 19 of the London Government Act 1899 and the order and scheme made thereunder (sect. 2), and that the exemption was not preserved by the Act or any order or scheme made under and by virtue thereof. (b) Because the provisions of the London (Woolwich) Scheme 1900 provided (*inter alia*) by sect. 2 (a) that sects. 207 and 209 to 227 of the Public Health Act 1875 should continue to apply to Woolwich to the 31st March 1901 only, and did not provide that such sections should continue to apply to Woolwich after the 31st March 1901. (c) Because the intention of the Legislature as expressed in sect. 19 of the London Government Act 1899 and given effect to by the orders and schemes, was to place Woolwich for all purposes under the general law applicable to the metropolis, to which it had prior to the passing of the Act been an exception, and not for any purpose to continue the application thereto of the Public Health Act 1875.

It was agreed between the appellants and respondents that if the respondents' contentions were not correct the proportionate part which ought to have been deducted from the total amount of the general rate which would otherwise be payable by the appellants in respect of the hereditaments numbered 2869 in the rate should be 499l. 19s. 10d., and the proportionate part which ought to have been deducted in respect of the hereditaments numbered 2870 in the rate should be 60l. 18s. 9d.

The questions for the opinion of the court were (a) whether the appellants were entitled to appeal, and if so, (b) whether the appellants were liable to be assessed to the general rate in respect of land covered with water upon the full net annual value thereof, or were entitled to such partial exemption as aforesaid from the general rate. If the court should answer either of the questions in favour of the respondents, then the court might either confirm the rate or make such other order as to the court should seem fit. If the court should answer both the questions in favour of the appellants, then either the rate was to be quashed or was to be amended in the manner contended for by the appellants, or by altering the amounts of the rate in the last column thereof so as to give effect to the agreement as to figures in this case, or the court was to make such other order as to the court should seem fit.

The Poor Relief Act 1743 (17 Geo. 2, c. 38) provides:

Sect. 4. In case any person . . . shall find himself aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, . . . it shall and may be lawful for such person or persons, in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies; and the justices of the peace there assembled are hereby authorised and required to receive such appeal, and to hear and finally determine the same, &c.

The Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67) provides:

Sect. 32. Any ratepayer, . . . who may feel aggrieved by any decision of the assessment committee, on an objection made before them to which he was a party, or by any decision of special sessions, whether he was a party or not, may appeal against such decision to the assessment sessions, &c.

Sect. 45. The valuation list for the time being in force shall be deemed to have been duly made . . . and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted, &c.

Ryde (Balfour Browne, K.O. and Boyle, K.O. with him) for the appellants.—The first question is whether the appellants were entitled to appeal to the quarter sessions, as they had objected to the assessment committee only as to the amounts of the assessments and on the basis of an alteration in those amounts, and had not applied to the committee for a division of the rateable values, so as to show the part of the property which was exempt. The appellants have a right of appeal to quarter sessions in this case. In dealing with the metropolis it is important to bear in mind the difference between an appeal against a valuation list and an appeal against a rate. In the metropolis an appeal on the ground of over-assessment is not against the rate, but is against the valuation list before it comes into force; outside the metropolis the appeal may be against each fresh rate. The appeal in this case is brought under sect. 4 of the Poor Relief Act 1743 (17 Geo. 2, c. 38), which is still in force and applies to the metropolis, giving a right of appeal from the assessment committee to the next general or quarter sessions to any person aggrieved by any rate or assessment. The section gives an appeal on almost any conceivable ground. The next section dealing with appeals is sect. 6 of the Parochial Assessments Act 1836 (6 & 7 Will. 4, c. 96), which was limited to appeals on questions of value only, but that section has been repealed as to the metropolis. Then the Union Assessment Committee Act 1862 (25 & 26 Vict. c. 103) created for the first time the valuation list, and any person who was aggrieved by this list might object to the assessment committee (sect. 18), and if on appeal against a rate, the rate were amended, then the valuation list was to be altered (sect. 22, repealed as to the metropolis). Then sect. 1 of the Union Assessment Committee Act 1864 (27 & 28 Vict. c. 39) made it a condition precedent

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to the right of appeal against a rate made in accordance with the valuation list, that notice of objection should have been given to the assessment committee, and that the person should have failed to obtain relief from the committee. If that section applied the appellants would be out of court, but it was repealed as regards the metropolis by sect. 77 of the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), which in sect. 45 made the valuation list conclusive evidence in certain matters, but not in the matter now in question. It made the valuation list conclusive evidence of the gross and rateable values, and it is said that that section limits the right of appeal in the metropolis, and that there is no appeal to quarter sessions unless the appellant is aggrieved by the decision of the assessment committee. That section leaves untouched the right of appeal in everything except as to values or amounts; and the right of appeal to quarter sessions, under sect. 4 of 17 Geo. 2, c. 38, is preserved, except as to amount. If this were not the true view, then in *Reg. v. Institution of Civil Engineers* (42 L. T. Rep. 145; 5 Q. B. Div. 48), in 1879, after the Act of 1869 came into force, the wrong thing would have been appealed against and the wrong court would have been appealed to. In *Smith v. Lambeth Assessment Committee* (48 L. T. Rep. 57; 10 Q. B. Div. 327), the appellants appealed to quarter sessions under sect. 4 of 17 Geo. 2, c. 38, against a rate, on the ground that they were not occupiers; if they had been limited to the right of appeal under the Act of 1869 they must have appealed against the valuation list, and have gone, not to quarter sessions, but to the assessment committee. So the valuation list is not conclusive as to an exemption of the hereditament by statute: (*Art Union of London v. Overseers of Savoy*, 71 L. T. Rep. 40; (1894) 2 Q. B. 609). If this had been an appeal against the valuation list, sect. 45 of the Act of 1869 would have applied, but the appeal here is against the rate, and that section has no application: (per Lord Esher, M.R. in *Gordon v. Williamson*, 67 L. T. Rep. at p. 217; (1892) 2 Q. B. at p. 463). With regard to the second point, it is expressly provided by the London Government Act 1899, in sect. 10, and in the schemes made under the Act, that the interests of those whose hereditaments were before wholly or partially exempt from any rate should be protected. [He was stopped on this point.] He also referred to

North-Eastern Railway Company v. York Union, 19 Mag. Cas. 473; 82 L. T. Rep. 201; (1900) 1 Q. B. 733.

Marshall, K.C. (*Courthope-Munroe* with him) for the respondents.—As to the first point, the appellants have no right of appeal to the quarter sessions. If they were aggrieved they ought to have gone to the assessment committee, and have asked the assessment committee to correct the valuation list by dividing the assessment so as to show the portion of the hereditaments entitled to the exemption. Sect. 45 of the Act of 1869 clearly shows that the valuation list is conclusive for these purposes, and there is no appeal unless the appellants can show that they are aggrieved by a decision of the assessment committee on an objection made by them to the valuation list. That is clearly shown by sect. 32. Here no such objection to the valuation list was made, and as

the valuation list is, by sect. 45, made conclusive evidence of the gross and rateable values of the hereditaments included therein, the appellants cannot now, for the purposes of this appeal, either contest the total amount or raise the question that the hereditaments ought to have been divided. The valuation list ought to show the hereditaments as separated into the parts in respect of which the exemption was claimed and those parts as to which no exemption was claimed. Sect. 11 of the Act of 1869 sets out the grounds on which persons may object before the assessment committee, and they may appeal if they complain of unfairness or incorrectness of the valuation, or of the insertion or incorrectness of any matter in the valuation list, and so on. That section gives larger powers of appeal to the assessment committee than are given by sect. 18 of the Union Assessment Committee Act 1862, as under sect. 11 there is power to go to the assessment committee in respect of the "incorrectness of any matter in the valuation list." What was complained of by the appellants was an incorrectness of a matter in the valuation list. They complained that the valuation list did not give them the exemption which they said they were entitled to in respect of part of the hereditaments; and they ought to have gone to the assessment committee and have asked them to separate the hereditaments, and the assessment committee would have had power to separate the hereditaments and correct the list. No notice of objection was given, and no objection was taken, upon that ground, and to have taken the objection at all they must have given notice specifying that as one of the grounds of their objection: (per Bruce, J. in *Reg. v. Justices of London* (1897) 1 Q. B. at p. 437). Therefore on the construction of sects. 11, 32, and 45, the appellants have no right of appeal. With regard to the second point, sect. 19 (1) of the London Government Act 1899 provides that any scheme under the Act should provide for placing Woolwich under the general law applying to the metropolis and for the repeal of the application thereto of the provisions of the Public Health Acts. The intention clearly was to place Woolwich under the general law as to these matters which apply in the metropolis, and there is no such exemption as is here claimed applicable in the metropolis. It was not intended that the exemptions given by the Public Health Acts should continue. The exemptions referred to in sect. 10 (1) are exemptions of particular hereditaments, and are not such exemptions as were allowed under the Public Health Acts. To allow this exemption would be to defeat the object of the Act, which was to place Woolwich under the general law applicable to the metropolis.

Ryde in reply.

Cur. adv. vult.

March 3.—Lord ALVERSTONE, C.J.—The actual facts of this case are somewhat complicated, and I do not think it necessary to state them in detail, as they must be gathered from the special case in the event of its being necessary to consider the facts of this case as bearing upon any other case. Prior to the passing of the London Government Act 1899 the district of Woolwich, in which this property of the dock company was situate, had been subject to the Public Health Act 1875, and under sect. 211 of that Act there was an exemp-

tion that land covered with water should only pay at the rate of one-fourth in respect of certain rates. The district was also subject at that time to the Valuation (Metropolis) Act 1869, and therefore for the purposes of rating procedure, the procedure of that Valuation (Metropolis) Act had to be followed. By the London Government Act of 1899, a scheme was enacted for bringing Woolwich into the general law applicable to the metropolis, and that Act did, in sect. 19, sub-sect. 1, provide, in general terms, that a scheme under the Act should provide for placing Woolwich under the general law applying to the metropolitan boroughs, and for the repeal of the application thereto of the provisions of the Public Health Acts. The Act also contained a provision in sect. 10, sub-sect. 1, that a scheme under the Act should provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate—which were rates as to which, under certain circumstances, there would be this lesser liability—but should make provision for protecting the interests of owners and occupiers of any hereditament which was exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments. Then came the London (Rating) Scheme 1901, which came into operation on the 9th March 1901, and which did provide for a particular method of maintaining the exemption; but it is not necessary to describe it. It is stated in sect. 2, sub-sect. 1 of that scheme, and it practically maintained the one-fourth exemption, assuming it to be valid and binding in a proper case, by a particular method of levying the rate. The particular valuation list on which the present question arises was the valuation list for 1900. The respondents sought to charge the appellants with an assessment for the full amount of the rate, and they justify that on two grounds: First, they say, on the merits, that by the provisions of the Act of 1899 it was intended to bring Woolwich within the general law applying to metropolitan boroughs, and therefore, inasmuch as some parts at any rate of the metropolitan boroughs had not got the protection of the Public Health Act in this respect, though they had certain other protection under certain other Acts, it was not intended that this exemption under the Public Health Act should be continued in Woolwich. We are all clearly of opinion that that ground cannot be maintained. Sect. 10, sub-sect. 1, is precise, and expressly says that a scheme “shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount.” We think it was clearly intended that, although generally Woolwich and other outlying places were to come within the metropolis, the scheme should continue that exemption. It has continued the exemption, and, if so, it cannot be said that the scheme is not valid and binding. Therefore the objection on the merits taken by counsel for the respondents, we think, does not prevail. The more troublesome and difficult contention is whether or not it was open to the appellants to raise the point because they had not objected before the assessment committee and obtained from them a distribution of the rateable value, which in the total was not objected to, between the part of the

hereditament which was land, and which was therefore not exempted property, and the part which was exempted property. The assessment was one total of 15,000*l.* for the dock, with tidal basin and quays, and although the total amount was agreed to after discussion, the appellants had not asked the assessment committee to divide the assessment between so much of the hereditament as was land covered with water and so much as was not. We are also of opinion that this objection cannot prevail, and that the appellants are entitled to raise the point. The original right of appeal goes back to the Act of 17 Geo. 2, c. 38, s. 4. There was intermediate legislation as to which we may only add the fact that it does not apply to the metropolis—namely, the Parochial Assessment Act of 1836 and the Union Assessment Committee Acts of 1862 and 1864. Those Acts do not apply to the metropolis, but I must not be taken as expressing the opinion that this kind of objection ought to have been raised before the assessment committee even under those Acts. I do not express any opinion upon that, because it is not necessary, and the matter may be argued before us in some other case. I should doubt whether any owner of a mixed hereditament can force the assessment committee to make the sub-division. There are certainly cases in which he could not, such as the simple and ordinary case of a man who has got a park with a lake in it. It is, however, unnecessary for us to decide whether under those Acts the party assessed could force the assessment committee to make a sub-division. No doubt it is very convenient that there should be a sub-division, because it possibly then provides a standard which the parties would acquiesce in as to how these differential rates should be levied. When we come to the metropolis the case is somewhat different, and the rights and liabilities of the owners or occupiers of properties depend upon the Valuation (Metropolis) Act. I do not pause to notice the procedure under that Act, which is very well known—that there is an appeal against the valuation list instead of against the rate. Under that Act it was contended by counsel for the respondents that because it was provided by sect. 45 that the valuation list should be conclusive evidence of the gross and rateable value of the several hereditaments included therein, therefore the appellants were not entitled for the purpose of this appeal either to contest the total amount or to raise the point that the assessment ought to have been sub-divided so as to enable them to raise their point as to the exemption. If there had been anything in the Valuation (Metropolis) Act which showed that this question was intended to be raised at that stage, there might have been something in that contention for the respondents; but it is, in my opinion, much too late to contend that the right of appeal on other grounds than those mentioned in that section—sect. 45—has been taken away. There have been many cases in which it has been held that upon an appeal against the rate other questions can be raised than those determined by the assessment committee, or by the sessions upon appeal against the valuation list, as, for instance, non-occupation or invalidity of the rate in other respects, and I see no reason why we should hold that a person is not entitled on an appeal against the rate to raise this question that he is the

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occupier of property in respect of the whole or part of which he is subject only to a differential rate. In fact, when I put the question to counsel for the respondents he did not dispute that, if the whole of the property was land covered with water, and the person had been rated in respect of the whole, he would be entitled on appeal against the rate to say in respect of that rate he was only liable to pay one-fourth of the rate. I am of opinion that the old right of appeal in respect of such a matter still remains, and that the only effect of the Valuation Act on the valuation list for this purpose is that the total valuation in the list is conclusive, and that if in any case there has been a sub-division of the assessment, and either by the original adjudication of the assessment committee or on a subsequent appeal the amount of the valuation of that separated item has been settled, then the valuation list would be conclusive as to the amount of such divided part. I cannot hold that there was any obligation upon the appellants to get this sub-division made at the stage of the making of the valuation list. There is another ground which also seems to us to be conclusive in favour of the appellants in this case. I think that the argument for the appellants was well founded, that at the time the valuation list was going through its initial and preparatory stages, Woolwich really did not know what the actual position would be. They did not know what steps would be taken, or in what way the scheme would provide for the preservation of their exemptions, and I think that within the principle of Lord Bowen's judgment in the case of *Gordon v. Williamson* (*ubi sup.*) it was not possible to contend that in that state of things Woolwich were bound to get what I will call a hypothetical division in view of what might possibly happen. Speaking for myself, both on the special grounds of this case and on the general view of the construction of the Valuation (Metropolis) Act, I am of opinion that this was no bar to the appeal. The parties agree about the figures. It is obvious that the conclusion we come to is in accordance with justice, because we do not think it was intended to remove the exemption either under the Act or the scheme, and it is satisfactory to know that what we think is the true state of the law can be carried out. The result is that the appeal must be allowed.

DARLING, J.—I agree.

CHANNELL, J.—I entirely agree with what my Lord has said, but I think I ought to say that my view of the matter is that so far as any future hereditaments are concerned, if, for instance, a new dock were made in Woolwich, it was intended to apply to Woolwich the general law applicable in the metropolis, and not the law applicable outside the metropolis. I understand that sect. 10, sub-sect. 1, by providing that a provision should be made for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate, and the provision that in fact was made in the scheme that effect should be given to any exemption from any existing rate of any hereditament to which the exemption applies—that is the exemption from the existing rate—showed that it was intended to prevent the particular persons in Woolwich who had at the time got hereditaments of that char-

acter, from being rated in the future at any higher rate. That is the reason why I do not think that our present decision is in any way contradictory to the express enactment that Woolwich should be put under the general law applicable to the metropolis. I think that Woolwich is put under the general law applicable to the metropolis in regard to the future; and therefore if any new dock were made it would come under the later law applicable to the metropolis and not under the earlier law. That is how I understand it, and it is on that ground, as it seems to me, that what has been called the point upon the merits is perfectly clear. That also is the answer to the argument for the respondents, which otherwise was quite a logical argument, that Woolwich is specially dealt with.

Lord ALVERSTONE, C.J.—The point taken by my brother Channell as to future hereditaments had not occurred to me. I do not differ from him except to say that I should like to hear that particular point argued. It does not, however, arise in this case.

Appeal allowed. Judgment for the appellants with costs. Leave to appeal.

Solicitors for the appellants, *Turner, Son, and Foley.*

Solicitor for the respondents, *Arthur B. Bryceson, Town Clerk, Woolwich.*

Wednesday, March 5, 1902.

Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MOORE (app) v. KEYTE (resp.) (a)

Vaccination — Failure to vaccinate — Power of vaccination officer to prosecute without the authority and against the order of guardians — Power of justices to convict without proof that notice was sent to, and public vaccinator visited, the child's home — Vaccination Acts 1867 to 1898 (30 & 31 Vict. c. 84; 34 & 35 Vict. c. 98; 37 & 38 Vict. c. 75; 61 & 62 Vict. c. 49) — General Order of Local Government Board, 18th Oct. 1898, arts. 26, 27.

A vaccination officer is entitled, as vaccination officer, to prosecute a parent who has failed to have his child vaccinated according to law, though the guardians have not instructed or have forbidden him to prosecute.

In such a prosecution it is not a condition precedent to a conviction that the vaccination officer should prove that the notice to the parent and the visit of the public vaccinator to the home of the child directed by sect. 1 (3) of the Vaccination Act 1898 were in fact sent and made.

CASE stated by the Justices of Leicester.

On the 8th Oct. 1901 an information was preferred by the vaccination officer appointed by the guardians of Leicester against one Moore, that he, being the parent of a certain child residing in Leicester, had unlawfully neglected to cause the child to be vaccinated within six months of its birth.

At the hearing before the justices the clerk to the guardians produced a letter from the Local Government Board sanctioning the appointment of Moore as vaccination officer. He also put in

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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evidence the following resolutions of the Leicester guardians :

That the board strongly condemns the action of the vaccination officer in prosecuting defaulters under the Vaccination Acts, and incurring law expenses, without consulting the guardians, and instructs him in future to report defaulters to the board, so as to afford them an opportunity to offer a reasonable excuse, as provided by sect. 29 of the Vaccination Act 1867. The guardians also point out to the vaccination officer that he is appointed (*inter alia*) subject to sect. 5 of the Vaccination Act 1871 to enforce the provisions of the Vaccination Acts 1867 to 1898, and to prosecute such persons as are charged as defaulters under the said Acts, and the guardians will specially authorise him in writing under their common seal to prosecute such defaulters as they desire to be prosecuted; and that a copy of this resolution, signed by the chairman, and sealed with the common seal of the board, be forwarded to the vaccination officer.

The clerk to the guardians further gave in evidence that pursuant to this resolution the vaccination officer submitted to the guardians a list of twelve persons on the 4th June 1901, and another list of ten persons, including the name of Moore, on the 1st Oct. 1901, and he also read from the minute-book of the guardians a resolution passed by the guardians at meetings held on the 4th June and the 1st Oct. 1901, which was as follows :

That the vaccination officer be and hereby is instructed to take no further steps in instituting proceedings against those persons whose names are included in the list submitted to the guardians to-day until he receives the instruction of the guardians to do so.

Copies of the above resolutions were sent to the vaccination officer, and there was no resolution of the guardians requiring him to take proceedings against Moore or generally.

It was proved by the production of the certificate of birth that the child in question was born on the 13th Jan. 1901.

The vaccination officer had received no certificate of excuse under the Vaccination Acts from Moore, nor a certificate of successful vaccination.

The vaccination officer admitted that he was aware of the above resolutions, but that notwithstanding them he had taken proceedings as vaccination officer of the parish of Leicester, and that he prosecuted as vaccination officer as he contended that his appointment as such gave him impliedly power to enforce the Vaccination Acts 1867 to 1898, and to take the present proceedings without the authority or directions of the guardians.

It was contended on the part of Moore that the onus lay on the prosecution to prove as a condition precedent to a prosecution under sect. 29 of the Vaccination Act 1867 (a) that the vaccination officer had received the authority or directions of the guardians to prosecute in the case if he prosecuted as vaccination officer; (b) that the public vaccinator had visited Moore's house for the purpose of vaccinating the child in accordance with sect. 1 (3) of the Vaccination Act 1898, and that the public vaccinator had previously served notice of his intention so to do.

For the vaccination officer it was contended that the vaccination officer as such was not in law bound to receive any authority or directions whatever from the guardians before he took proceedings under the Vaccination Acts 1867 to

1898, and that resolutions passed by the guardians purporting to limit the powers of the vaccination officer under the Acts were *ultra vires* and of no avail, and that the vaccination officer when once appointed had, as such, full powers, independently of the guardians, to take such proceedings under the Vaccination Acts, and that proof of notice and visit by the public vaccinator was not a condition precedent to a prosecution by the vaccination officer under the said Acts.

The justices convicted Moore, and fined him 1s. with 6s. 6d. costs.

Moore appealed.

The questions on which the opinion of the court was sought were as follows : (1) Whether the vaccination officer, by virtue of his appointment as vaccination officer, without directions, general or special, from the guardians at any time, and notwithstanding the guardians' directions not to prosecute in certain specified cases, could institute proceedings under the Vaccination Acts 1867 to 1898 as vaccination officer of the guardians; (2) whether it was a condition precedent to a prosecution by the vaccination officer under sect. 29 of the Vaccination Act 1867 that due proof must be given of the public vaccinator having previously given to the parent the notice mentioned in the Vaccination Acts 1867 to 1898, and visited the house of the child as therein prescribed.

Vaccination Act 1867 (30 & 31 Vict. c. 84) :

Sect 16 The parent of every child born in England shall within three months after the birth of such child, or where, by reason of the death, illness, absence, or inability of the parent or other cause, any other person shall have the custody of such child, such person shall take it or cause it to be taken to the public vaccinator of the vaccination district in which it shall be then resident, according to the provisions of this or any other Act, to be vaccinated, or shall within such period as aforesaid cause it to be vaccinated by some medical practitioner; and the public vaccinator to whom such child shall be so brought is hereby required with all reasonable dispatch, subject to the conditions hereinafter mentioned, to vaccinate such child.

Sect. 29. Every parent or person having the custody of a child who shall neglect to take such child or to cause it to be taken to be vaccinated, or after vaccination to be inspected, and shall not render a reasonable excuse for his neglect shall be guilty of an offence and be liable to be proceeded against summarily.

Vaccination Act 1898 (61 & 62 Vict. c. 49) :

Sect. 1 (1). The period within which the parent or other person having the custody of the child shall cause the child to be vaccinated shall be six months from the birth of the child instead of the period of three months mentioned in sect. 16 of the Vaccination Act 1867, and so much of that section as requires that the child shall be taken to a public vaccinator to be vaccinated shall be repealed. . . . (3) If a child is not vaccinated within four months after its birth the public vaccinator of the district after at least twenty-four hours' notice to the parent shall visit the home of the child and shall offer to vaccinate the child with glycerinated calf lymph, or such other lymph as may be issued by the Local Government Board.

Rawlinson, K.C. (*Schultess Young* with him) for the appellant.—Under sect. 1 (3) of the Vaccination Act 1898 the public vaccinator must give the parent of the child notice, and must visit the house and offer to vaccinate it. Until he has done this there is no neglect to

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vaccinate on the part of the parent, and there is, therefore, no offence against the Vaccination Acts. In other words, the notice and the visit are both conditions precedent to an offence, and, as such, must be proved before there is evidence to support a prosecution. This view is supported by sched. 5 to the general order under the Vaccination Acts 1867 to 1898, made the 18th Oct. 1898. Par. 5 of form A in that schedule says: "The public vaccinator will give you at least twenty-four hours' notice of his intention to visit the home of the child as mentioned above in pars. 3 and 4, and the visit will, in the absence of any sufficient reason for delay, be made within two weeks after the receipt of the notice from you or from the vaccination officer as the case may be. If when the public vaccinator visits the home of the child," and so on. This I submit clearly shows that the parent is not in default until the vaccination officer has sent notice, and has visited the child's home. My second point arises on the construction of sect. 29 of the Act of 1867. That section makes neglect to vaccinate an offence only when the parent shall not render a reasonable excuse. To whom is he to render the reasonable excuse? I submit clearly to the guardians. They are the only authority who have to make inquiry into it under sect. 27, to whom he can make the reasonable excuse. [Lord ALVERSTONE, C.J.—I should have thought it must be rendered to the persons who were to convict him of the penalty.] I submit not, my Lord. Before a prosecution is commenced it must be established by inquiries that the parent had no reasonable excuse. No doubt the same defence can be set up before the justices, but my point is that there can be no prosecution until it is ascertained that the parent has no reasonable excuse. Sect. 27 is repealed, but the law on this point is not altered. Unless he neglects without reasonable excuse no crime is committed; and if the guardians, having inquired into the matter, and having found that the parent has a reasonable excuse, directs the vaccination officer not to prosecute, the vaccination officer has no right or power to prosecute *qua* vaccination officer. No doubt, by the Vaccination Act 1871, the appointment of vaccination officers which had been merely permissive before was made compulsory on the guardians, and the duties and powers given to registrars by the Act of 1867 were transferred to them. But there is nothing in that Act to enable the vaccination officer to disregard the orders of the guardians, whose officer he is. It is true that by art. 17 of the General Vaccination Order 1874 power was given to the Local Government Board to interfere between the guardians and their officer, and to order the latter to prosecute. But that order has been rescinded by the order of 1898, which contains no such provision. It must be assumed then that it is the deliberate intention of Parliament to leave the matter of inquiry and initiation of prosecutions to the guardians, whose officer prosecutes, and who are responsible for the costs of the prosecution. The order of 1898 contains an express provision that the vaccination officer shall, "when required by the guardians, give them full information as to any legal proceedings taken by him as vaccination officer, and subject to the provisions of the Vaccination Acts 1867 to 1898, and of this order, shall obey all lawful

orders of the guardians which are applicable to his office." As to the cases bearing on the point, in *Robinson v. Lowe* (13 Times L. Rep. 19) Wright, J. condemned the general directions to prosecute given by the guardians in that case. It is true that in *Bramble v. Lowe* (1897) 1 Q. B. 283 he qualified his remarks in *Robinson v. Lowe* (*sup.*), and held that a general direction was sufficient, and seemed to be of opinion that proceedings might be taken by the vaccination officer without any orders from the guardians. That decision, however, was upon sect. 31 of the Act of 1867—not upon sect. 29—and, moreover, there no question arose as to the authority of a vaccination officer to prosecute in specific cases, where he had received orders not to prosecute from the guardians, whose servant he is.

The Attorney-General (Sir R. B. Finlay, K.C.) (with him *H. Sutton*) obtained leave to intervene on behalf of the Local Government Board.—The question as to the right of vaccination officers to prosecute in proper cases without the authority or even against the directions of their guardians is a matter of much public importance, and the Local Government Board are anxious to have the decision of the court upon it. As to the first point, it turns upon sect. 1 (3) of the Act of 1898. I submit with regard to it, firstly, that on the construction of that sub-section it is clear proof of the service of the notice, and the visit of the public vaccinator is not a condition precedent to the initiation of prosecution. It may be that if in a prosecution it is shown that no notice was sent and no visit paid the court might consider this a reasonable excuse for the parent's failure to have the child vaccinated; but, I submit that the offence is not having the child vaccinated within the period fixed by law, and that the notice and visit are not a condition precedent to the offence nor proof of them a condition precedent to a prosecution. As to the second and more important point, the facts set out in the case show clearly that there was no real inquiry here. The names of the persons in default were sent up to the guardians, and the same day the guardians passed a resolution forbidding prosecution. The result, of course, is to nullify the order recently made by this court directing them to appoint a vaccination officer who would enforce the Vaccination Acts. But I respectfully ask the court for a decision on the question of principle. Is the vaccination officer entitled without the authority or contrary to the orders of his guardians to commence prosecutions as vaccination officer in proper cases? I submit that he is, that the duty of enforcing the vaccination laws is on him and not on the guardians. The only section placing that duty on the guardians is sect. 27 of the Act of 1867, and it is now repealed. And the question of reasonable excuse referred to in sect. 31 of the same Act is for the court which hears the prosecution. The General Vaccination Order 1898 clearly recognises that the duty to prosecute is now on the vaccination officer, and that order has statutory force. By art. 26 the vaccination officer must observe the instructions given in the 4th schedule to the order. Among the instructions in that schedule is the following: (6, d) "If the vaccination officer has not received in respect of any child a certificate under sect. 2 of the Vaccination Act 1898 within the time limited by that section, and at the end of seven days after the expiration

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of six calendar months from the birth of the child has not received any other of the certificates mentioned in sub-division (a) of this paragraph, the vaccination officer shall forthwith give a notice in the form K, set out in the 5th schedule to this order . . . to the parent. . . . If that notice is not duly complied with within the time specified therein it will become the duty of the vaccination officer, under the Vaccination Act 1871, to take proceedings for the enforcement of the law." This clearly recognises that it is the duty of the vaccination officer to take proceedings in proper cases. It is true that under art. 29 of this order the guardians are liable to pay their vaccination officer's costs of prosecutions, and by art. 26 their vaccination officer is to give the guardians information as to legal proceedings and obey the orders of the guardians; but the costs the guardians are to pay are confined to "reasonable costs and expenses," and the orders the vaccination officer is to obey are confined to "all lawful orders." Here I contend the guardians' orders were not lawful, having regard to the vaccination officer's duties under the Vaccination Acts, and the costs were reasonable, since the person proceeded against had failed to have his child vaccinated without reasonable excuse. The case of *Bramble v. Lowe* (sup.) decides that a general direction to prosecute is sufficient, but Wright, J. expressly says that the vaccination officer, in his opinion, was entitled to prosecute without any direction at all. In *Knight v. Halliwell* (30 L. T. Rep. 359, at p. 361; L. Rep. 9 Q. B. 412), Blackburn, J. says, the vaccination officer was right in proceeding without special instruction.

Parfitt, for the respondent, was not heard.

Rawlinson, K.C. in reply.—The guardians made no real inquiry in this case because their orders to the vaccination officer were not final. They merely directed him not to prosecute until further orders. Again *Bramble v. Lowe* (sup.) is a decision on sect. 31, and I contend it goes no further than to decide that special instructions are not necessary to enable a vaccination officer to apply for an order when a child shall be vaccinated; that is not a criminal proceeding.

Lord ALVERSTONE, C.J.—The points raised in this case are no doubt questions of great public importance, and it was for that reason, and that reason only, that we thought it right to hear the Attorney-General, and we should if necessary have heard Mr. Parfitt, in order to see that we had before us all the materials on which the judgment should be formed, and not that we have any doubt, notwithstanding the very able argument of Mr. Rawlinson, as to what the judgment should be that we are about to pronounce. The first point taken was that in every prosecution the prosecution must prove the notice and the domiciliary visit of the public vaccinator before the prosecution can be launched at all. That depends upon three sections of the Act of Parliament which, I think, make the matter abundantly clear. Sect. 16 of the Act of 1867 now stands in these terms: "The parent of every child born in England shall, or where, by reason of the death, illness, absence, or inability of the parent or other cause, any other person shall have the custody of such child, such person shall cause it to be vaccinated by some medical practitioner."

The reason for the omission from the section of all the other words, which I need not refer to now, is because by reason of sect. 1 of the Act of 1898 provision is made, not that the child shall be taken to the vaccination officer, but by a new and a most salutary provision—as I think, one of the greatest amendments of the Vaccination Acts—that the medical man must visit the home of the parent of the child, it being the duty of the parent to cause the child to be vaccinated, and the medical man has to go to the house. Sect. 29, under which the prosecution was launched, is now in these terms: "Every parent or person having the custody of a child who shall neglect to cause it to be vaccinated, or after vaccination to be inspected, and shall not render a reasonable excuse for his neglect, shall be guilty of an offence." Now, it seems to us absolutely plain that when the magistrates have the case before them they will have to consider, and must consider under the question of whether there is a reasonable excuse shown, whether there has been a visit or whether there has not been a visit by the public vaccinator; but, assuming no such point is raised, it would be involving the parties in an absolutely useless and unnecessary expense if there should be required to be formal proof in every prosecution of those conditions, without which, of course, one cannot reasonably imagine that any prosecution would have taken place. The statute imposes upon the public vaccinator the duty of going there, and imposes on the parent the duty of causing his child to be vaccinated under those conditions, and to say that the prosecution must prove that the public vaccinator did visit, or that the matter is at all relevant except in connection with the consideration of what is a reasonable excuse, appears to us putting forward an argument in which there is nothing substantial, and we are of opinion that it is not necessary to give this formal proof, though it may be very material to consider what has happened in the event of it arising under some question of reasonable excuse. The next question, though it does not present any greater difficulty, is of some public importance, and I may say, speaking for myself, that I answer this question because we have been asked to answer it. It is a point of law which is capable of argument and has been argued before us, and I must not be thought to indorse the opinion that such a kind of condition can possibly be a condition for a prosecution under sect. 29. I will refer to that before I deal with the merits of the questions that have been argued before us. Sect. 29 says that every parent or person who does not cause a child to be vaccinated shall be guilty of an offence, unless he shows a reasonable excuse. Now, the real point which arises with regard to a prosecution, apart from the question which is stated to us, is whether it is necessary to show that the guardians have authorised a prosecution before the magistrates could entertain it. I am of opinion that there is nothing of the kind necessary. My brother Channell referred, in the course of the argument, to cases in lunacy, and there are many other cases where the fiat of the Attorney-General has to be obtained, as in the case of criminal proceedings against trustees, where you have to prove the fiat, and the officer goes down to prove it. In my opinion there is no ground for saying that the consent of the guardians is, on the face

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of the statute, on the ground of any consideration supposed to be involved in the statute to be made a condition precedent to this prosecution. But the case goes further, and we are asked to say whether the vaccination officer, by virtue of his appointment as such, without directions, general or special, from the guardians at any time, and notwithstanding the guardians' directions not to prosecute in certain specified cases, can institute proceedings under the Vaccination Acts 1876 to 1898, as vaccination officer of the guardians. Now, I do not deal with any question between the guardians and the officer as to any question of expense he has incurred, or anything else which will arise as between the officer and the guardians; I deal with the question of what are the public duties of the vaccination officer. We have again to go back and see the scheme of the Legislature. Sect. 16 I have already read. The parent is to cause the child to be vaccinated. Sect. 29 creates the offence. Sect. 31 was a section which gave an alternative method of getting the child vaccinated, which was a duty undoubtedly imposed originally upon the registrar or any officer appointed by the guardians, and which was subsequently by the Act of 1874 imposed upon the vaccination officer. Now, in my judgment, having regard to the provisions of the Act, and the duty which the vaccination officer has to perform, the vaccinating officer has the duty of taking proceedings. I should have come to this conclusion quite independently of the order, but I think that, most properly, the order of 1898 makes the matter, if I may use the expression, more abundantly clear. It is not as if this kind of order was passed for the first time. From the year 1874, when the Vaccination Act 1874 (37 & 38 Vict. c. 75) removed any doubt upon the point as to the powers of the Local Government Board, these orders have been made. For the purpose of to-day, I think the Attorney-General is right in saying this order is in the position of a statute. There had been in the order of 1874 arts. 16 and 17, which were under consideration in the case of *Bramble v. Love* (sup.), where my brother Wright had expressed his opinion, for the purpose of sect. 31 (I agree for no more than that), that, notwithstanding the provisions of the then existing order as to the power of the guardians to direct prosecutions, the vaccination officer had the duty to proceed. I agree with Mr. Rawlinson that that is not a decision upon these sections which we are considering, but it is a decision upon analogous matter. Now, I need not read again the provisions of the order of 1898, referred to by Mr. Rawlinson and the Attorney-General; but there is a positive direction that the instructions contained in the 4th schedule are to be obeyed by the vaccination officer. The instructions are that the vaccination officer shall give a certain notice, and if it is not complied with it will become the duty of the vaccination officer, under the Vaccination Act of 1871, to take proceedings for the enforcement of the law, and form K (which he is directed to serve) tells the person that, failing the vaccination of the child, it will be his duty to take the proper steps for securing the enforcement of the law. Now, in my opinion, that order cannot, having regard to the previous legislation and the previous orders, and the powers of the Acts of 1871 and 1874, be said to be *ultra vires*. Mr. Rawlinson does not go as far as saying it is *ultra vires*, but

argues that if the vaccination officer affects to take proceedings which are either generally prohibited or specially prohibited by the guardians he is bound in that respect to obey what are supposed to be lawful directions of the guardians. I think he is bound to obey the order of the Local Government Board, and any direction of the board of guardians which interferes with that order of the Local Government Board would be illegal, and he is not bound to obey it; but in my opinion there is the duty of the vaccination officer, as such, to take these proceedings. Mr. Rawlinson has said that we ought to assume in this case there was a *bona fide* investigation by the guardians into each of these cases, and that they thought there ought not to be a prosecution upon the merits. I cannot come to that conclusion; but I do not wish to be thought to base my judgment on any such narrow ground, I base my judgment on the ground of its being the duty of the vaccination officer under the statutes and orders to see that the provisions of the Act are observed, and to take proceedings if those provisions are not observed; and I answer the question, therefore, in the way I have said, not because it could be alleged it was a condition precedent to the prosecution being entertained, but because we have been asked to express an opinion on the point before us, and I am therefore of opinion that the appeal should be dismissed with costs.

DARLING, J.—I am of the same opinion. On the first point raised, whether it was necessary to prove that the doctor had attended at the house, I do not desire to say anything. The other point raises a legal question. The question that we are asked upon that head is this: Whether the vaccination officer can legally prosecute for breaches of the law, if ordered by the guardians not to do so, and so ordered by them for no reason given whatever? In effect, that question, if you look at the case and the documents set out in it, and on which it is founded, comes to this: that the question we are asked is whether guardians, who have been compelled by *mandamus* to appoint an officer to enforce the vaccination laws, can obey the law by appointing a vaccination officer, paying his salary, and then ordering him never to prosecute anyone unless he has their sealed order to do so, and then never issuing any sealed order, nor, so far as I can see, ever intending to issue one? Now, that is the question. To act in such a way as these guardians show, upon these resolutions that they pass, they intend to act, is simply to claim a right to reduce the vaccination laws to an absolute nullity. They pass a resolution in which they condemn the vaccination officer for prosecuting defaulters. They bring up a list of ten people—defaulters—and another list of twelve people—defaulters. They passed a resolution that he is hereby instructed to take no further steps instituting proceedings against those persons until he receives instructions from the guardians to do so, and it was very well known that they had not investigated the cases for a moment. They do not intend to issue instructions, and they set out in their resolution that the guardians will specially authorise him in writing under their common seal to prosecute such defaulters, not "as have broken the law," but the words they use are very significant, "as they desire to be prosecuted." I

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do not want to use any words which may seem disrespectful to this elected public body—the Leicester Guardians—but when I put this claim in words it irresistibly occurs to me—and I should think it would irresistibly occur to anybody who might not choose to say it, but I think I will—that this claim of the guardians is to liken the vaccination laws, and to hold that Parliament meant them to be like a very celebrated recipe for dressing cucumber, which was that you were to choose it very carefully, just as though it were a vaccination officer, peel it and cut it up into delicate slices, add to it expensive things like vinegar, pepper, salt, and the best Lucca oil, and then throw the whole mixture out of window. In simple language, that is what the claim of these guardians comes to, and I cannot believe that Parliament devoted a whole session and worlds of trouble to reduce the vaccination laws to any such ridiculous basis. I think the argument put before us by the Attorney-General really was not necessary, but it made the matter so plain that it was to the public advantage it should be put forward, and I agree in the judgment and in the language in which it has been expressed by my Lord.

CHANNELL, J.—I agree, and I do not think it is necessary to add anything to my Lord's judgment.

Appeal dismissed.

Solicitors for the appellant, *Crowders, Visard and Oldham*, for *Owston, Dickinson, and Simpson*, Leicester.

Solicitors for the respondent, *Fowler and Fowler*, Leicester.

Solicitors for the Local Government Board, *Sharpe, Parker, Pritchard, Barham, and Lawford*.

Thursday, March 13, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GREENWOOD (app.) v. BACKHOUSE (resp.). (a)
Animal—Horse—Working in an unfit state—Guilty knowledge—Prevention of Cruelty to Animals Act 1849 (12 & 13 Vict. c. 92), s. 2.

The appellant, who was charged with causing two horses to be worked in an unfit state, carried on business in London, and the two horses in question were under the charge of one L. at a farm at C., where the appellant resided. He was practically always away, and did not see the horses above once a fortnight, they being under the entire management of L. There was some evidence that the appellant knew that the horses had been out of condition at some time, but no evidence was given as to the date when that was, or how long it was before the alleged improper working. There was no evidence that the appellant had interfered with L., had given any order for the horses to be worked, or knew of their condition on the day in question. On the 2nd May 1901 the horses were being worked in an unfit state. The justices convicted the appellant.

Held (allowing the appeal), that there was a failure on the part of the prosecution to give any evidence of guilty knowledge with regard to the offence in question.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

CASE stated on an information preferred by the respondent against the appellant charging him with unlawfully causing to be cruelly ill-treated, abused, and tortured certain animals—to wit, two horses—by causing them to be worked in an unfit state.

Upon the hearing of the information the following facts were admitted or proved:—

The appellant was a slate merchant carrying on business in London and employing horses in his business. He resided at Hill Top, Chaldon, where he had a pleasure farm of 100 acres.

At the beginning of May 1901 John Lunn and a man named Bradford were in the employment of the appellant at Hill Top Farm, Lunn in the capacity of foreman.

On the 2nd May 1901 two horses were being worked in an unfit state on the appellant's farm by Bradford. They were suffering from old sores on the shoulders.

The following evidence was also given: Two witnesses called by the respondent swore that on the day in question on one horse there was a mass of old sores extending from the withers to the point of the shoulders, and that on the shoulders of the other horse was an old sore the size of a five-shilling piece.

The respondent swore that on the 3rd May 1901 he went to Hill Top Farm. The stable door was locked, but he looked through a ventilator and the two horses were pointed out to him by the first two witnesses. He could see a large sore on the right shoulder of one of them which was standing about 7ft. away—apparently an old sore.

On the same day he saw the appellant and said to him: "I've called to see you respecting two horses the police stopped yesterday which were suffering from sore shoulders and were unfit for work." The appellant replied: "Write to me, and I will reply to you." The respondent declined to do so, and added: "I understand that you have given orders for these animals to be locked up." The appellant replied: "Precisely so. If you are not going to summon me, you shall see the horses; but if you are, you shall not. I'll get a veterinary surgeon to see them."

The respondent offered to see the horses with the appellant, or to see them when the veterinary surgeon came. The appellant again wanted an undertaking that the respondent would not summon him as a condition of his being allowed to see the horses.

Later on the same day the appellant came up to the respondent and said: "It seems to me as if you wanted to get people fined or put in prison." The respondent said that he was waiting to see Lunn.

Later on still the appellant appeared with Lunn, and said to the respondent: "Now, here is Lunn, and I've told him that he is not to say one word to you or to answer any questions."

The respondent said: "I shall ask him one question," and then he said to Lunn: "Have you ever spoken to your master about the horses' shoulders?" The appellant said: "Come on; don't you answer him; don't say a word," and turned him away.

The respondent followed, and said to the appellant that Bradford had told him that he (Bradford) had been dressing the shoulders with hot water and salt for some few days, and that he (Bradford) had seen the appellant go into the

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stables while the horses were suffering from the sores. To this the appellant made no reply.

For the defence the appellant gave evidence, and swore that he took no personal management of the farm, but left that to Lunn. The last time he saw the horses at work before the 2nd May was about a week previously, when he saw them at work in the distance, but could not tell whether anything was the matter with them or not. He did not know the state they were in. He was in business in London and left home very early in the morning, and, as a rule, did not get back before seven o'clock in the evening. In cross-examination the appellant said that he did not go to see that his horses were well fed or kept clean. He visited the stables perhaps once a week or a fortnight to see the horses. He went in order to go round and see all there was there. He did not know that water and salt had been obtained from the house, and he had not been spoken to about the wounds. There was a previous case of the same kind against him in which the respondent gave untrue evidence; that was why he (the appellant) said to him: "If you have any questions, in order that there may be no misunderstanding, you put them in writing, and you shall have the answers in writing." That previous case was dismissed. He had never, to his knowledge, been in the stable when the horses had suffered from boils or sores.

Lunn was also called, and swore that the appellant did not see the animals often; that he (Lunn) had the whole management of the horses, and that the appellant was in London all day; and that he did not think that the appellant knew anything of the condition of the animals. He did not remember seeing the appellant in the stables during the week previous to the 2nd May. He (Lunn) had said to Police-constable Boon that the appellant would hold him (Lunn) responsible, but he did not see how he could be responsible for this sort of thing on his pay.

On the part of the appellant it was contended that there was no evidence upon which the appellant could be convicted of the offence charged against him.

The justices were of opinion that there was such evidence, and they accordingly convicted the appellant.

The question of law arising on the above statement for the opinion of this court was whether there was any evidence upon which the conviction could be supported.

Woodcock for the appellant.—Here there is an entire absence of guilty knowledge which is necessary for a conviction under sect. 2 of 12 & 13 Vict. c. 92. That guilty knowledge must be proved by the prosecution. It is not enough to prove that the appellant knew the state of the horses; it must be proved that he knew they were being worked in that state. There is no evidence that he knew that the horses were being worked in that state, or were going to be worked. He referred to

Elliott v. Osborne, 65 L. T. Rep. 378; 17 Cox C. C. 346;

Small v. Warr, 47 J. P. 20.

Cecil Dwyer (Colam with him) for the respondent.—There is some evidence upon which the justices could draw the conclusions which they have. In *Elliott v. Osborne* (sup.) and *Small v.*

Warr (sup.) the only evidence was that the persons there were in the relationship of master and servant respectively; that, of course, would not be sufficient for a conviction, but the facts here go a good deal further than that. The conviction was right.

LORD ALVERSTONE, C.J.—Of course, if there is evidence on which the magistrates can act, whatever we may think of their finding, we ought not to interfere. But in this case, when the whole of the evidence is looked at, we do not think there is evidence of guilty knowledge on the part of the defendant. It has been recognised for a great many years that under this Act there must be some guilty knowledge. The defendant was, on the evidence, in London all the day. It is further said that, on the evidence, he was practically always away, but he did visit the stables once a fortnight. It is also sworn by Lunn, who was called, that he had the whole management of the horses, that the appellant was in London all day, and that he (Lunn) did not think the appellant knew anything of the condition of the animals. The only evidence which may be said to be against that, and I think it cannot be said to be wholly inadmissible, is some evidence that the inspector, making a statement to the appellant, made a statement in reference to what Bradford had said to him, which would go to show that the appellant was told by the inspector that he did know that the animals had been out of condition at some time, because it was stated to him, and he made no reply. He said that he had seen Bradford with water and salt for some few days, and that the appellant had gone into the stable while the horses were suffering from sores. At first I thought that that was enough; on consideration I think not. It is perfectly true that it is said that the appellant made no reply, but nothing is said as to the date when that occurred, and how long it was before the alleged improper working, and there is no evidence that the appellant had interfered with Lunn, had given any order for the horses to be worked, or knew of the condition of the horses on this day. I think the conversation and the apparent reluctance to give answers to the inspector was sufficiently explained, or so sufficiently explained that the magistrates ought not to act upon that confirmative evidence. Whatever view may be taken of the particular defence set up, or the particular explanation given by the defendant, I think there was on the part of the prosecution failure to give sufficient evidence, or any evidence on which the magistrates ought to have acted, of guilty knowledge on the part of the appellant. Therefore the appeal should be allowed and the conviction quashed.

DARLING, J.—I am of the same opinion. It seems to me that what was before the magistrates amounted to a suspicious amount of ignorance, and the magistrates interpreted suspicious ignorance to be guilty knowledge. I do not think that they are the same thing.

CHANNELL, J.—I agree. I assume that the magistrates are entitled to disbelieve the appellant's evidence if they liked. There was something to the contrary, and we cannot judge whether they were right or wrong in disbelieving him, but, assuming that they did disbelieve him, that does not supply the defect which seems to

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me to exist in the affirmative evidence for the prosecution.

Appeal allowed.

Solicitors: *Dixon, Weld, and Dizons; S. G. Polhill.*

March 13 and 14, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. TEMPEST AND OTHERS. (a)

Licensing—Justices—Likelihood of bias—Justice holding brewery shares—Disqualification—Licensing Act 1872 (35 & 36 Vict. c. 94), ss. 38, 60.

An application was made to the licensing committee of the borough of T. for the removal of a licence to new premises.

Three of the justices were members of the borough council of T., and one held shares in a brewery company that sold beer within the district.

A suggestion was made before the committee that if the transfer was granted another licence would be given up and certain property would be placed at the disposal of the corporation for town improvements. The transfer was granted.

The confirming authority, which included the four justices, confirmed the transfer, but the offer above stated was withdrawn.

Held, that there was not any likelihood of bias on the part of the three justices who were members of the borough council, so as to render the orders made invalid; and

Held, further, that the orders were not invalid by reason of the fact that the fourth justice adjudicated, owing to proviso (3) of sect. 60 of the Licensing Act 1872.

Secus, where actual bias could be shown in fact to exist.

CAUSE shown against a rule nisi for a writ of certiorari to bring up and quash an order dated the 23rd Oct. 1901 confirming and sanctioning an order, dated the 25th Sept. 1901, of the licensing committee of the borough of Tamworth for the removal of the licence of the Rose and Crown inn to certain new premises to be erected, on the ground of bias on the part of some justices and pecuniary interest on the part of one of them.

From the affidavits filed in support and opposition to the rule it appeared that the owners of the Rose and Crown inn gave orders for the preparation of plans for the erection of a new building on a site opposite to that upon which the Rose and Crown stood. It was arranged that the building line of the new premises should be set back about 7ft., the result of which would be that the corporation of Tamworth would become possessed of a strip of land, 7ft. wide, running the whole length of the new premises.

The plans as arranged were submitted to the Sanitary and Streets Committee of the borough council on the 11th July, and were subsequently approved by them.

Three of the members of the borough council were also members of the licensing committee of the borough, and one of the justices held shares in Allsopps Limited, a brewery company which sold beer in the district.

On the 25th Sept. an application was made to

the licensing committee, at the meeting of which the justices above referred to were present, for the provisional removal of the licence of the Rose and Crown to the proposed new premises.

It was stated by counsel at the hearing on behalf of the applicant that if the application was granted the owners would surrender another licence which they held in the town, and would also place the site of the old Rose and Crown and of six cottages at the disposal of the corporation.

The licence for the new premises was granted by a majority of the justices.

On the 23rd Oct. the confirming authority, which consisted, among others, of the above justices, confirmed the order of the licensing committee.

At this hearing the offer made to surrender the old site of the Rose and Crown and give the other property was withdrawn, and after such withdrawal the licence was confirmed as stated.

It was suggested that there was bias on the part of the three justices because of the proposal as to the old site of the Rose and Crown and the cottages having regard to the fact that some of the licensing justices were members of the borough council, and that the corporation would benefit by the transfer being allowed, and that as to the other justice, the orders were bad because he had adjudicated, having a pecuniary interest in the shares of a brewery company, which precluded him from sitting under the Licensing Act 1872, s. 60.

The justices denied that their judgment had in any way been affected either by the acquisition of the strip of land referred to or by the suggestion as to the handing over of the old site of the Rose and Crown and the cottages to the corporation.

Laing (George Elliott with him) showed cause against the rule.—With regard to the justice who had an interest in a brewery I cannot contend that he was not disqualified, but I contend that this would not affect the result, having regard to the proviso in sect. 60 of the Licensing Act 1872. The words of that section are: "No justice shall act for any purpose under this Act or under any of the Intoxicating Liquor Licensing Acts . . . who is in partnership with or holds any share in any company which is a common brewer . . . or retailer . . . of any intoxicating liquor in the licensing district or in the district or districts adjoining to that in which such justice usually acts. . . . No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid." Also by sect. 38 of that Act it is provided: "No objection shall be made to any licence granted or confirmed in pursuance of this section on the ground that the justices or committee of justices who granted or confirmed the same were not qualified to make such grant or confirmation." There was a similar disqualification in the Act of 1828, but there was no proviso. Here with regard to those justices who were members of the borough council, I contend that there was no offer made, but if in fact an offer had been made it was absolutely withdrawn, and did not weigh at all with them when considering the application. The whole question here turns upon whether or no there was any bias in fact. That would no doubt show the distinction between this case and *Rex v.*

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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Justices of Sunderland (ante, p. 288; 85 L. T. Rep. 183; (1901) 2 K. B. 357). In that case the late Master of the Rolls laid it down as follows: "What is the rule on the subject? If the justice acting is pecuniarily interested there clearly is a bias which disqualifies him. There is, however, no question of any personal pecuniary interest in this case. Then what is the rule with regard to bias in cases other than those in which there is a pecuniary interest on the part of the justice. In *Reg. v. Rand* (L. Rep. 1 Q. B. 230) Blackburn, J., who delivered the judgment of the court, after stating that in cases where there was a direct pecuniary interest in the subject of inquiry, however small, that no doubt disqualifies a person from acting as a judge in the matter, but that in the case before the court there was no such interest in the justices alleged to be biased, proceeded to say: 'But the only way in which the facts could affect their impartiality would be that they might have a tendency to favour those for whom they were trustees, and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would from kindred or any other cause have a bias in favour of one of the parties, it would be very wrong in him to act, and we are not to be understood to say that where there is a real bias of this sort this court would not interfere.' " There can be no real bias in this case, and the matter is quite different to the facts in *Rex v. Justices of Sunderland* (sup.)

Hestall in support of the rule.—With regard to sects. 38 & 60 of the Licensing Act, they must be read together. They cannot destroy a disqualification of justices on the ground of bias, and they cannot furnish any answer to a case like the present one. The meaning of those provisions is that any order made would be valid, and not by reason of the constitution of the tribunal on the particular occasion, have to be considered as a nullity. If, for instance, a licence was granted and liquor sold under it, which licence was afterwards found to be bad on the ground of the disqualification of the justices, the seller of the liquor would be protected. [Lord ALVERSTONE, C.J.—That will not do, for the words are: "No act done by any justice." The act done by the justice is not selling the liquor, but sitting and sanctioning the licence.] I submit that the word "invalid" means this: it does not mean that the section shall have the power of setting up the justice who but for this proviso would have had no jurisdiction on objection being taken, but it means that the innocent third party shall not suffer by being liable to penalties under the Licensing Acts for which in no way he could be held responsible. The facts here clearly show reasonable apprehension of bias, owing to the combination of circumstances. He referred to

Rex v. Justices of Sunderland (sup.);

Reg. v. Rand (sup.);

Reg. v. Meyer, 34 L. T. Rep. 247; 1 Q. B. Div. 178.

In *Reg. v. Hain* (12 Times L. Rep. 323) the late Lord Chief Justice, Lord Russell, said: "But could it be said that these three gentlemen approached the consideration of the question of the licence under circumstances free from all probability of bias? Was there not, on the contrary, a strong probability that they would be,

consciously or unconsciously, subject to bias?" Again, in *Reg. v. Huggins* (72 L. T. Rep. 193; (1895) 1 Q. B. 563) Wills, J. said: "Here there is no question of Martin having any pecuniary interest in the result of the litigation, nor is it suggested that he had any actual bias against the defendant. The question is whether there was a reasonable apprehension of bias . . . it is far safer to enlarge the area of this class of objections to the qualifications of justices than to restrict it." I submit the rule should be made absolute.

LORD ALVERSTONE, C.J.—This rule was moved upon affidavits which stated the possible bias of certain justices who were members of the corporation of Tamworth, and also on the ground that one of the justices had an interest which prohibited him from sitting under sect. 60 of the Act of 1872. I adopt the test that was laid down by the Master of the Rolls in the *Sunderland* case, which I well remember, because it was argued at very great length before my brother Lawrance and myself (84 L. T. Rep. 591). We took a view on the facts different from that which the Court of Appeal took. We thought it within the case of *Reg. v. Justice of Stockport* (60 J. P. 552), of which the Court of Appeal have expressed disapproval. The test laid down by the late Master of the Rolls was this: The decision must really turn on a question of fact whether there was or was not under the circumstances a real likelihood that there would be a bias on the part of the justices alleged to have been so biased. In this case the facts which gave rise to the question were these: Before the licensing committee on which these gentlemen sat the brewers had offered or expressed the intention of giving to the town or giving for the purpose of a street in the town the site of the public-house and some cottages next to it. There was also another reason urged for the grant of the transfer of the licence, that another licence in another part of the town was going to be given up, and that latter consideration has been held to be a legal consideration for the magistrates to bear in mind when dealing with the transfer of a licence. Another point raised, which in my opinion is not really material, that when the new premises were going to be fitted up there was to be a widening of the street. It seems clear that the widening of the street was necessitated as a public improvement, and had been practically determined on by the street committee, and did not depend on any offer of the brewers. Before the confirming tribunal, where the objection was taken to the magistrates who were sitting, the offer was stated to be withdrawn. The question is whether we ought to come to the conclusion that the statement made before the licensing committee and withdrawn at the time of the hearing for confirmation was such that the magistrates would be likely to be biased in granting the transfer because of the hope and expectation that the brewers would carry out their original intention though they had withdrawn it, and that therefore these magistrates would not bring to bear on the question an open mind or at any rate that there was a likelihood or probability that they would be biased. Taking the question of fact, and applying strictly the rule laid down in the *Sunderland* case, it seems to me that the evidence was not sufficient. I for

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myself think we ought to attach importance to this. I do not disregard the affidavit of the magistrates themselves, who said that they considered the matter independently, that they were not influenced, that they thought it was good for the town to have better premises, and that also the number of licences was being reduced. In the face of that ought we to hold that this statement by counsel—probably made imprudently but still made at the original hearing—ought to be enough for us to say there was a reasonable probability of the magistrates not being unbiassed, and that there was such reasonable probability of their being biassed that we ought to hold they were disqualified? Applying the test indicated by the Court of Appeal, I come to the conclusion there was not sufficient evidence in this case of bias. Then remains the further point, which is not without difficulty. The fourth magistrate who was present at the confirming sessions appears to have a share in *Allsopps*, and it is not disputed he comes within the opening words of sect. 60. The point we have to consider is whether the licence is bad because he adjudicated upon it notwithstanding the provisions of that section. The true meaning of the proviso at the end of that section is not without difficulty. The words are: "No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid." It was argued by Mr. Hextall that comparing that with the analogous provision in sect. 38, it meant to say that no objection should be taken to the sale of liquor in that case, acting under the licence, and if the question had arisen solely under sect. 38, I think that there would be some ground for that argument. But when you look at the actual language of sect. 60, which creates the status of disqualification, it says that: "No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid." In my opinion it is impossible to put such a limited construction as that contended for. I think the words of the Act here occurring in the proviso to a section creating a disqualification against the doing of the act, and creating a penalty, cannot be construed so narrowly; that is to say, that the act was not intended to be protected if that was the only disqualification. I would further point out that this proviso would be no protection where a case of actual bias was raised—where it is said that the interest of the brewer is such that he would be biassed. In that case, of course, the section would not be wanted, but it is quite plain to my mind that the section saying "by reason only of such disqualification" means thereby what I may call the technical disqualification created by the Act. But if any brewer was to sit, and the case made was that he was biassed in fact, or likely to be biassed in fact, different considerations would arise. Under all the circumstances I think neither of the objections are successful, and the rule must be discharged.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree.

Rule discharged.

Solicitors: *Braikenridge and Edwards*, for *Nevill, Atkin, and Mathews*, Tamworth; *Andrew Wood and Purves*, for *J. H. Dewes*, Tamworth.

March 13 and 17, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. FRENCH; *Ex parte* ROBERTS AND ANOTHER. (a)

Justices — Jurisdiction — Conviction — Right of common — "Title to any lands . . . or any interest therein" — Offences against the Person Act 1861 (24 & 25 Vict. c. 100), s. 46.

Where an assault was committed by one commoner on another, and it was alleged that the assault was committed in setting up a claim of right to prevent the complainant from spoiling the pasture of the common by taking a cart and horse across it.

Held, that the jurisdiction of the justices was not ousted under sect. 46 of the Offences against the Person Act 1861, as no question arose as to the title to any lands or any interest therein.

CAUSE shown against two rules *nisi* for writs of *certiorari* to bring up and quash two convictions of one Roberts and his servant Simmonds for assaults on one Freeman.

From the affidavits it appeared that Roberts and Freeman both had common rights in relation to Aspoll Green, in Suffolk, and when Freeman was leading a horse and cart across the green Roberts struck him across the back with a hunting-whip. Subsequently Roberts' servant Simmonds committed another assault on Freeman.

He thereupon summoned Roberts and Simmonds for assault, and they set up a claim of right to prevent Freeman from spoiling the pasture by taking a horse and cart across it.

The justices held that there was no *bonâ fide* claim of right, and convicted Roberts and Simmonds.

The rules *nisi* were obtained on the ground that the magistrates' jurisdiction was ousted by there being a claim of right.

It was contended that the justices' jurisdiction was ousted by the Offences against the Person Act 1861 (24 & 25 Vict. c. 100), which provides by sect. 46 that "nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom."

Walter Stewart showed cause against the rules. — Here there was no question as to the title to any land or to the title to any interest in lands. The evidence showed that the defendant's claim of right was not *bonâ fide*, and the justices were right in so holding. Both the complainant Roberts and the defendant were commoners, and this was the first time that Roberts tried to raise a contention of this kind though the complainant Freeman had for years taken a horse and cart across the common. A mere assertion by a defendant that he committed the assault in order to support a claim of right cannot oust the jurisdiction of the justices.

Avory, K.C. (Elliston with him) in support. — The justices in this case seem to have considered that, if a *bonâ fide* claim of right was asserted and made out, that would oust their jurisdiction. That is not the case here at all. The jurisdiction of the justices here was ousted by the Offences

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

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against the Person Act 1861 (24 & 25 Vict. c. 100), which gives the justices jurisdiction to deal with cases of common assault, and which provides by sect. 46 that "nothing herein contained shall authorise any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom." The question under that section is not as to a *bonâ fide* claim. If one commoner prevents another by force from injuring the grass, there is a dispute as to a right, and the title to an interest in lands is in dispute. It was held in *Reg. v. Pearson* (22 L. T. Rep. 126; L. Rep. 5 Q. B. 237) that under this section all jurisdiction was taken away from justices to determine cases of assault where any such question was shown to arise, and they cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of title to lands. It is quite clear from the authorities that where a disturbance is caused to or any obstruction is placed on the common, the commoner can use force to remedy the interference with his rights. He referred to

Davies v. Williams, 16 Q. B. 546; 15 Jur. 752;
Hall v. Harding, 1 W. Bl. 678; 4 Burr. 2426;
Perry v. Fitzhove, 8 Q. B. 757; 13 Jur. 799;
Jones v. Jones, 1 H. & C. 1; 8 Jur. N. S. 1132;
Reg. v. Oridland, 7 Ell. & Bl. 853; 3 Jur. N. S. 1213.

Stewart, by leave, in reply.—It was admitted in *Reg. v. Pearson* (*sup.*) that the assault was committed in asserting a *bonâ fide* claim of right. The other authorities have no bearing on this case.

LORD ALVERSTONE, C.J.—In these cases two rules have been obtained for writs of *certiorari* to bring up and quash two convictions for assault against a gentleman named Roberts and his servant Simmonds; and the question raised is whether there was any jurisdiction in the magistrates to entertain the charges at all, on the ground that the matter came within the proviso of sect. 46 of the Offences against the Person Act 1861. The facts are not in dispute, and I will state them briefly. The complainant Freeman and Roberts both had rights of common over a certain piece of land; and it appeared that for some two or three days before the assault complained of Freeman had been carting across the grass in a way which Roberts objected to. It does not appear that Roberts had given the complainant any notice of his objection or raised any question as to what he was doing before the day when the assault occurred. On that day, as Freeman was carting a load of swedes, Roberts assaulted him, after some remonstrance, by striking him with a whip. His servant Simmonds came up and there was a subsequent assault. Both defendants were summoned by Freeman, and at the hearing before the justices it was contended that their jurisdiction was ousted as a question was raised as to an interest in land. The justices convicted both the defendants, being of opinion that the objection raised under the proviso to sect. 46 of the Act of 1861 was a frivolous one and not *bonâ fide*. It was argued that they had confused the question they had to decide—namely, they had mixed up the question under sect. 46 with the question of a *bonâ fide* claim of right. I do not think that they have entertained the question

otherwise than from a right point of view. That section prohibited the magistrates from adjudicating on any assault and battery in which any question arose "as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom." In the present case it was not denied that the defendant might have been indicted for what had happened, but it was argued that because the question as to the right of common was connected with the assault the justices had no jurisdiction. I think that the decision of the justices was quite right. I do not think that the section can be construed to mean that any question of an interest in land, whenever and however raised, is sufficient to oust the jurisdiction of the justices. Their jurisdiction, I think, is ousted when a question as to the title to any land or any interest therein arises in the course of the proceedings, and it does not make such a question arise in the proceedings because one of the defendants says he owns or possesses land on which the complainant was when the assault took place. In this case no question of title to lands arose at all, nor any question of any title to any interest in lands, as both parties were admitted to be commoners and had rights on the land. Pressed with this difficulty, Mr. Avory raised two points. He said, first, that there was a right on the part of a commoner to remove obstructions, as, for instance, pulling down a house. But the fact that that right exists and questions may arise on it does not throw light on sect. 46 as to its meaning and the conditions necessary for the application of the proviso to that section. He further cited *Reg. v. Pearson*, in which it was decided that on the hearing of a summons for assault, when there was a *bonâ fide* question relating to the title to land involved, the jurisdiction of the justices was ousted. That case is an authority to which we pay the greatest respect, and if it were an authority upon the question now before us it would be binding upon us, but in my opinion the facts of that case are different in substance from those of the present so far as this proviso is concerned. It was contradicted there that the assault was committed in the assertion of title, and it was admitted by both sides that the defendant was raising a claim of title, and that the prosecutor entered on the land to which the defendant laid claim. That case was decided on the ground that the question of title arose in the proceeding which caused the assault. In the judgments in the older cases it appears that the reason for ousting the jurisdiction of the justices in such cases was that, unless this was done, they would indirectly be determining the question of right and title between the parties. No question of the right of one person or another to land or an interest in land arose in the present proceedings. They both had a right to be where they were—namely, on the land, and an assault took place there. The justices came to a right conclusion when they considered that the defence raised by the defendant that there was a claim of right was a frivolous one, and so they were right in considering whether the claim was *bonâ fide*. I am of opinion that no question of title arose, and both the rules must be discharged.

DARLING, J.—I am of the same opinion. I think to hold otherwise would be to determine that an assault, if committed in a quarrel regard-

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ing land, could not be determined by justices. This would be so whether the assault was committed on the land or not. I do not think that the Act meant this, and I think the construction put on the section by my Lord is right.

CHANNELL, J.—I agree. I want to make it clear that our judgment proceeds on the reading of the statute. It must be that the word "title" in sect. 46 governs not only the words "lands, tenements, or hereditaments," but also the words "any interest therein or accruing therefrom." In this case there was no question as to the title of any interest in any land or any interest accruing therefrom. If any question had arisen as to the title to the right of common the statute would apply, for I think that the words would apply to such a right—namely, a *profit à prendre*. This was merely a quarrel between the two parties concerning a right which they both had, and no such question as I have referred to above arose.

Rules discharged.

Solicitors: *Morris and Bristowe, for Lawton, Warnes, and Sons, Eye; Guscotte and Fowler.*

Tuesday, March 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. JUSTICES OF KINGSTON; *Ex parte* DAVEY. (a)

Licensing—Objections by justices—No objection taken at meeting—Adjournment—Refusal of renewal—Jurisdiction—Mandamus—Form of—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 42.

Where no notice of objection has been served not less than seven clear days before the commencement of the general annual licensing meeting any objection then made under sect. 42 (2) of the Licensing Act 1872 must be made in open court before the adjournment, otherwise when the justices deal with the renewal upon the adjournment they will have no jurisdiction except to renew the licence.

An objection can be made under sect. 42 (2) at the general annual licensing meeting by the justices themselves, but such objection must be made in open court.

The court will not by mandamus order a judicial tribunal to act in a particular way, unless it is quite plain that what it has to do is purely ministerial and not judicial.

Therefore, a mandamus will not be granted to justices to hold a further adjournment of the general annual licensing meeting and at such further adjournment grant a renewal of a licence, but it will merely order the justices to hear and determine according to law.

CAUSE shown against a rule nisi for a writ of mandamus directed to the licensing justices for the borough of Kingston commanding them to hold within a reasonable time a further adjournment of the general annual licensing meeting and at such further adjournment to grant to W. G. Davey the renewal of his licence in respect of the premises, the Royal Oak public-house.

The following facts appeared from the affidavits filed in support and in opposition to the rule.

On the 5th March 1902, the licensing justices held the annual general licensing meeting.

No notice was given to Davey of any objection to the renewal of his licence, and at the meeting no objection was made to the renewal by any person whatsoever.

The chairman read out a list of houses, of which the Royal Oak was one, and said that the consideration of the renewal of these licences would be adjourned till the 19th March.

No notice to attend was served upon the applicant, and no notice of objection or grounds was given to him.

On the 19th March the applicant was represented by counsel, who submitted that the justices had no power to refuse the renewal of the licence, because no objection had been made as provided by sect. 42 of the Licensing Act 1872, and no notice requiring him to attend or notice of objection had been given.

The justices, without hearing evidence on oath or otherwise, refused the renewal of the licence.

At the annual licensing meeting of the justices in 1900 an announcement was made to all the licence-holders present, and published in the local papers, that, though all the licences would be renewed that year, a reduction would be made the next year, and the trade were invited to submit specific proposals for effecting such reduction. This notice having produced no result, in 1901 another announcement was made and duly published, to the effect that unless some proposals as to the reduction of licences were received from the trade it would become the duty of the justices to take the matter into their own consideration independently of the trade itself. This notice also being productive of no result, the justices at the licensing meeting on the 5th March 1902, proceeded to consider in the public interest where the reduction in the number of licences should take place, and, finding that the district in which the Royal Oak is situated was one where a considerable decrease of population had taken place in the last few years, they adjourned the consideration of the renewal of the licences of four houses in that neighbourhood, including the Royal Oak, until the 19th March. The above circumstances were explained to the solicitor for the applicant on the 17th March by the clerk to the justices.

At the adjourned meeting on the 19th March the chairman observed that the renewal of the licences of the four houses had been deferred, as the justices considered that the population had sensibly decreased, and they then refused the renewal.

Avory, K.C. (Lynn with him) showed cause against the rule.—As to the case apart from the point as to the form of mandamus asked for the question is raised whether, under sect. 42 of the Licensing Act of 1872, the justices themselves can start an objection to the licence, or whether such an objection must be made by a third party. I submit that they can, for otherwise the justices would be deprived of their absolute discretion as to renewals unless some third party objected. As to the point that the applicant had no notice of the adjournment, he was represented at the adjourned meeting, and so must have known. The notice need not necessarily be a formal one given in court. If the court, however, are of opinion that there has not been sufficient notice

(a) Reported by W. de B. HERBERT, Esq., Barrister-at-Law.

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of the meeting, the justices are quite ready to hear and determine again. As to the form of the rule asked for, it cannot be granted in those terms, because on the authorities that the only form in which it can go would be to direct the justices "to hear and determine and according to law," and not as an order to them to renew the licence. In *Reg. v. Farquhar* (L. Rep. 9 Q. B. 258) a *mandamus* was asked commanding the justices to hold a meeting, and at such meeting to grant a renewal, but the court declined to grant it in that form, and limited it "to hear and determine." Again, in *Reg. v. Howard* (60 L. T. Rep. 960; 23 Q. B. Div. 502), *Reg. v. Farquhar* was discussed. There, where the justices had returned to the writ of *mandamus* that they had heard and determined, that was held to be sufficient.

Hammond Chambers, K.C. (*Russell* with him) in support of the rule.—No objection was taken either by the justices or by anyone else to the renewal of the licence at the meeting, and that being so, there was no power under the proviso to sub-sect. 2 of sect. 42 to adjourn the meeting. As there was no jurisdiction to adjourn, and no objection was taken at the meeting, the court can only direct them to do what they ought to have done before—namely, renew the licence as a matter of course, and should not direct them to hear and determine the application. Their duty now is merely ministerial, and, therefore, as they can only act in one way there is no objection to the rule going in that form. There was no jurisdiction in the justices to adjourn, as there was no objection under sect. 42 of the Licensing Act 1872. The case of *Reg. v. Merthyr Tydvil Justices* (14 Q. B. Div. 584) shows that the objection must be taken in open court. He referred to

Ruddick v. Liverpool Justices, 42 J. P. 406.

In *Evans v. Conway Justices* (82 L. T. Rep. 704; (1900) 2 Q. B. 224) it was held that on an appeal to quarter sessions against the refusal of licensing justices to renew a licence, the quarter sessions are not entitled to refuse to renew a licence without evidence of any ground of objection to its renewal. In that case the Court of Appeal directed that the licence must be renewed. He referred to

Baxter v. Leche, 62 J. P. 292; 14 Times L. Rep. 352.

LORD ALVERSTONE, C.J.—In this case Mr. Hammond Chambers obtained a rule nisi for a *mandamus* calling upon the Kingston justices to show cause why they should not grant a renewal of a licence, and he has pressed us for reasons which are sufficiently obvious to grant the rule in that form. He says that we ought not to make the rule absolute calling upon the justices to hear and determine the application for a renewal. Mr. Horace Avory, who suggests to us that there was a sufficient hearing and determining by the justices in the case on the 19th March, has expressed the willingness of the justices to hear and determine the application of Mr. Davey, on whose behalf the rule has been moved. I think it is better that I should state first what I understand the law to be, and then deal with the actual form of the rule. I think it is quite plain that under sect. 42 (2) of the Licensing Act the objection to the licence must be made in open

court before the case can be adjourned, so that the magistrates may deal with it on the adjourned hearing, notwithstanding no notice of objection has been given pursuant to the earlier part of the section, and if it should turn out that no objection was taken in open court then the magistrates, when they deal with this matter, will have no jurisdiction except to confirm or rather to renew the licence. But I think it would be wrong upon the materials before us to come to the conclusion that there was clearly no notice of objection, and therefore act as though there was nothing for the magistrates to hear and determine. I think it is quite unusual to direct a judicial tribunal to act in a particular way unless it is quite plain that what they have to do is purely ministerial and is not judicial. It has been contended by Mr. Avory that the affidavits are sufficient to show that the applicant knew enough about it by what occurred on the 5th March, supplemented by the notice of the 19th March, and supplemented by the fact that one of the four gentlemen whose licences were postponed did go into the merits and contest the matter. Unfortunately it does not appear what the magistrates did when counsel who represented the applicant on the later hearing on the 19th March took the objection that no notice had been given. If they had decided that notice had been given, that there had been an objection taken, and had then called upon the applicant for evidence on the merits, a different question would have arisen. The affidavit, however, stops short of that. It seems to me quite impossible for us to come to the conclusion that there was sufficient evidence of an objection taken upon the 5th March, and of that objection being brought to the notice of the applicant and determined upon the 19th March, and to say that there was a hearing. Therefore I am of opinion that the rule ought to be made absolute calling upon the magistrates to hear and determine the application. Then Mr. Hammond Chambers has pressed us to say that the rule ought to be made absolute to grant a renewal, and he bases his argument mainly upon the case of *Reg. v. Merthyr Tydvil Justices* (14 Q. B. Div. 584), and he says that we ought to follow the form of the rule in that case under the circumstances of this case rather than the form of the rule which was adopted in *Reg. v. Farquhar* (L. Rep. 9 Q. B. 258) and in *Reg. v. Howard* (60 L. T. Rep. 960; 23 Q. B. Div. 502). In the first place it seems to me that, even if you take the report of *Reg. v. Merthyr Tydvil Justices* (*sup.*) by itself, it is quite plain that Lord Coleridge did not mean to lay down an absolute rule as to what one must do. In this case, if Mr. Hammond Chambers is right, it is pointed out in which form the *mandamus* should go; in other words, it seems to have been practically conceded that no objection had been taken, and therefore there could be no right in the magistrates to decline to renew the licence. That that is really the true view of the case is, I think, plain when you come to consider the judgment in *Reg. v. Farquhar* (*sup.*), where Blackburn, J., as he then was, points out that the magistrates might themselves take the objection, and they having taken the objection would be entitled to give notice to the applicant, and subsequently hear and determine. In *Reg. v. Howard* (*sup.*) the extent to which Coleridge, C.J.

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is supposed to lay down the law is commented upon by Mathew, J. It seems perfectly plain to my mind that Mathew, J. took the view which I am suggesting is the right one—namely, that Lord Coleridge, in the case of *Reg. v. Merthyr Tydvil Justices* (*sup.*) could not have intended to lay down the rule that under such circumstances there must be a rule to order the justices to grant a renewal. The actual form of the rule, which my brother Channell has kindly handed to me, was “to hear and determine.” Therefore that shows us what one would have expected—namely, that that particular point was really immaterial for the purpose of Lord Coleridge’s decision, but the actual rule granted was “to hear and determine.” I have only two other observations to make with regard to matters which have been referred to in the argument. It seems to me, for the reasons I have given, that an objection can be started by the magistrates themselves. That was said by Blackburn, J. in *Reg. v. Farquhar* (*sup.*), but it must be stated in open court. That Mr. Hammond Chambers has very fairly conceded, and if stated in open court the case can then be dealt with. I myself think the case must be dealt with on the merits, and if facts are to be proved they ought to be proved in evidence, and I do not think there ought to be casual conversations between justices which are not brought to the knowledge of the person who is applying. Of course nobody can say beforehand what must be done in every case. It may be that the facts which are stated are not disputed by the applicant, and therefore there may not be necessity for the amount of evidence in some cases that there would be in others. Those matters can only be dealt with when the particular concrete case arises. It not being clear in this case to my mind whether an objection was taken on the 5th March, and it certainly not being established that that objection was judicially brought to the mind of the applicant to treat the hearing on the 19th as binding upon him, I think the rule ought to be made absolute to the justices to hear and determine.

DARLING, J.—I am of the same opinion. The question really is whether enough happened on the 5th March to bring into operation the proviso of sect. 42 (2) of the Licensing Act. Now, in order to enable the magistrates to adjourn the consideration of this licence in order to determine about its renewal from the 5th March there must have been on the 5th March an objection in open court. I think it does not make any difference that the objection is taken by one of the magistrates. I think one of the magistrates might have taken the objection, and if he had taken it in open court then there might have been an adjournment, and the applicant might have been required to attend and the matter might have been gone into. I do not see myself any evidence from these affidavits that an objection was taken in open court, but, for all that, it may have been. The fact that an objection may have been taken is enough to show that it would not be proper in this case simply to issue a *mandamus* to the justices that they should do a particular thing which might depend upon whether that objection was taken or whether it was not. The *mandamus* will therefore be to the magistrates to hear and determine according to law. It seems to me that if no objection in open court was in

fact taken upon the 5th March then the magistrates would have to renew the licence. If, however, objection was taken then they may renew or refuse to renew it according to the opinion which they form in their discretion. One must assume that when they receive this *mandamus* and proceed to hear and determine they will proceed to hear and determine according to law, and not in some other way. I simply point out that if it is desired to ascertain whether they do or do not hear and determine according to law the proceedings to be taken will be found by Mr. Hammond Chambers and his client in *Reg. v. North Staffordshire Justices* (51 L. T. Rep. 534; 14 Q. B. Div. 13).

CHANNELL, J.—I am of the same opinion. I think it is an important matter which should be thoroughly understood, that this court does not by *mandamus* direct either justices or any public body or anybody else upon whom a duty is cast, how and in what manner they are to perform their duty. They simply direct them by *mandamus* to perform their duty. I think also that even where the facts are all admitted, so that in the particular circumstances of a particular case—as my brother has pointed out in this case—there happens to be but one way of performing that duty, still the *mandamus* goes to perform the duty, and not to perform it in a particular way. There may possibly be cases, but none in fact have been brought to our attention, where, in consequence of the circumstances being such that there is but one way of performing the duty, no one has thought it worth while to question the form in which the *mandamus* should go. Accordingly it has gone to do the particular act because nobody has thought it worth while to trouble about the matter at all. When we see the rule that was granted in *Reg. v. Merthyr Tydvil Justices* (*sup.*), and see what was said in that case, it seems to me that all that Lord Coleridge said was that it did not signify in that particular case in which form the rule went. I do not say I think there is no authority for granting a *mandamus* in the other form. The other case pressed upon us was *Evans v. Conway Justices* (19 Mag. Cas. 602; 82 L. T. Rep. 704; (1900) 2 Q. B. 224), but there there was a case stated by the magistrates, and that makes all the difference, because if the magistrates state a case you have to tell them how they are to perform their duty. But it is a totally different thing here. Upon the other matters I entirely agree with what my brothers have said, and I do not think it necessary to add anything. If, on the one hand, the facts are all one way, the justices will have nothing to do but to grant this licence; on the other hand, if there was in point of fact an objection taken in open court, then I think that they can give notice of their adjourned hearing under our order, and I think that they could hear and determine that objection in the way in which they ought to have heard and determined it on the 19th March.

Rule absolute.

Solicitors: *Wilkinson, Howlett, and Wilkinson; Pyke and Parrott.*

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GORRINGE (app) v. MAYOR, &C., OF SHOREDITCH (resps.).

[K.B. Div.]

March 24 and 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.).

GORRINGE (app.) v. MAYOR, &C., OF SHOREDITCH (resps.). (a)

*Metropolis—Combined scheme—Order of local authority—Alteration—No order—Drain a sewer.**Certain houses in B. street in 1853 were drained by a combined scheme under the order of the local authority.**In 1889 No. 85, B.-street was disconnected from No. 83 and connected to its adjoining house on the other side, No. 87. No order was made by the authority for this, but it was superintended by their officers.**In 1900 the owner of No. 85 erected a workshop on the garden, and the drainage from that, including an additional w.c., was connected with the drain of No. 87. This was superintended by the respondents' officers, and, although a plan had been approved by the respondents, the work was not in fact carried out in accordance with that plan.**Held, that the drain of No. 87 did not become a sewer.*

CASE STATED.

The appellant was the owner of No. 87, Brunswick-street.

In Sept. 1853 one John Hartley, who was then building a row of houses in Brunswick-street, made application in writing to the Metropolitan Commissioners of Sewers asking permission to drain the proposed houses in accordance with the plan accompanying that application. The commissioners by an order duly approved such plan, and the houses and drains were then constructed in accordance with that plan.

In 1889 that part of the drainage from No. 85 which ran into the drain of the house to its left (No. 83) was disconnected from No. 83, and the drain was connected to the drain which drained Nos. 85 and 87. The alteration was carried out under the superintendence of the officers of the late vestry of Shoreditch, but there was no evidence that any plan was submitted to them, or that they made any order as to that drain.

In 1900 Martin Alfred Robinson, the owner of No. 85, wishing to build a factory or workshop on the garden or yard belonging to and behind his house, presented a plan to the respondents for draining the new factory or workshop showing the drainage as running under No. 85, as it was thought at that time to do, and the respondents duly approved of that plan.

After the factory or workshop had been built it was found that No. 85 had not a separate drain, as described upon the presented plan, but that the drainage from No. 85 ran into the drain which passed through and drained No. 87.

The whole of the drainage work in connection with the alterations in No. 85 was carried out under the inspection of one of the respondents' sanitary inspectors, and all the new drains, including that from an additional water-closet, which was subsequently erected by the directions of the respondents on a portion of the site of the back addition of No. 85, in order to comply with

the requirements of the Factory Acts, were connected with the old drain at No. 87.

The appellant contended that the alterations made in the drainage in 1889 and 1900 had caused the old drain on her premises, No. 87, to become a sewer.

The respondents contended that, notwithstanding the alterations and additions, the old drain on the premises Nos. 85 and 87 remained a drain by reason of (a) that there had not been any addition to the combined drain or drainage of any other premises without the same curtilage; (b) that the approval of the plan and the carrying out of the work in relation to the factory in 1900 amounted in law to an order by the respondents for drainage by combined operation; and (c) that the addition to the combined drain of the pipe from the factory roof being for the collection and discharge of rain-water only, which formerly fell into the yard or garden, did not cause the combined drain to become a sewer.

The magistrate held that the drain on the appellant's premises remained a drain and had not become a sewer, and he made an order upon the appellant to abate the nuisance complained of.

Macmorran, K.C. and Mallinson for the appellant.

Courthope-Munroe for the respondents.

LORD ALVERSTONE, C.J.—I am not at all sure that any real question of law arises here, and I am not going to express any opinion upon what could be done upon the curtilage or premises attached to a house, it still being a combined system of drainage and not becoming a sewer. It seems to me that it is not necessary to decide it. We ought not to deal with any case which may involve different facts. In order really to understand this case, and what the magistrate has decided, we have to see what the state of things was under the alteration. There was undoubtedly a combined order for Nos. 85 and 87, and they were both houses. There has been an erection put at the back of No. 85, which has been called a workshop, and which has been called a factory in the case. In consequence of that they added to the old water-closet a second one, and some rain-water, which originally fell in the garden and which drained away somehow, now comes down into this combined drain. That being so, the contention before the magistrate was, on the part of the appellant, that, she being the owner of No. 87, that inasmuch as this alteration had been made, that which had previously been a drain on her premises had become a sewer, because the work of 1889 and 1900 had been done. The contention of the respondents, which I agree with Mr. Macmorran the magistrate must have adopted, were, first, that there had not been any addition to the combined drain of the drainage of any other premises without the curtilage. I will take the third point next, "that the addition to the combined drain of the pipe from the factory roof being for the collection and discharge of rain-water only which formerly fell into the said yard or garden did not cause the said combined drain to become a sewer." It seems to me that those two questions, although they undoubtedly raise a question of law to a certain extent, also involve a question of fact. The magistrate came to the conclusion that such alteration, as it was, did not turn that drain into a sewer. It is con-

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tended that it must have done so as a matter of law, because there was a structure put at the back of the garden, the rain-water from which came down into this combined drain. It seems to me perfectly obvious that that mere increase of the sewage burden cannot be sufficient, or otherwise the putting up of a second water-closet in the house originally sanctioned might have increased the sewage burden. The mere fact that more sewage goes to the combined drain cannot be contested. It is equally clear, perhaps I will not say equally clear, but I can imagine a case where the nature of the building and the purpose for which it was put were such, the magistrate would come to the conclusion that it was substantially a fresh drainage system added on to the old combined drain, and therefore it was a sewer. The authorities certainly seem to establish that if a drain or sewer from new premises, meaning thereby new houses and buildings, is added to the drain of houses which were previously drained by a combined drain, the drain becomes a sewer. They have not gone further, and I do not think they ought to go further. Any suggestion of hardship on the owner of No. 87 has been met by the argument of Mr. Courthope-Munroe. The owner buys the property and must be taken to know that there was a combined drain. She did not make the inquiry; therefore it is her own fault. Therefore, unless the state of things is such that there has been established a sewage system for different premises, I think that the magistrate was justified in coming to the conclusion that that which was originally a combined drain has not ceased to be so, and that this appeal should be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I also am of the same opinion. I think that this case is governed by the opinion of my brother Darling and myself in the case of *Greater London Property Company v. Foot* (80 L. T. Rep. 390; (1899) 1 Q. B. 972). Certainly it is within what I personally meant to decide in that case, and I think further that there is no case which has held that a wrongful act by one of the existing owners of two properties can convert what previously was a drain into a sewer. The case of *Kershaw v. Taylor* (73 L. T. Rep. 274; (1895) 2 Q. B. 471) proceeds entirely on the fact that there had been at some antecedent period a wrongful act, and it was not known by whom it was done. If it had been done by one of the parties, the party who was complaining in that particular case, my recollection of the course of the argument is that the court would have decided the other way. But certainly it is no authority that if the wrongful act is done by one of the parties to the litigation, one of the owners of the two houses, when any question arises, that the wrongful act will have the effect of converting the thing previously a drain into a sewer. There are at least two authorities to the contrary. In reference to *Holland v. Lasarus* (66 L. J. 285, Q. B.; 61 J. P. 282), as reported, it seems to come within *Kershaw v. Taylor* (*sup.*), because there seems to have been some doubt—very little, I think, but some—as to who had made the alteration. If it is to be taken upon the facts of the case that it is uncertain who made the alteration, then of course it merely follows *Kershaw v. Taylor* (*sup.*). If, on the other

hand, it is to be taken that Holland, the plaintiff, at whose house the alteration had been made, had himself made it, then I cannot help thinking that the case requires some review, and that when it is considered it will not be followed. But, of course, if the true facts were the other way, and the judgment at any rate does not make it quite clear which way they are, it merely follows *Kershaw v. Taylor*, which is an authority on the case.

Appeal dismissed.

Solicitors: *George Brown, Son, and Vardy; H. Mansfield Robinson.*

March 14 and 26, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. JUSTICES OF WARWICK; Ex parte MAYOR OF COVENTRY. (a)

Justices—Costs of appeal from licensing justices to quarter sessions—Borough or county funds—Alehouse Act 1828 (9 Geo. 4, c. 61), s. 29—City of Coventry Act 1842 (5 & 6 Vict. c. 110)—Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43)—Local Government Act 1888 (51 & 52 Vict. c. 41).

C. is a county borough, having a separate commission of the peace, but no separate court of quarter sessions. The justices of the county of W. hold quarter sessions at C. by adjournment from W.

An appeal was brought to the quarter sessions against the refusal of the justices of C. to grant the renewal of a licence, and that appeal was allowed.

Held, that the costs of the justices of C. by virtue of sect. 29 of the Alehouse Act 1828 were not payable by the treasurer of the borough of C., but by the treasurer of the county of W.

CAUSE shown against a rule nisi for a writ of *certiorari* directed to the justices of the county of Warwick, to bring up and quash an order made by such justices at the general quarter sessions held by adjournment at the city of Coventry, whereby it was ordered that a certain appeal against the refusal of certain justices for the city of Coventry to grant the renewal of a certain licence should be allowed and the renewal licence granted; and whereby it was further ordered that the treasurer of the city of Coventry should pay the costs of that appeal.

The grounds upon which the rule was desired were that the justices had only jurisdiction to make such order for the payment of costs by the treasurer of the county of Warwick, and not by the treasurer of the city of Coventry.

Coventry is a city in the county of Warwick, and a municipal borough regulated by the Municipal Corporations Act 1882, and a county borough within the Local Government Act 1888, having a separate commission of the peace, but no separate court of quarter sessions. The justices of the county of Warwick hold a quarterly session at Coventry, by adjournment from Warwick, for the city of Coventry. The expenses of the city police force are defrayed out of the borough fund, and there is a treasurer of the city appointed under the Municipal Corporations Act 1882.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

K.B. Div.] REX v. JUSTICES OF WARWICK; *Ex parte* MAYOR OF COVENTRY. [K.B. Div.]

Upon the order of the Local Government Act Commissioners, dated the 28th Jan. 1892, as to financial adjustments, the city pays half-yearly to the county council of Warwick a fixed sum towards the expenses of the county incurred in part on behalf of the city, including the expenses of county buildings (including the county hall, Coventry), assizes, quarter sessions, criminal prosecutions, coroner, and salaries and remuneration of county officers, including clerk of the peace and county treasurer.

Under an arrangement made between the city and the county council, embodied in the same order, the fines received in respect of summary convictions by the city justices for offences committed within the city are paid to the borough fund, and an agreed sum in satisfaction thereof is paid half-yearly by the city to the county council.

The quarter sessions at Coventry are held under the City of Coventry Act 1842 (5 & 6 Vict. c. 110), which enacts that after the 9th Nov. 1842 there shall be no sheriff and no recorder in the city of Coventry, and that no separate court of quarter sessions of the peace shall be holden in the city, but that after that date the justices of the county of Warwick shall hold a quarterly session of the peace at Coventry, by adjournment from Warwick, for the city and such other part of the county as the Warwickshire justices shall order (now the Coventry petty sessional division) after the business of the session at Warwick shall have been concluded, and it is enacted that the justices of the county of Warwick shall not have jurisdiction within the city except for the purposes of holding the quarter sessions and of levying county rates.

The city paid the county rates from the 9th Nov. 1842 till April 1889, when under the provisions of the Local Government Act 1888 the city became a county borough, and therefore during that time contributed to the fund out of which costs (if any) ordered to be paid by the justices who were respondent on the appeal were defrayed.

At the adjourned general annual licensing meeting of the justices of the city held on the 25th Sept. 1901 one Walter Edwin Mealand applied for a renewal of the full publican's licence held by him at the New Inn in the city, and the justices there assembled refused to renew the same.

Walter Edwin Mealand and Messrs. Phillips and Marriott Limited, the owners of the New Inn, appealed from the refusal to the Court of Quarter Sessions for the county of Warwick, and the appeal was heard at the quarter sessions held by adjournment at the county hall, Coventry, on the 17th Oct. 1901, when the city justices appeared as respondents.

The Court of Quarter Sessions allowed the appeal, and granted the renewal of the licence.

On the deputy-chairman of quarter sessions announcing the decision of the court allowing the appeal, application was made by counsel for the respondent justices for an order on the county treasurer for their costs, but the court refused such application, and made an order on the city treasurer for such costs.

Boskill showed cause against the rule.—It is said that these costs should be paid by the treasurer of the county of Warwick, but I submit that the order was properly made against

the treasurer of the city of Coventry. He referred to

The Alehouse Act 1828, s. 29.

The case relied on against me is *Reg. v. Justices of the West Riding of York*, (1900) 1 Q. B. 291, but that is distinguishable, and it does not affect this question which arises under the Licensing Acts. The reasoning in that case cannot apply to the application for a licence as here. All the penalties inflicted would go to the treasurer of the city of Coventry. All the authorities dealing with penalties do not apply to cases of licensing. In *Reg. v. Amos* (2 B. & Ald. 533; 21 R. R. 386) it was held that where justices of a borough, contributing to the county rate, have committed prisoners to the county house of correction for offences cognisable within the county, the justices at their borough sessions have a right to order such prisoners to be brought before them for trial there; but, *quære*, where a county magistrate having concurrent jurisdiction has committed a prisoner for an offence within the borough, whether the borough sessions have not the same power of ordering such prisoner to be brought before them for trial. He referred to

Winn v. Mossman, 20 L. T. Rep. 672; L. Rep. 4 Ex. 292.

The only jurisdiction that the county justices had within the city were with regard to the matters specifically provided for by sect. 154 of the Municipal Corporations Act 1882. The city justices here were not acting for the county on an application for a renewal of a licence, but only for the city, because of sect. 1 of the City of Coventry Act 1842 (5 & 6 Vict. c. 110) and sect. 38 of the Licensing Act 1872. This last section provides that in the first instance the city justices have exclusive jurisdiction. The fees here go to the city, and not to the county. He referred to

Reg. v. Dale, 6 Cox C. C. 93; Deas C. C. 37;
Mayor of Reigate v. Hart, 18 L. T. Rep. 237;
L. Rep. 3 Q. B. 244.

The other side cannot rely on sect. 31 of the Summary Jurisdiction Act 1848 and say that "place" means a place with a separate court of quarter sessions within that section, which deals with the costs of respondent justices. Since *Boulter v. Justices of Kent* (77 L. T. Rep. 288; (1897) A. C. 556), justices hearing licensing applications are not a court of summary jurisdiction. The costs here should be paid by the city of Coventry, and not by the county.

F. Low in support of the rule.—*Winn v. Mossman* (*sup.*) was a decision under sect. 26 of the Alehouse Act 1828 (9 Geo. 4, c. 61), and sect. 31 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43) is the section substituted for it. Under both Acts, and in the decisions of *Winn v. Mossman* (*sup.*) and *Reg. v. Justices of the West Riding of York*, (1900) 1 Q. B. 291, "place" means county. Where the penalties go in substance, that is the fund to bear these expenses and costs. The county before this financial arrangement would have received the penalties and fines, and so it would have been liable.

Cur. adv. vult.

March 26.—CHANNELL, J. read the following written judgment of the court.—In this case a

rule *nisi* was granted to bring up on *certiorari*, in order to quash it, an order of the justices of Warwickshire for payment by the treasurer of the county borough of Coventry of the costs of certain justices of Coventry as unsuccessful respondents to an appeal to the quarter sessions against their refusal to renew the licence of a public-house. The order was made under 9 Geo. 4, c. 61, s. 29, and it was admitted that the quarter sessions were bound to make an order for the payment of the justices' costs, but it was contended that it should have been made on the treasurer of the county of Warwick, and not on the treasurer of the city of Coventry. The city of Coventry has had no court of quarter sessions since 1842, when the court was abolished by 5 & 6 Vict. c. 110, and it was made a county borough by the Local Government Act 1888. The authorities quoted on the argument of the rule satisfied us that between 1842 and 1888 the costs of the justices of Coventry in such a case as this would have been payable by the county of Warwick, and not by the city of Coventry, but we reserved our judgment in order to consider the effect of the city having become a county borough, and of the financial adjustment which was made under the Act of 1888. By the Act of 9 Geo. 4, c. 61, s. 29, the costs of justices are, in the event of a reversal of their decision, to be paid by the treasurer of "the county or place in and for which such justice whose judgment shall have been so reversed shall have acted on the occasion when he shall have given such judgment," and by the 37th section "county or place" were defined as including, amongst other things, "town corporate." There have been a series of cases showing that "place" means a "place having a separate court of quarter sessions." Prior to the Municipal Corporations Act 1835, the question whether county justices had jurisdiction within a borough depended on whether there was a non-intromittant clause in the borough charter. In *Rees v. Amos* (2 B. & Ald. 533) it was held that in a borough not having such a clause, and where, therefore, the county justices had concurrent jurisdiction, the borough justices acted within the borough as justices for the county of which the borough formed a part. By the Municipal Corporations Act the grant of a court of quarter sessions had a similar effect to a non-intromittant clause. In a quarter sessions borough the county justices had no jurisdiction, and in particular could not rate the parishes in the borough to the county rate. The quarter sessions borough paid from its borough fund to the county fund a money payment in respect of services rendered to it by the county at the expense of the county fund, but, not being directly rated to the county rate, it did not share in the burden of general county expenditure, and was for financial purposes separated from the county. On the other hand, a non-quarter sessions borough was subject to the jurisdiction of county justices, and its parishes were rated to county rates just as parishes in the county outside the borough were. Such a borough was therefore for financial purposes a part of the county. Accordingly, in an Act of Parliament in which such expressions as "county or place for which justices acted" or "county or place where an offence was committed" were used for the purpose of declaring to what fund fines or penalties should be paid or from what fund costs should be paid

it has been uniformly held that "place" meant a place which had a separate court of quarter sessions, and was therefore separated from the court for financial purposes. The justices of a non-quarter sessions borough were held to act for the county of which their borough was part, according to the principle of *Rees v. Amos* (2 B. & Ald. 533; 21 R. R. 386), and the justices of a quarter sessions borough were held to act for their borough as a "place" separated from the county for financial purposes by being withdrawn from the jurisdiction of the county justices. Thus the quarter sessions borough paid the costs of its own justices when they were unsuccessful respondents to a licensing appeal, but, not being rated to the county rate, did not pay any share of the costs of justices of other parts of the county when such other justices were in the same position. On the other hand, the non-quarter sessions borough did not directly pay the costs of its own justices under such circumstances, but did pay through the county rate, to which it was rated, a share of such expenses, both of its own justices and any other justices of places within the county other than quarter sessions boroughs. The authorities for these propositions are *Reg. v. Dale* (6 Cox C. C. 93), *Mayor of Reigate v. Hart* (18 L. T. Rep. 237; L. Rep. 3 Q. B. 244), and *Winn v. Massman* (20 L. T. Rep. 672; L. Rep. 4 Ex. 292). The last of these cases is a very strong case, for the court held, in order to arrive at this result, that the express words of 24 & 25 Vict. c. 75, s. 4, that "county or place" in the Licensing Act should include "every borough having a separate commission of the peace although it may not have a separate court of quarter sessions," were controlled by the preamble of the Act, and were limited by it to enabling the justices in such boroughs to act in licensing matters. The law so far being clear, the only question we should have to consider, apart from the Act of 1888, would have been whether the Act 5 & 6 Vict. c. 110 had placed Coventry in any different position from any other non-quarter sessions borough. We think it clear that it did not, for, although the jurisdiction of county justices was excluded for some purposes, the city was expressly made subject to the county jurisdiction as regards county rate, and this, we think, clearly brought it within the decided cases as to other non-quarter sessions boroughs. The Act of 1888, however, divided boroughs in a different way, and the having or not having a separate court of quarter sessions became no longer the test whether the borough was subject or not to county rate, and was or was not separate from or included in the county for financial purposes. County boroughs were created; a new class, or possibly an extension of the formerly very limited class of cities and boroughs which were counties of themselves. The new county boroughs, whether quarter sessions boroughs or not, are not subject to be rated to the county rate. They pay, as quarter sessions boroughs formerly did, many contributions from their borough fund to the county fund for certain matters of common expenditure, but they are for general financial purposes separate from the county. The next class of boroughs of population over 10,000, but under 50,000, are made subject to the county rate, whether quarter sessions boroughs or not, and they are now for general financial purposes part of the county, though exempt as to some particular matters. There is

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a third class of the still smaller boroughs with which we are not now concerned, but we may refer to the recent case of *Thetford Corporation v. Norfolk County Council* (77 L. T. Rep. 498; 79 L. T. Rep. 315; (1898) 1 Q. B. 141; (1898) 2 Q. B. 468) as showing their position. Speaking generally, the effect of these alterations is that for many purposes "county borough" now stands in the position of a "quarter sessions borough before 1888," and a non-county borough in the position of a non-quarter sessions borough. What we have to consider is how far the position of the city of Coventry as regards the particular matter before us is affected either by the provisions of the 32nd and some other sections of the Act of 1888, or by the award of the commissioners forming the financial adjustment between the borough and the county. By sect. 32, sub-sect. 1, certain liabilities are to cease, and compensation is to be given in the adjustment for their cessation. The adjustment between Coventry and the county of Warwick deals with fines and penalties, but not expressly, at any rate, with these costs of justices. By sub-sect. 3 it further appears that the adjustment is, so far as possible, to prevent either body suffering loss by the altered arrangements, and in proviso *b* it is said that where the borough was not at the passing of the Act a quarter sessions borough (which is the case with Coventry) the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and if a grant of quarter sessions should be thereafter made should redeem such liability. The cost of quarter sessions is defined in sect. 100 in wide terms and as including costs of prosecutions and the costs of defendants' witnesses, "and all other costs incidental to the quarter sessions." We think the costs with which we have to deal here must be considered costs of quarter sessions within this definition. They are the costs of one of the parties before the Court of Quarter Sessions, and as much costs of quarter sessions as costs of prosecutions or defendants' witnesses. They are costs as to which the Court of Quarter Sessions has to make an order. It appears, therefore, that Coventry has to contribute by a money payment towards costs, similar to those in question in the present case, incurred by justices of other places within the county, and, that being so, it would be only fair to hold, unless we were forced to do otherwise, that Coventry has not to pay the entire costs of its own justices when unsuccessful as respondents, but only a share of those costs by its contribution to quarter sessions expenses. These provisions of the Act of 1888 have somewhat altered the machinery for payment of quarter sessions costs, for Coventry is no longer directly subject to county rate, but, if the view we take as to these costs being costs of quarter sessions is correct, it cannot be said that, so far as regards this particular matter before us, Coventry is financially separate from the county of Warwick any more than it was before the Act. We think, therefore, that we ought to hold, as we should have held but for the Act of 1888, that Coventry, not having a court of quarter sessions and being liable to contribute to quarter sessions expenses, is not a "place" within the meaning of the 29th section of 9 Geo. 4, c. 61—that is to say, not a place separate from the county—and that, as before the Act of 1888, the justices must be considered to

have acted for the county of Warwick. The county justices have at all events got jurisdiction within Coventry for the business reserved to them by the Act of 1842, except as to the county rate, which alone was taken away by the Act of 1888. The doctrine of *Res v. Amos* (*sup.*) may therefore still be applied to some extent. The explanation of the matters with which we have to deal in the present case being left in as much doubt as they are, is, I think, that the Legislature intended when the Act of 1888 was passed that all such details should be dealt with by the "financial adjustment." There were too many matters of detail involved in the changes made by the Act to make it possible for the Legislature to deal with them all, and accordingly they were intentionally left for adjustment between the parties, or, if necessary, by the commissioners or an arbitrator. We think, therefore, although the point is not quite clear, if the costs in question are costs of quarter sessions, that an adjustment between Coventry and the county of Warwick expressly providing in some way for costs of justices under the section in question of the Act of 1828 (9 Geo. 4, c. 61, s. 29) would have been good and binding. The matter is not, however, dealt with in the adjustment, unless, indeed, the provision as to the fines and penalties being paid to Coventry carries with it the corresponding liability to these costs, which have always been considered to be payable out of the same fund as that to which the fines have to be paid. As to this, however, it may be said, on the one hand, that the fines and penalties belong under the Act to the county, and that the borough has purchased the right to them for a money payment, and, on the other hand, it may be contended that the Act of 1888 has transferred the right to these fines from the county to the borough, and that the money payment is the compensation payable under the Act for the right to the fines having been so taken away. The test, therefore, as to the fund which receives the penalties does not help us much in the present case. The only case decided since 1888 on a similar point to that before us is *Reg. v. Justices of the West Riding of York*, (1900) 1 Q. B. 291, in which the decision was given in accordance with the old authorities, and without any reference, either in the arguments of counsel or in the judgments, to the Act of 1888. As, however, the matter in question there was the actual costs of prosecutions at quarter sessions, it would be still more clear in the present case that the Act of 1888 had not really affected the matter, and the decision is in accordance with our present view. That view is that, although the Act of 1888 has made very extensive alterations in the relation of boroughs to counties, it has not clearly provided that the liability of these particular costs should be transferred from the county of Warwick, which should have borne it prior to 1888, to the city of Coventry, and, further, that, as the city has to contribute to similar costs from other parts of the county, it is only just to assume that the liability was intended to remain with the county of Warwick. The order of quarter sessions was therefore wrong, and the rule should be made absolute.

Rule absolute.

Solicitors: *Field, Roscoe, and Co., for E. Field, Leamington; Crowders and Vizard.*

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MEE v. CRUIKSHANK.

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Nov. 25, 1901, and Jan. 28, 1902.

(Before WILLS, J. at Manchester Assizes.)

MEE v. CRUIKSHANK. (a)

Prisons—Governor of prison—Prisoners—Legal custody of, during trial in court—Illegal detention of prisoner by warder after acquittal—Liability of governor for illegal act of warder—Prison Act 1865 (28 & 29 Vict. c. 126), ss. 58, 63—Prison Act 1877 (40 & 41 Vict. c. 21), ss. 5, 35—Prison Rules for Local Prisons of April 1899, rr. 103, 124.

The legal custody of prisoners when at the place of trial and during actual trial in court is in the governor of the gaol from which they have come, or from which, if bailed, they would have come if they had not been bailed, as the effect of the Prison Act 1865 and the subsequent legislation has been to transfer such custody from the sheriff to the gaoler; and consequently, if, after a prisoner, whether he has come from the prison or having been admitted to bail has surrendered in court to take his trial, has been tried, acquitted, and ordered to be discharged, the warders unlawfully detain him, the governor of the prison is responsible for the illegal act of the warders, although he may not have been present in court or have ordered or directed it.

The plaintiff was committed to quarter sessions on a charge of felony; he was admitted to bail, he surrendered, took his trial, and was acquitted, and was ordered by the chairman of the court to be discharged; whereupon the warders who were in charge of the prisoners for trial, instead of allowing the plaintiff to go, took him to the cells below the court and detained him for a considerable time, and questioned him as to his age, parentage, and other particulars, and noted down his answers in a book, and afterwards allowed him to go. The governor of the prison from which the plaintiff would have come if he had not been bailed was not present in court, and the unlawful detention by the warders was not by his orders or directions. In an action for false imprisonment against the governor:

Held, that the legal custody of the plaintiff after he had surrendered and during his trial was in the governor of the prison, and that the governor, whose duty it was to see that the plaintiff was properly discharged after acquittal, was responsible for the illegal acts of the warders in so detaining the plaintiff.

FURTHER consideration by Wills, J. at Manchester, in an action tried before him with a special jury at the Manchester Assizes on the 11th Nov.

The action, which was originally brought in the Manchester County Court, but was removed by *certiorari* to the High Court, was brought by the plaintiff, John Mee, an infant suing by his father, against the defendant, Robert Cruikshank, the governor of His Majesty's prison at Strangeways, Manchester, to recover 50*l.* damages for an alleged false imprisonment.

The statement of claim alleged that on the 15th April 1901 the plaintiff having entered into recognisances to appear and take his trial at the quarter sessions to be held at Strangeways, Manchester, did so appear and was tried and acquitted and discharged; and that after his acquittal and discharge the defendant by his

servants or agents, or persons under his control, wrongfully assaulted and falsely imprisoned the plaintiff and detained him for a long time, and searched and examined him and recorded in a book certain distinctive marks personal to the plaintiff.

The defendant in his defence said (*inter alia*) that he was the governor of His Majesty's prison at Strangeways, Manchester, and was appointed such by the Home Secretary under the provisions of sect. 5, sub-sect. 2, of the Prison Act 1877; that the warders of the prison were not appointed by him, and that he had no power to dismiss them, nor did he pay them; that he did not after the acquittal and discharge of the plaintiff, by his servants, agents, or persons under his control, do the acts complained of, and that after such acquittal and while the plaintiff was in lawful custody a warder in charge of him asked him certain questions and wrote down his answers thereto, and at the same time noted down from observation a description of the plaintiff's personal appearance, &c.; and the defendant denied that the acts complained of were done by him or by his order or authority.

The facts as proved at the trial were these: The plaintiff, who was a carter and was about twenty years of age, was arrested on a charge of stealing a sack of oats at Eccles in April. He elected to be tried by a jury, and he was accordingly committed for trial to the quarter sessions to be held at Manchester. He was then released on bail, and at the quarter sessions he surrendered, pleaded not guilty, was tried and was acquitted, whereupon the chairman of quarter sessions directed him to be discharged. At the time the jury returned their verdict the grand jury had not been discharged. After the plaintiff had been acquitted and the chairman of quarter sessions had ordered him to be discharged, the warder in charge of the plaintiff, instead of discharging him, took him to the cells below the court and, according to the plaintiff's account, he was locked in a cell and detained there for about an hour, but, according to the warder's account, for only a quarter of an hour; shortly afterwards another warder came with a book and questioned the plaintiff as to his age, place of birth, trade, religion, residence, the address of his father, and other particulars, and his answers thereto, and a description of the plaintiff's personal appearance and characteristics were noted down in a book. The warder then left, but returned in a few minutes and gave the plaintiff some articles which had been taken from him before his trial. The plaintiff was then taken to the chief warder in court, when he was allowed to go.

He then brought the present action for assault and false imprisonment against the governor of the prison. The governor of the prison was not present in court at the trial of the plaintiff, and the alleged detention of the plaintiff was not by him or by his orders or directions. The jury found a verdict for the plaintiff, and awarded him 50*l.* damages, and the question of law as to the liability of the governor for the acts of the warders was then reserved for the judge for further consideration.

The Prison Act 1865 (28 & 29 Vict. c. 126) provides:

Sect. 4. "Prison" shall mean gaol, house of correction, bridewell, or penitentiary; it shall also include the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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airing grounds or other grounds or buildings occupied by prison officers for the use of the prison and contiguous thereto; "gaoler" shall mean governor, keeper, or other chief officer of a prison.

Sect. 58. Every prisoner confined in a prison shall be deemed to be in the legal custody of the gaoler, provided that nothing in this Act contained shall affect the jurisdiction or responsibility of the sheriff in respect of prisoners under sentence of death, or his jurisdiction or control over the prison where such prisoners are confined, and the officers thereof, so far as may be necessary for the purpose of carrying into effect the sentence of death, or for any purpose relating thereto; and in any prison in which sentence of death is required to be carried into effect on any prisoner, whether such prison is or not the common gaol of the county, the sheriff shall, for the purposes of carrying that sentence into execution, be deemed to have the same jurisdiction with respect to such prison as he has by law with respect to the common gaol of a county, or would have had if this Act had not passed.

Sect. 63. A prisoner may be brought up for trial, and may be removed by or under the direction of the gaoler from one prison to another, or from one place of confinement to another, to which such prisoner may be legally removed, for the purpose of being tried or undergoing his sentence, and no prisoner whilst in the custody of a gaoler shall be deemed to have escaped, although he may be taken into different jurisdictions or different places of confinement.

The Prison Act 1877 (40 & 41 Vict. c. 21) provides:

Sect. 5. Subject as in this Act mentioned—(2) The appointment of all officers, and the control and safe custody of the prisoners in the prisons to which this Act applies; also all powers and jurisdiction at common law or by Act of Parliament or by charter vested in or exercisable by prison authorities or the justices in sessions assembled, in relation to prisoners or prisoners within their jurisdiction, shall, on and after the commencement of this Act, be transferred to, vested in, and exercised by one of Her Majesty's principal Secretaries of State, in this Act referred to as the Secretary of State.

Sect. 35. The officers attached to prisons at the time of the commencement of this Act (in this Act referred to as existing officers of a prison) shall hold their offices by the same tenure, and upon like terms and conditions, as if this Act had not passed, and shall receive salaries of not less amount than those which they have hitherto received. Such existing officers as aforesaid may be distributed amongst the several prisons to which this Act applies in such manner as may be directed by the Secretary of State, and they shall perform such duties as they may be required to perform by the said Secretary of State, so that such duties are the same or analogous to those they performed previously to the commencement of this Act, and, subject as aforesaid, they shall perform the same duties as nearly as may be as they are performing at the time of the commencement of this Act.

The Prison Act 1898 (61 & 62 Vict. c. 41) provides:

Sect. 2 (1). The Secretary of State may make rules (in this Act called prison rules) for the government of local prisons and convict prisons, and may thereby regulate, among other things—(a) any matter dealt with by the regulations in schedule 1 to the Prison Act 1865; and (b) any matter which under this Act may be regulated by prison rules.

The Prison Rules, dated the 21st April 1899, made by the Secretary of State under the above Act, which came into operation on the 1st May 1899, provide:

Rule 103. All officers of the prison shall obey the directions of the governor, subject to the prison rules,

and all subordinate officers shall perform such duties as may be directed by the governor, with the sanction of the commissioners, and the duties of each subordinate officer shall be inserted in a book to be kept by him.

Rule 124. The governor shall strictly conform to the law relating to prisons and to the prison rules, and shall be responsible for the due observance of them by others. He shall observe the conduct of the prison officers, and enforce on each of them the due execution of his duties, and shall not permit any subordinate officer to be employed in any private capacity, either for any other officer of the prison or for any prisoner.

Rule 125. The governor, in case of misconduct, may suspend any subordinate officer, and shall report the particulars without delay to the commissioners.

Nov. 25.—*Shee, K.C. (Edmund Sutton with him) for the defendant.*—The question is whether the relationship in which the governor of the prison stood to the warders was such as to make the governor liable for the illegal acts of the warders. If there were any illegality committed by the warder then the warder and not the governor would be liable. Even if the plaintiff had been in the legal custody of the governor, the governor would not be liable for any illegal act done by the warder. The warder was not authorised to do an illegal act, and even if the illegal act of the warder had been done in the gaol itself the governor would not have been responsible unless he had ordered it, or had been present and had sanctioned it. Even if the governor as gaoler had appointed the warder to act as gaoler in court, that could only have been an employment of the warder to do the work lawfully. It could not have been an employment of the warder to do the work unlawfully or illegally, and if in carrying out the work the warder had acted illegally the governor would not have been liable. The plaintiff had been acquitted and discharged, and it was the warder's duty to discharge him. Instead of doing his duty he detained and took him to the cells below and questioned him. These were acts done by the warder after his duties as warder to the governor had ceased; and clearly the governor cannot be held responsible for such acts. [WILLS, J.—The warrant of commitment says that the prisoner is committed to the custody of "the gaoler and keeper of the house of correction" to "safely keep him until he shall be thence delivered by due course of law." That would be a strong argument to show that the prisoner committed for trial was in the custody of the gaoler.] That might be so if the prisoner came direct from the gaol; but it would not apply to prisoners out on bail who are not in the statute described as "prisoners." [WILLS, J.—As soon as a prisoner who is out on bail surrenders he must be in the custody of somebody; it would seem to me that he must be in the same custody as he would have been in if he had been in custody all the time and had not been out on bail, and if he had not been out on bail, he would have been in the custody of the gaoler. That would seem to show that the jurisdiction of the gaoler is the same in the case of a prisoner who has surrendered to his bail as in the case of a prisoner who has not been on bail.] When he surrenders he is then in the custody of the "proper officer of the court," and the officers in court are not gaolers in the same sense as when they are in the prison. The "proper officer of the court" probably means the warder in the dock,

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and as the plaintiff could not be said to be a "prisoner," the governor, even if present in court, could not have the custody of him as governor of the gaol, but only as an officer of the court; and as the warden could only have had the custody of the plaintiff as gaoler or officer of the court, and could have had no relationship in that capacity to the governor as governor of the prison, the governor cannot be responsible for the illegal acts of the warden. At the time of the detention the grand jury had not been discharged, and until their discharge the plaintiff's detention was justified. He referred to the Prison Acts 1865 and 1877, and the Standing Rules for Local Prisons, drawn up by the Home Office, and dated the 21st April 1899.

C. H. M. Wharton for the plaintiff.—By the terms of a commitment warrant a prisoner is committed to the custody of the governor of the gaol. When a prisoner is admitted to bail the warrant is for the time being suspended, but when he surrenders the warrant is again in force and the prisoner is in the same custody as before; as, when he surrenders to his bail, he must surrender to the same person to whom the warrant was originally made out—that is, to the governor of the prison, the gaoler. The act done by the warden was an act done by him in the interests of the gaoler. The gaoler is made responsible by the Acts of Parliament, and he is responsible for the acts of his agents, the warders, and by the regulations it is the duty of the gaoler to see that those regulations are properly carried out. The relationship between the governor and the warden is similar to that of principal and agent, for the warden is bound to obey the governor, whose subordinate officer he is. The dock and place where prisoners are kept for trial are clearly parts of the prison; and, if so, the plaintiff was confined within the prison and was in the legal custody of the gaoler, who is therefore responsible for the illegal acts done by the warders. [WILLS, J.—The case is one of very great importance, and I must consider it carefully.]

Cur. adv. vult.

Jan. 28.—WILLS, J. at Manchester read the following judgment: The plaintiff was committed to the quarter sessions holden at Strangeways, Manchester, in April 1901, on a charge of felony. He was admitted to bail, surrendered, took his trial, and was acquitted, whereupon the chairman of quarter sessions directed that he should be discharged. He was, however, taken by the warders of the gaol to the cells below the court, and was there detained until a warden had questioned him as to his name, parentage, and a number of particulars, and had taken a note of his answers and also of his personal and physical characteristics. The detention occupied, according to the warders, a quarter of an hour, according to the plaintiff, an hour. He was then allowed to depart. The defendant is the governor of the gaol at Strangeways. He was not present at the trial of the plaintiff, being engaged elsewhere on duties connected with his office; and the detention of the plaintiff was actually effected not by him or his orders, but by the warders who were in charge of the prisoners who had to take their trials. The jury assessed the damages for the plaintiff's detention, and for the indignity

to which he was subjected, at 50*l.* The question I have to decide is whether the defendant is liable for the acts of the warders. They are not his servants. He cannot either appoint or dismiss them, and he does not pay them. Their duties are regulated by Act of Parliament and by rules made under statutory authority. It is, therefore, not a case in which the rules as to the liability of a master for the acts and defaults of his servants apply, and the liability of the defendant, if it exist, must depend upon the status of the gaoler in respect both of the officers of the prison and the prisoners. The first step in the inquiry appears to me to be to ascertain in whose custody are prisoners when actually upon their trial. At common law the custody of all prisoners committed for trial or convicted of indictable offences was in the sheriff: (see 4 Edw. 3, c. 10, and the references to him in 19 Hen. 7, c. 10; 24 Geo. 3, c. 54, s. 6, c. 56, s. 8; and 31 Geo. 3, c. 46, s. 3). The gaoler was his officer. I cannot find any express authority that the prisoner during his trial was still in the custody of the sheriff, but neither can I find any trace of authority for the proposition that he was in the custody of anyone else. The inconvenience of a shifting right to the custody of the prisoner would be very great, and I cannot suppose that at common law anything of the kind took place. The gaol was in old times the only public establishment for the imprisonment of persons committed on remand, or for trial, or under sentence, and the gaoler the only principal officer appointed to keep such prisoners in ward; he was appointed by the sheriff and paid either by the sheriff or by the fees he was entitled to take from prisoners. By degrees other kinds of prisons for convicted offenders were constituted by Acts of Parliament under the names of bridewell, houses of correction, and penitentiaries, and statutes have been passed from time to time, especially within the last one hundred and fifty years, to regulate the mode of appointment and remuneration of gaolers and of the keepers of the other prisons I have mentioned: (see, for example, 24 Geo. 3, c. 54, s. 20; 31 Geo. 3, c. 46, s. 1), but no Act affecting the legal custody of persons confined in the common gaol was passed until 28 & 29 Vict. c. 126 (the Prison Act 1865), and up to that time the custody of such persons was in the sheriff. By sect. 58 of that Act, every person confined in a prison is to be deemed to be in the legal custody of the gaoler, except prisoners left for execution, as to whom the authority and jurisdiction of the sheriff remains unaltered. It follows that, with this exception, prisoners in a prison are no longer in the custody of the sheriff. "Prison" is defined by sect. 4 to mean a "gaol, house of correction, bridewell, or penitentiary," and "gaoler" to mean "governor, keeper, or other chief officer of a prison." Sect. 58 therefore applies to persons under remand, committal, or sentence, and in one of the classes of prisons enumerated. It does not touch the detention of a prisoner on the way from a prison to the place of trial, nor during the period when he is at the place of trial but untried, or during trial. By sect. 62 the sheriff is relieved of the duty of preparing and delivering to the judges of assize, or to the justices in quarter sessions, a calendar of the prisoners in custody for trial at such assizes or sessions, and this duty is cast upon the gaoler.

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By sect. 63 a prisoner may be "brought up for trial"—the expression is in the Act—and may be removed by or under the direction of the gaoler from one prison to another, or from one place of confinement to another to which such person may be legally removed for the purposes (amongst others) of being tried, and whilst in the custody of a gaoler shall not be deemed to have escaped, although he may be taken into different jurisdictions or different places of confinement. I have been unable to find any other statutory authority for the detention of prisoners at and within the precincts of the court houses at which they take their trial. But the practice of detaining prisoners at such places immediately before and after trial is as old as any part of our legal history, and I cannot doubt that the cells attached to a court-house where criminal justice is regularly administered, and the dock itself in the court, are places of confinement to which prisoners committed for trial may be legally removed for the purpose of being tried. The gaoler, therefore, of the prison to which an untried prisoner is committed may order his removal to the cells attached to the court house and to the dock for the purpose of being tried. The expression "brought up for trial" must cover appearance in the dock. By 40 & 41 Vict. c. 21 (the Prison Act 1877), s. 5, the control and safe custody of the prisoners in the prisons to which the Act applies, was transferred to the Secretary of State. I do not, however, think that the Act meant to alter the status of the gaoler in respect of the prisoners. The expression used is that the "control and safe custody" of the prisoners shall be vested in the Secretary of State. I think the intention was to give him a general supervision and superintendence, and not to restrict the legal right of the gaoler to confine his prisoners. The section applies not only to the transfer of the "safe custody" of prisoners, but to that of the appointment of all officers in prisons and the powers of various prison authorities. Sect. 35 provides in express terms that the officers attached to prisons shall hold their offices by the same tenure and upon the like terms and conditions as if the Act had not been passed, and that subject to the orders of the Secretary of State requiring them to perform any duties analogous to those already performed by them, they shall perform the same duties as nearly as may be as they were performing before that Act was passed. So far as this case is concerned, the term "prison" in this Act bears the same meaning as in the Act 28 & 29 Vict. c. 126, above cited. The same Act gave the Secretary of State power to make rules: amongst other things which the Secretary of State may do is the specification of duties which the prison officers may be required to perform (sect. 35). Rules were made, dated the 21st April 1899. In these rules the gaoler is always spoken of as the governor. Rule 103 is very nearly a repetition of regulation 93 appended to 28 & 29 Vict. c. 126. By sect. 20 of that Act (that is, of 28 & 29 Vict. c. 126) such rules are to have the same force as if they were in the Act itself. Rule 103 of the Secretary of State's Rules provides that all officers of the prison shall obey the directions of the governor and all subordinate officers (which the warders are), shall perform such duties as may be directed by the governor. Rule 124 is a repetition of regulation 69 in the

schedule to the same Act (28 & 29 Vict. c. 126), and provides that the governor shall be responsible for the due observance "by others" (which must include the warders) of the law relating to prisons and of the prison rules. He is also to enforce on each of the subordinate officers the due execution of his duties. Before the Act of 1865, which vested the custody of prisoners in prisons in the gaoler instead of the sheriff, certain Acts of Parliament were passed which appear to treat what was done at shirehalls in respect of trials as mere parts of the common law. By various statutes, of which the most important are 7 Geo. 4, c. 63; 7 Will. 4 and 1 Vict. c. 24; and 10 & 11 Vict. c. 28, powers were given to county justices to build, acquire, rent, or contract for the use of buildings for the purpose of holding assizes and sessions therein, and the only provision for the exercise therein by any one of powers of detention and custody is an enactment that all things done therein shall be as valid as if done in the ancient and immemorial shirehalls. It may be mentioned by way of illustration that when Birmingham was made by Orders in Council an assize town, no provision was made by statute, or by order made under statutory authority or otherwise, for the custody of prisoners. For some years the assizes were held in the municipal buildings, which had no special provisions for the safe keeping of prisoners, who were detained when awaiting trial in some of the ordinary rooms in the buildings, never designed for any such purpose and never appropriated to it by statute. I believe the same state of things existed when a few years back, upon the occasion of an epidemic of typhoid at Maidstone, the assizes were held at Canterbury. In both cases, no doubt, the conditions required by the statutes I have cited existed, and thereupon it was assumed that the common law provided for all that was necessary. Up till the Act of 1865, therefore, such matters were left to the common law, and there can, I think, be no doubt that by common law the sheriff had the legal custody of persons committed for trial, during preliminary detention, during removal to and from the shirehall or other place of trial, until trial and during the trial itself, and in the case of convicted prisoners during removal back to the prison and whilst they were serving their sentences in the prisons; and the question is reduced to whether it can be collected from the Act of 1865 and subsequent legislation that the custody was thereafter to be that of the gaoler, at the place of trial and during trial. I have come after careful consideration to the conclusion that, although the legislation may be somewhat wanting in distinctness, such was the intention of the Legislature. If it were not so, there would be a shifting custody, the custody being in the gaoler during removal to the place of trial and during removal back to the prison, and until he is "brought up for trial"—that is, until he appears in the dock (for I do not think it can be doubted that such is the effect of sect. 63), and in the sheriff during and till the end of the trial—a most inconvenient arrangement, and one which it is extremely unlikely that the Legislature should have intended. His jurisdiction and responsibility in respect of persons under sentence of death are expressly reserved. Nothing in the Act is to affect them (sect. 58). It would be strange if an

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Act which dealt specially with his status as to prisoners sentenced to death should, if it was intended that his responsibility as to such prisoners amongst others during the actual trial should continue unaffected, have made the saving clause begin to operate only after sentence. A further portion of sect. 63 has a bearing upon the subject. The prisoner is not to be deemed to have escaped whilst in the custody of "a gaoler," though taken into a different place of confinement, and into different jurisdictions. This general expression covers, and was, I have no doubt, meant to cover, such a case as that of a prisoner removed from one of the local prisons in the county to Strangeways prison for trial at Manchester. Can it be doubted, in the face of such a section, that upon being removed from Manchester gaol to the cells below the court, he would, although in a different place of confinement, still be not "escaped," but in the custody of the only gaoler who could bring him there, and also the only gaoler who ever interferes with or regulates prisoners when so brought from the gaol? In no court-house that I have ever sat in is there a gaoler appropriated either to the cells belonging to the court-house or to the dock; and the only person who ever acts as gaoler there is the gaoler of the gaol from which the prisoners are brought for trial. In sect. 66 provision is made for cases in which under the powers of the Act the authorities of one prison may contract with the authorities of another prison for the reception of prisoners who would naturally and primarily go to the first prison. Under such circumstances the prison of the receiving authority shall be deemed to be the prison of the contracting authority for all purposes incidental to the commitment, trial, detention, and punishment of the prisoners of the contracting authority. These words are, I think, meant to cover the whole of the processes by which arrest develops into punishment; and the whole series of events are treated as attached, so to speak, to the prison. The expenses to be paid for by the contracting authority to the receiving authority, are to include all costs incurred in respect of the prisoners: (sect. 32). There is no doubt that the prisoners sent from any prison for trial at any place outside the prison are maintained during detention at the assizes or sessions by the prison from which they come; which is a strong reason for concluding that they are still in the custody of the gaoler of that prison. It has been suggested that different considerations apply to a prisoner on bail, but I do not think that it makes any difference whether he was committed to prison, or was out on bail. When once he has surrendered he must be in the same custody as if he had been in prison awaiting his trial. The condition on the bail bond is that he shall surrender himself into custody, which must be the same custody as that of prisoners who have not been on bail. I thought that some light might have been thrown upon the question raised in this case by the form of commitment given in Jervis' Act (11 & 12 Vict. c. 42, form H in the schedule), but clearly the framers of the Act did not think of the removal to a distant court, and detention and trial there. The only direction given to the gaoler is "to receive him into your custody in the said prison, and him there safely to keep until he shall be thence delivered by due course of law." It is obvious that no

gaoler who removed a prisoner out of a prison to a court for trial ever did obey the direction to keep the prisoner "in the prison" till his delivery thence by due course of law. Indeed, it is an impossible direction, and therefore affords no assistance towards the solution of the present question. It is, however, of some importance to observe that the condition of the bail bond is that the accused shall appear at the assizes or quarter sessions in question, and there surrender himself to the custody—of whom? Not of the sheriff, but of the keeper of the common gaol, or whatever the prison may be to which such keeper belongs. It is the constant practice, and must have been so in the year 1848, when that Act was passed, for the surrender to take place when the case is actually called on for trial. If I am right in the view that a prisoner when on trial is in the custody of the gaoler of the prison from which he came, if not on bail, or from which, if bailed, he would have come had he not been bailed, it follows, I think, that the gaoler ought either to set him free, or to take care that he is set free, when the court has ordered his discharge. It is true that the gaoler cannot always be present in court; but it is an important part of his duty to exercise control over what is done there to prisoners. It is true that the officers are not his servants, and he is not responsible for what they do, or do not do, on that ground, nor probably to the same extent as if they were his servants, but they are bound to obey his orders (Regulation 93 in the schedule to 28 & 29 Vict. c. 126, and r. 103 of April 1899). I do not rely upon the expressions either in the schedule to the Act 28 & 29 Vict. c. 126, or in rule 124 of the Rules of April 1899, that the gaoler shall be responsible for the due observance by others of the law relating to prisons and to the prison regulations as imposing upon him an unqualified civil responsibility for any breach of these duties by a warder; but the legislation certainly imposes upon him the necessity of taking ordinary precautions that his officers shall exercise their duties in a manner consistent with law, and the least he can do, if he cannot be present, is to tell his officers what they ought to do, and to take some care that they do not act as they did in the present case. The warder in charge of the prisoners at the quarter sessions in question appeared to have no notion that there was anything improper in putting a man, who had been acquitted, into a cell, questioning him as to his birth, parentage, age, religion, and the like, and taking down particulars of his appearance and physical characteristics. It is an instructive fact worthy of the notice of those who industriously compile what are called judicial statistics as to criminal matters, that one of the "particulars" entered by the warder on his sheet was "reading imperfect." I asked whence the information came. The warder's answer was "we get that from his appearance." The defendant was called and examined upon several points, but he did not say that he had ever told the warders that a man who had been acquitted ought to be discharged at once and not put in a cell, detained, questioned, or have any record made of his appearance or history. It was urged upon me for the plaintiff when the case was argued before the close of the assizes, that the cells in question were really a part of the Strangeways prison. The point was not

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made when the case was before the jury, and although they very possibly might have found that they were so, there is no such finding, and I therefore cannot act upon any such view. In my opinion, however, the defendant is liable on the other grounds already discussed, and I must therefore give judgment for the plaintiff.

Judgment for the plaintiff for 50l.

Solicitors for the plaintiff, *Smiles and Co.*, for *J. H. Cooper*, Manchester.

Solicitor for the defendant, *The Treasury Solicitor*.

March 5 and 6, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

BROWNE (app.) v. BRANDT (resp.). (a)

Innkeeper—Common law duty to receive travellers—Night—All bedrooms occupied—Inn full.

An innkeeper is under no common law duty to provide shelter and accommodation for travellers wishing to spend the night at his inn when all the rooms ordinarily used as bedrooms for guests are occupied.

APPEAL from the decision of the County Court judge of Surrey.

The facts of the case as they appeared upon the judge's note of the evidence and from the defendant's answers to interrogatories were as follows:—

On the 9th April 1901 the appellant was travelling on a motor-car from Crawley to London. The car broke down in the neighbourhood of Horley.

The appellant and a friend who was travelling with him pushed the car to Horley, where they came to an inn called the Chequers, of which the respondent was the landlord. They arrived there about two o'clock in the morning.

Having roused the respondent, the appellant demanded a bed or beds for himself and his friend, who were both wet through.

The respondent declined to admit them to the inn, saying that the house was full.

The appellant then asked for some refreshment, when, after some demur, the respondent admitted him and his friend into the inn and provided the refreshment required.

The appellant again asked for beds or a bed, and was again refused on the ground that the house was full.

The respondent then said that as the bedrooms were all occupied he and his friend would be content to remain for the night in the coffee-room or in a sitting-room which was unoccupied.

This the respondent refused to permit, saying that he never allowed anyone to stay up all night in the coffee-room or sitting-rooms.

The appellant and his friend then left the inn, and, failing to find shelter elsewhere, they procured a brougham and drove back to Crawley.

The appellant sued the respondent for damages sustained by reason of the respondent having refused to give him shelter in his inn.

At the hearing before the learned County Court judge the latter found as facts that the Chequers was on the night of the 9th April full as regarded

proper sleeping accommodation; that there was no unoccupied bedroom; that there were, however, at least two other rooms available for the shelter and accommodation of the appellant and his friend, and that the shelter and accommodation were refused.

On these facts he held that the Chequers was on that night full when the appellant demanded shelter and accommodation, and that the respondent was therefore not bound to give shelter and accommodation to the appellant on that night. He gave judgment for the respondent, but, in case his judgment might on appeal be held wrong, he assessed the appellant's damages at five guineas.

Thornton Lawes for the appellant.—The point here is whether at common law a belated traveller is entitled to shelter in an inn when all the bedrooms, but not all the other rooms in it, are occupied. It is admitted that all the bedrooms in the Chequers were occupied on the night of the 9th April. I submit, however, that is not sufficient. The innkeeper is bound to give a traveller who claims it any shelter and accommodation he can give him. He can only refuse to give him such shelter and accommodation on one of two grounds—(1) that the traveller is an improper person, or (2) that the inn is full. Here no question arises on the first of these grounds, and I submit on the second that an inn is not full on a night when all its bedrooms are occupied, but other rooms are unoccupied. From the earliest times the common law gave an action against an innkeeper who refused shelter when his house was not full, but it cannot be said that the literature or decisions on the subject very clearly define what is meant by the house being full. But it is to be noted that the words always are that the "house" must be full, not that the "bedrooms" must be full: (Roll. Abr. F. 3, pl. 1). I submit that a house is not full when several of its rooms are empty, and that a traveller, if he chooses to put up with the inconvenience, is entitled to claim shelter for the night in a sitting-room just as much as in a bedroom. The extent of the innkeeper's liability is laid down in *Hawkins' Pleas of the Crown* (at p. 714) in these words: "It seems also to be clear that if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury in an action on the case at the suit of the party aggrieved, but may also be indicted and fined at the suit of the King. Also it is said that he may be compelled by the constable of the town to receive and entertain such a person as his guest, and that it is no way material whether he have any sign before his door or not, if he make it his common business to entertain travellers." This passage is chiefly useful as showing the serious way in which the common law regarded and the strenuous way in which it enforced the obligation. No doubt since railways were introduced the obligation has not been of the same importance as previously, but now with the cycle and the motor-car road travelling has become common again, and the courts should protect the ancient rights of the traveller. Here the appellant found himself denied shelter at two o'clock on a rainy

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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night. If the law gave him a right to such shelter as the inn could afford, it was a grave wrong on the part of the innkeeper to refuse it. The traveller is entitled at least as much to shelter at night as to shelter during the day, and it does not matter how late it is when he demands it:

Rees v. Ivens, 7 C. & P. 213;

Fell v. Knight, 8 M. & W. 269.

The licensing laws do not affect the point.

English Harrison, K.O. and *R. Burleigh Muir*, for the respondent, were not called upon.

LORD ALVERSTONE, C.J.—In this case the appellant, his motor-car having broken down, arrived at the respondent's inn after midnight, and was, after some discussion, let in for refreshment, but was not allowed to remain. He thereupon brought an action in the County Court contending that the respondent had broken his common law duty as an innkeeper to provide accommodation for travellers, and that the action could be maintained if the respondent had a room of any kind, or at any rate a coffee-room or sitting-room, where he could have remained for the night. The County Court judge found that the respondent's house was full as regarded proper sleeping accommodation; that there was no empty bedroom; that there were two rooms available for the accommodation of the appellant, and that the accommodation was refused. I do not think that the question whether the appellant demanded to take the one sitting-room which was empty was submitted to the County Court judge, but I do not wish to decide this case upon any narrow ground, and I will therefore assume in favour of the appellant that there was some place in the house where possibly the respondent might have permitted the appellant to stay for the night. I think it would be straining the common law liability of an innkeeper if we were to hold that the appellant has a good cause of action. The true view of the common law rule, in my opinion, is that an innkeeper may not pick and choose his guests; he must give accommodation to people who come as travellers to his inn and are in a position to pay. I cannot think that the authorities to which we have been referred mean that, where an innkeeper provides a certain number of bedrooms and sitting-rooms for the accommodation of guests, he is under a legal obligation to receive and shelter as many people as the rooms will hold without overcrowding. I do not think that a person who comes to an inn at night has a legal right to demand to be allowed to pass the night in a sitting-room; if the bedrooms are all full, I think the landlord is under no legal obligation to receive and shelter him. He must act reasonably and not capriciously or unreasonably refuse to receive guests when he has proper accommodation for them. Here the County Court judge has found in effect that the landlord did not act unreasonably. For these reasons I am of opinion that his judgment must be affirmed.

DARLING, J.—I am of the same opinion. No doubt an innkeeper is bound to provide accommodation for travellers, but it is not his absolute duty to do so at all risks and at all costs. He is bound to provide accommodation only so long as his house is not full; when it is full he has no duty in that respect. The question, then, is, When

is an inn to be said to be full? I do not think the old cases can help one very much on this point, because one knew that in olden times people were in the habit of sleeping very many in one room and several in one bed. People who were quite unknown to one another would sleep in the same room, as is done in common lodging-houses at the present time. Therefore, if we got a definition of "full" in one of the old cases of the fourteenth or fifteenth centuries, I should not be surprised to find that what was called "full" then we should now call "indecent overcrowding." It is the habit now of people to occupy separate bedrooms, and it seems to me that, having regard to modern habits, "full" must at present mean "full" in the sense in which a decently conducted inn would be considered full—that is, the house must be considered full when all the bedrooms were occupied, if what the person wanted was to pass the night. There might have been some difficulty here if the appellant had said: "I will take your sitting-room; I do not want to go to bed; I wish to sit up all night." But that difficulty does not arise on the facts of the case. The County Court judge has come to the conclusion that the house was full, having regard to modern habits. He referred to the *Canterbury Tales* of Chaucer and the state of inns in this country when the pilgrims to *Canterbury* left the Tabard (Prologue to *Canterbury Tales*, vv. 19-20). And counsel for the respondent might have cited an incident in Laurence Sterne's *Sentimental Journey* to show that a room was not considered then as full which certainly would be considered too full at the present day.

CHANNELL, J.—I agree.

Appeal dismissed.

Solicitors for the appellant, *George Terrell, Terrell, and Varley*.

Solicitors for the respondent, *Cooper, Turner, and Evans*, for *Morrison and Nightingale*, Reigate.

March 16 and 17, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GOODWIN (app.) v. CORPORATION OF SHEFFIELD (resps.). (a)

Police—Pension—Calculation of—“Annual pay” —Free residence and fuel—Right to include for purpose of pension—Right of appeal from quarter sessions—Police Act 1890 (53 & 54 Vict. c. 45), s. 11, sched. 1, rr. 1, 11.

When a police constable appeals under sect. 11 of the Police Act 1890 to quarter sessions from the decision of the police authority on a reconsideration of the amount of his pension, the parties may appeal by case stated on a question of law for the opinion of the King's Bench Division, notwithstanding the provision in that section that the decision of the court of quarter sessions shall be final.

By the Police Act 1890, a police constable, after a certain number of years' service, is entitled as of right to retire and to receive a pension to be calculated on the amount of his "annual pay" at the date of his retirement.

A divisional inspector retired from the service with

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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the right to a pension. At the date of his retirement he had, in addition to his weekly payment in money, a free residence for himself and family, and free fuel, gas, and water. Held, that the value of the free residence, fuel, gas, and water was not a part of his "annual pay" for the purpose of calculating his pension, and ought not to be taken into consideration.

APPEAL from the recorder of the city of Sheffield.

The appellant appealed to the quarter sessions for the city of Sheffield against a decision of the watch committee of the Sheffield Corporation, under sect. 11 of the Police Act 1890, for a reconsideration of the amount of the pension granted under the Act to him upon his retirement. The watch committee had refused to increase the amount of the pension from the sum of 7l. 3s. 4d. per lunar month, the amount fixed by them, to the sum of 8l. 14s. 1d., the amount claimed by the appellant.

The appeal was tried before the recorder on the 11th July 1901, when he allowed the appeal and reversed the decision of the watch committee, and made an order that the amount of such pension should be 8l. 14s. 1d. per lunar month, instead of the 7l. 3s. 4d. per lunar month, subject to the opinion of the court upon this case.

The facts were as follows:—

The appellant joined the Sheffield police force in 1868; was appointed inspector in 1876, and was appointed or promoted divisional inspector in 1892, and retained that position until his retirement from the force in April 1901.

The appellant accepted the provisions of the Police Act 1890.

The appellant received as inspector the weekly pay of 2l. 10s., and a fire brigade allowance of 15s. per lunar month, which together amounted to 189l. 15s. per year, and there was deducted therefrom a sum equal to 1½ per cent. on such amount as a contribution towards the police pension fund.

The appellant when appointed or promoted to the position of divisional inspector was required to live at the divisional head police station, where he resided free of rent and rates, and further had the free use of the fuel, gas, and water provided for the station for the rooms therein occupied by himself and his family. These matters had been agreed for the purposes of this case to be of the value of 30l. per annum. On being appointed or promoted to the position of divisional inspector no alteration was made in the pay of the appellant except in so far (if at all) as these matters agreed to be of the value of 30l. may properly be described as "pay." The deductions for contributions towards the pension fund were still calculated at 1½ per cent. on 189l. 15s. per annum as theretofore, though the appellant had on different occasions applied to the watch committee to have his cash pay increased to 170l., and to be allowed to pay for rent and other matters as above out of such sum, and to have a deduction for police pension fund made in respect of such sum of 170l., but the watch committee had on each occasion declined to entertain such application.

The appellant gave all requisite notices of his desire to retire from the force and to receive a pension, and was entitled as of right by the Police Act 1890 to retire and receive a pension for life

of two-thirds of his "annual pay" at the date of his retirement.

The watch committee duly awarded the appellant a pension of 7l. 3s. 4d. per lunar month, or 93l. 3s. 4d. per annum, being two-thirds of the sum of 189l. 15s.

The appellant duly made application to the watch committee, under sect. 11 of the Police Act 1890, for a reconsideration of the amount of his pension, submitting that there should have been taken into account the payment in kind received by him—namely, house rent, fuel, gas, and water, amounting in value to 30l. per annum, on which, he submitted, pension ought to be awarded, but the watch committee, after reconsideration, declined to entertain such application.

Notice of appeal to the next General Court of Quarter Sessions for Sheffield against the decision of the watch committee on such reconsideration, was duly given by the appellant, upon the ground that the pension granted to the appellant was calculated on a wrong basis, being upon a lower rate of pay than the appellant was in law and in fact actually receiving.

In April 1893 the police force sub-committee of the watch committee presented a report, which was confirmed and adopted by the council, recommending that Inspector Moody be promoted to the rank of chief inspector of detectives and inspector of common lodging-houses, and that his remuneration should be equal to that of a divisional inspector, who, in addition to his pay, received an allowance for taking charge of the fire-extinguishing apparatus at his station, and was provided with a good house free of rent and rates, and supplied gratuitously with water, coal, and gas; and the sub-committee estimated the pay and allowances of one of these inspectors at 170l. per annum, and recommended that Chief Inspector Moody's pay should be increased to that amount. Since that time Chief Inspector Moody received an annual cash payment of 170l., less a sum equal to 1½ per cent. on that amount as a contribution towards the police pension fund. Under the "scale of pay" for the police force, which was adopted by the council in 1891, and was in force on the date when the appellant retired, the pay of an inspector in the position of appellant at the date of his retirement, was 2l. 10s. per week. In the weekly "pay sheet" signed by the appellant every week, there was entered, under the heading "Rate of Pay per Week," 2l. 10s., and under the heading "Deductions payable to Superannuation Fund," contributions, 7½d., and under the heading "Net Pay received by each Officer and Constable," 2l. 9s. 4½d., and under the headings "Allowance for Rent," "Allowance for Boots," "Gross Amount of Pay," there were no entries. A separate receipt for one lunar month's fire brigade allowance (15s.) was signed by the appellant, and under the heading "Nature of Special Duty" was the entry "Taking care of Hose-Reel."

If the matters hereinbefore mentioned, and agreed to be of the value of 30l. per year, formed part of the "annual pay" of the appellant within the meaning of the Police Act, the amount of his pension should have been 8l. 14s. 1d. per lunar month, and not 7l. 3s. 4d., as fixed by the watch committee.

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The question for the opinion of the court was, whether upon the above facts the matters hereinbefore mentioned and agreed to be of the value of 30l. a year, were or were not part of the "annual pay" of the appellant, within the meaning and for the purposes of the Police Act 1890. If they were, then the order of the quarter sessions was to stand confirmed; but if not, then the order was to be quashed, and the decision of the watch committee was to stand confirmed.

The Police Act 1890 (53 & 54 Vict. c. 45) provides:

Sect. 1. Subject to the provisions of this Act, every constable in a police force—(a) if he has completed not less than twenty-five years approved service . . . shall, on the expiration of such time not exceeding four months after he has given written notice to the police authority of his desire to retire as the police authority may fix, be entitled without a medical certificate to retire and receive a pension for life.

Sect. 11. In any of the following cases—(a) Where a pension after being granted to a constable has subsequently in pursuance of this Act been declared to have been forfeited, and (b) where a constable is dismissed without a pension to which he would be otherwise entitled, and in any other case where a constable, or the widow or child of a constable, claims a pension or allowance under this Act as of right, and the police authority do not admit the claim, the constable, widow, or child may apply to the police authority for a reconsideration of the claim to the pension or allowance, and if aggrieved by the decision upon such reconsideration, may apply to the next practicable court of quarter sessions for the county within which the constable last served; or if the constable last served in the police force of a borough having a separate police force and a separate court of quarter sessions, then to the next practicable court of quarter sessions for that borough, and that court, after inquiry into the case, may make such order in the matter as appears to the court just, which order shall be final; but nothing in this section shall confer a right to appeal against the exercise of any discretion, or against any decision which is declared by this Act to be final.

Sched. 1.—As to pension scale:

(1) The pension to a constable on retirement shall be within the maximum and minimum limits following; that is to say, (c) if he has completed twenty-five years approved service, an annual sum not less than thirty-sixtieths nor more than thirty-one fiftieths of his annual pay, with an addition of not less than one-sixtieth nor more than three-fiftieths of his annual pay for every completed year of approved service above twenty-five years, so however that the pension shall not exceed two-thirds of his annual pay. (11) In estimating any pension, gratuity, or allowance for the purposes of this Act—(a) a pension or gratuity to a constable shall be calculated according to the amount of his annual pay at the date of his retirement.

Macmorran, K.C. (*H. W. W. Wilberforce* with him) for Goodwin.—There is a preliminary objection that there is no right of appeal in this case, as the decision of the recorder is declared by sect. 11 of the Police Act 1890 to be final. This point was not raised in *Upperton v. Ridley* (*ante*, p. 65; 82 L. T. Rep. 233; (1900) 1 Q. B. 680, and 84 L. T. Rep. 18; (1901) 1 K. B. 384), where the appeal was heard; but it is submitted that the appeal in that case was only entertained by the consent of the parties. Here the respondents never consented to have a case stated.

W. Valentine Ball (*Avory*, K.C. with him) for the Sheffield Corporation.—This is not a proceeding in the nature of an appeal at all; the learned

recorder has only given a decision subject to a special case, and in the judgment delivered by him he expressed great difficulty in coming to a conclusion: (see the report in *Moore and others v. Mayor, &c., of Sheffield*, 65 J. P. 458). This court is asked to exercise its "consultative jurisdiction." It was held in *Rea v. Justices of Sussex* (2 Bott's Poor Laws, 5th edit., p. 751) that a case may be stated by the quarter sessions on a point of law, without the consent of the parties. That case was cited with approval in 2 Nolan's Poor Laws, 4th edit. (1825), p. 558. The right to state a case has never been taken away. The Quarter Sessions Act 1849 merely gave the parties a right to consent to have a case stated. He referred to

Reg. v. Chantrell (33 L. T. Rep. 305; L. Rep. 10 Q. B. 587.

[He was stopped.]

Macmorran, K.C., in reply, referred to

Reg. v. Bridge, 62 L. T. Rep. 297; 24 Q. B. Div. 609.

Lord ALVERSTONE, C.J.—The court will hear the appeal on the merits.

Avory, K.C. (*W. Valentine Ball* with him) for the Sheffield Corporation.—These allowances are not part of the "annual pay" of the appellant. The case is really governed by the decision of the Court of Appeal in *Upperton v. Ridley* (*ubi sup.*), and the present is an *a fortiori* case, as the matters there in question might possibly have been held to be "pay," but the matters in question here cannot possibly be "pay." In *Upperton v. Ridley* (*ubi sup.*) an allowance of 1s. a day for special duty in the House of Lords in addition to the constable's ordinary pay, was held to be no part of the constable's "pay" for the purpose of calculating his pension. If so, then clearly these allowances of a free house, fuel, &c., form no part of the "annual pay" for the purpose of calculating the pension. As pointed out by Channell, J. in that case, there has for a long time been the distinction between pay and emoluments or allowances. This distinction is clearly recognised by the Legislature in the Police Act 1893 (56 & 57 Vict. c. 10), for instance, in sect. 2, sub-sect. 2, which speaks of the "pay" of constables and the "allowances" of constables, and in sect. 1 there is the provision that constables employed on fire duty are to be deemed to be acting in the execution of their duty. But for that provision the fire brigade allowance would not be "pay" for the purposes of calculating the pension. The learned recorder in his judgment (reported 65 J. P., at p. 459) seems to have thought that the words in sect. 11 that the court "may make such order in the matter as appears to the court just," gave him a discretion in the matter, and that it would be inequitable that if an inspector were provided with something in addition to his pay, which he regarded as part of his "remuneration," he were not allowed to take that into consideration for his pension. The court of quarter sessions has no such discretion under sect. 11, which gives an appeal to that court only in certain matters affecting the pension, but gives no appeal in other matters which are left to the discretion of the police authority. In sect. 32 (5) there is a special provision that "emoluments" are to be taken into account for the purposes of the pension in the case of the commissioners of police in the metropolis. That

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shows that they are not to be included in other cases; and the distinction between "pay" and "allowances" has been drawn in other Acts on analogous matters such as the Superannuation Act 1859 (22 Vict. c. 26), and the Poor Law Officers' Superannuation Act 1896 (59 & 60 Vict. c. 50). In the latter Act the superannuation allowances are calculated on the salary or wages and "emoluments" (sect. 3), and the term "emoluments" is (in sect. 19) defined as including the money value of apartments and other allowances in kind. There is nothing in the Police Act 1890 analogous to that. In this case the appellant is claiming an allowance for coal, but an allowance for boots is in just the same position, and there is no suggestion that he could claim an allowance for boots. The recorder was dealing with a matter with regard to which he had not an absolute discretion; he can only decide the amount of the pension according to the statute, which gives him no discretion.

Macmorran, K.C. (H. W. W. Wilberforce with him) for Goodwin.—This case is not governed by the decision in *Upperton v. Ridley (ubi sup.)*. In that case there was no right to the special allowance, and the payment was a mere gratuity for special services, and if the constable were ill and someone else did the services, such person would get the allowance. Here there was a right to the allowances. The pay list does not necessarily determine what is "pay" and what is not. A man's pay may be more than he receives in cash; he may receive so much in cash, and he may have something more which is equivalent to cash, and that something more is part of his pay. That has been so held under the Workmen's Compensation Act 1897 (see *Pomphrey v. Southwark Press*, 83 L. T. Rep. at pp. 469-470; (1901) 1 K. B. at p. 90). In the city of Sheffield this allowance for rent is considered as part of the "pay," as it was in *Moody's* case; it is remuneration, and there is really no distinction between remuneration and pay, and all the parties treat remuneration as pay. It is a question of fact in each case what is a constable's pay; it may be more than he receives in cash; and if it is a question of fact, the recorder has dealt with it. The words in sect. 11 that the court may make such order as may seem just, give the court a discretion, and in this case the recorder has exercised that discretion, and this court ought not to interfere.

Avory, K.C. in reply.

Lord ALVERSTONE, C.J.—In this case I have felt a great deal of difficulty in coming to a conclusion. In my opinion, it is not covered by the decision of the Court of Appeal in *Upperton v. Ridley (ubi sup.)*; but the court there lay down the principle that everything which a police constable receives in money or otherwise by way of remuneration is not necessarily to be included in his "pay" for the purpose of calculating his pension. The decision does not go further, or lay down any other rules binding the court in this case. The Master of the Rolls decided the case on the ground that the extra allowance was a mere gratuity, and Collins, L.J. said that "the evidence of what the Secretary of State has declared on the document signed by the constable to be his pay, the amount awarded as pension to the appellant, and the whole practice for many years with regard to the stoppage of

the special allowance during absence from the special work and the deductions for a pension fund, point in the same direction, and show that this extra allowance which the constable received cannot be brought within the term 'annual pay.'" What we have to consider in this case is whether the "annual pay" of the police constable which is given in the 1st schedule to the Police Act 1890 as the basis for estimating his pension, includes an emolument of the kind received by the appellant in this case. After a great deal of doubt, I think it should not be included, and that the decision of the recorder cannot be supported. "Pay" is to a certain extent a technical word, known and commonly used with reference to certain classes of persons, such as soldiers, sailors, and police. At the time when the Police Act 1890 was passed allowances in kind were made to the police and were well known; allowances for clothing, for boots, and in some cases for rent were made, and in some cases constables lived rent free at the police station or in the police barracks. If it had been intended that the "annual pay" of a police constable should be the fair money value of everything in money or in kind which the constable received, different considerations would apply. But the decision of the Court of Appeal, and the provisions of the Police Act 1890, show that to be "annual pay" within the meaning of the Act it must come within what is properly understood as pay. In the present case the employment of the appellant necessitated his living at the station, and he got coal, gas, and water free. It is difficult to bring under the word "pay" such things as the free use of a house, gas, coal, and other such things, especially as it was a necessary incident of his employment that he had to reside there; and when we once get away from the "pay" fixed by the employment we get into other considerations as to the annual value of emoluments. Sect. 32, to which Mr. Avory referred, points in the same direction. Therefore, upon the facts of this case, I think it is not possible to hold that these things were "annual pay." It was contended by counsel for the appellant that the question what was "annual pay" was a question of fact, and that the finding of the recorder as to what was "pay" cannot be reviewed. I do not, however, think that the recorder based his judgment upon such a finding of fact. Under the Act an appeal lies to the recorder only when the constable claims a pension as of right, and he can only claim a pension as of right when he claims in respect of something which comes within the words "annual pay." I therefore cannot avoid dealing with the point of law. I should also mention that the document signed by the appellant in this case is very different from that signed by the police constable in *Upperton v. Ridley (ubi sup.)*, and the facts of the two cases are different. There the allowance was a mere gratuity. There is this further difficulty in the case, that it is impossible to put the parties back into the same position, as the deduction for the pension fund was not made on the value of the free house, fuel, gas, and water. The appellant received the full value of these things without any deduction; though on several occasions he asked to be put in the position of receiving the rent as an increase of salary and of having a deduction made therefrom for the pension fund. For these reasons I think this

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appeal should succeed. As to the preliminary objection, sect. 11 of the Police Act 1890 was not intended to prevent an appeal in these cases. It was not intended to interfere with the right of the parties to have a case stated on a question of law, and I think that the principle of *Reg. v. Bridge (ubi sup.)* applies so far as the argument upon the preliminary point is concerned.

DARLING, J.—I am of the same opinion. The case is, I think, one of considerable hardship, because the police constable tried to get his pay fixed at a higher sum, and to be allowed to pay for his rent, &c., which had been done in the case of Inspector Moody. The question we have to consider is whether the free residence and the other things mentioned in the case are "annual pay" within the meaning of the Act. I do not think they are. I do not think that free residence, with coal, gas, and water, was intended by the statute to be taken as part of a police constable's "annual pay." If his house were part of his pay, so also would his uniform, as each increases the value of his appointment, and he is bound to live in his house as well as to wear his uniform. I cannot see how we could hold that his house was part of his pay without also holding that his uniform was part of his pay, and no suggestion has been made that his uniform is part of his pay. It may be said that this does not apply to coal, gas, and water, but I agree that these things are merely incidents of the residence in the house. I think that the natural meaning of "annual pay" is that which is received in money, and does not include that which is received in other things.

CHANNELL, J.—I am of the same opinion. I think that the argument in this case and the consideration of the judgment of the Court of Appeal in the case of *Upperton v. Ridley (ubi sup.)* has rather confirmed me than otherwise in the opinion that I endeavoured to express in the Divisional Court in that case—namely, that "pay" in this Police Act of 1890 was used as a technical word to mean the money actually paid which the police constable got, and which is properly distinguished from "allowances" or "emoluments" or any such words as those, which had in some former Acts been taken into consideration for some purposes, but which were not intended to be taken into consideration in this Act of 1890. There is an obvious convenience in making a fixed money payment to be the standard of the pension, which is to be so many sixtieths of the amount of his annual pay, rather than in taking in the allowances and things which had to be estimated in value, and which, therefore, would not be nearly so convenient for the purpose of estimating a pension on a given scale. I think that there is quite enough in this Act, and in the other Acts dealing with the same matter, to show that that is what was meant, and to show that "pay" is a technical word meaning the money payment according to the scale approved of by the Secretary of State, and I think that that was the scale adopted to calculate the pension upon. I agree that it is not quite clear that the Court of Appeal adopted that view to its full extent in the case of *Upperton v. Ridley (ubi sup.)*, because in that case there were other grounds on which it might be said that the sum under consideration there was purely voluntary and gratuitous. There

is, however, nothing inconsistent with this view in the decision of the Court of Appeal in that case, and I think the matter is quite clear.

Appeal allowed. Leave to appeal.

Solicitors for the appellant, *Pitman and Sons, for Chambers and Son, Sheffield.*

Solicitors for the respondents, *Richard F. and C. L. Smith, for H. Sayer, Town Clerk, Sheffield.*

Monday, March 17, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WOODFORD URBAN DISTRICT COUNCIL (apps.) v. STARK (resp.). (a)

Local government—Urban district—Drain—New house—Block of two houses—Combined drain—Necessity of separate drain for each house—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 25.

An urban authority have power under sect. 25 of the Public Health Act 1875 to require in respect of each newly built house the construction of a separate drain for the drainage of each such house, and their powers under that section are not limited to questions as to the size, materials, and level of the drain.

The respondent deposited with the urban authority notice of his intention to erect a block of two houses, semi-detached, with a plan which showed a combined drain for the two houses. The urban authority on the report of their surveyor disapproved on the ground of the unsatisfactory provisions for drainage, and made an order, under sect. 25 of the Public Health Act 1875, for the construction of one drain for each house, to be properly constructed and to be connected with the public sewer:

Held, that sect. 25 required a separate drain to be constructed for each house, and that a combined drain for the block of two houses was not a compliance with the provisions of the section, and that the urban authority had power under the section to make an order for the construction of a separate drain for each house.

CASE stated by justices of the peace sitting as a court of summary jurisdiction at Stratford in the county of Essex.

On the 11th Oct. 1901 certain informations (hereinafter set out) preferred by the Woodford Urban District Council (the appellants) against Frederick Stark (the respondent) were heard and determined, and were dismissed by the justices, subject to this case.

On the 5th July 1901 the respondent deposited with the appellants notice of his intention to erect two houses in Maybank-road, Woodford, Essex, and attached to such notice was a block plan, which was produced before the justices and admitted as evidence. The plan showed a block of two semi-detached houses connected together, and having at the back a boundary fence between the gardens.

The notice and plan were passed on to the surveyor, who reported to the appellants that they should be disapproved on the grounds of unsatisfactory drainage and building line, and on the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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15th July the appellants passed a resolution disapproving of the plans, and notice of disapproval was given by the surveyor to the respondent on the 16th July.

The surveyor to the appellants prepared a report to the appellants, setting forth what was, in his opinion, necessary for the satisfactory drainage of each of the two houses, and such report was considered by the appellants on the 12th Aug. 1901, when an order was made and sealed in pursuance of sect. 25 of the Public Health Act 1875, and was duly served on the respondent on the 13th Aug.

The order was in the following terms:

Urban District of Woodford.—The Public Health Act 1875, s. 25.—To Mr. F. C. Stark, of Waverley Villas, Crescent-road, South Woodford.—Whereas a certain plan has been deposited with us, the urban district council for the district of Woodford, for the erection by you of two houses in Maybank-road, South Woodford, within the said district, and whereas the means of drainage of the said two houses as shown upon the said plan have not been approved by us: And whereas a report has this day been presented to us by our surveyor specifying the drains necessary for the effectual drainage of each of the said two houses: Now therefore, we, the said urban district council, acting as the urban sanitary authority for the district of Woodford, in pursuance of the powers conferred upon us, do hereby declare that the drains which upon the said report of our surveyor appear to us to be necessary for the effectual drainage of each of the said houses are as follows, namely: One drain, properly constructed, of 4in. stoneware pipes with thoroughly water-tight joints, having in every part a fall of not less than 1 in 60, and in any part where it may be necessary for such a drain to pass under the house to be laid on 6in. of concrete, the said drain to be provided with necessary traps and means of ventilation as required by the bye-laws of this council, and to be laid at a depth of not less than 2ft. 6in. below the finished surface of the ground, and connected to the sewer in Maybank-road.—Given under the common seal of the Woodford Urban District Council, this 12th day of August 1901.

On the following day, the 14th Aug., the respondent wrote to the appellants' surveyor acknowledging the receipt of the order, and giving notice of his intention to cover up the drains, which were then already constructed, on the morning of the 17th Aug. On the 16th Aug. the surveyor and one of the building inspectors attended at the premises and inspected the drains, when they found that they were not in accordance with the order, which had been served on the respondent, and that the respondent had constructed a combined drain for the two houses as shown on the plan, instead of a separate drain for each house. The surveyor accordingly refused to pass or approve the plans.

On the 27th Aug. the appellants gave further notice to the respondent that they proposed to take legal proceedings under the Public Health Act unless he proceeded to comply with the order of the appellants before the following Monday, but the respondent merely acknowledged the receipt of such notice, and had not since complied with the order.

The appellants then, on the 16th Sept., caused two informations (one in respect of each house) to be laid against the respondent, that the respondent did on the 17th Aug. 1901 unlawfully and wrongfully construct, erect, and build a certain house situate on the south-eastern side of

Maybank-road, Woodford, without constructing a covered drain or drains of such size and materials and at such a level and with such a fall as upon the report of their surveyor appeared to the appellants to be necessary for the effectual drainage of such house, contrary to the provisions in that behalf of the Public Health Acts, and to the bye-laws of the council made thereunder.

These two informations were heard before the justices on the 11th Oct. Their attention was called to the case of *Matthews v. Strachan* (ante, p. 271; 85 L. T. Rep. 68; (1901) 2 K. B. 540), and to the judgments therein. The justices were of opinion that the appellants were not entitled in making the above order of the 12th Aug. 1901, to take into consideration any other matters than those relating to the size, level, materials, and fall of the drain; that the requirements of the appellants under the section must be confined to those matters, and that the appellants had no jurisdiction under the section to make an order requiring a separate drain for each of the two houses instead of a combined drain for the two houses. They dismissed the informations accordingly.

The question for the opinion of the court was whether the above determinations of the justices were right in point of law. If in the opinion of the court the justices were right, then the informations were to stand dismissed; if otherwise, the case was to be remitted to the justices with the opinion of the court thereon.

Sect. 25 of the Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

It shall not be lawful in any urban district newly to erect any house or to rebuild any house which has been pulled down to or below the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed, of such size and materials, and at such level, and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house; and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use, and which is within one hundred feet of some part of the site of the house to be built or rebuilt; but if no such means of drainage are within that distance, then shall empty into such covered cesspool or other place, not being under any house, as the urban authority direct. Any person who causes any house to be erected or rebuilt, or any drain to be constructed in contravention of this section shall be liable to a penalty not exceeding fifty pounds.

Macmorran, K.O. (Naldrett with him) for the appellants.—The decision of the justices was wrong in so far as they held that the only power which the local authority had under the section was in connection with the size, levels, &c., of each drain. The section was intended to give to the local authority the largest possible discretion as to what drains should be made. The difficulty the justices felt arose from the case of *Matthews v. Strachan* (ante, p. 271; 85 L. T. Rep. 68; (1901) 2 K. B. 540), in which the appellant had erected a house and had provided for its drainage by a single drain, which he proposed to connect with a sewer. All that was decided in that case was that the local authority, in deciding what is "necessary for the effectual drainage" of a new house, under sect. 25, must only consider what is necessary for the particular house in question. There are some expressions in the judgments in that case which misled the justices

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in this case; but assuming that the local authority are not entitled to go beyond the requirements of a particular house, as was decided in that case, it does not in the least touch the question in this case. In *Self v. Hove Commissioners* (72 L. T. Rep. 234; (1895) 1 Q. B. 685), Wright, J., in speaking of the local authority, says: "They could have performed that duty in this case by ordering the plaintiff and the owner of the adjoining house to provide a separate drain running into the public sewer for each house. Instead of doing that, they ordered the plaintiff to repair the existing drain. . . . For myself, I should like to see the case of *Travis v. Utiley* (70 L. T. Rep. 242; (1894) 1 Q. B. 233) considered in the Court of Appeal. I think that local authorities may get out of the difficulties created by that decision by compelling people to make separate drains." &c. In *Travis v. Utiley* (*ubi sup.*) the distinction between "drain" and "sewer" was considered. Sect. 19 of the Public Health Act 1890 (53 & 54 Vict. c. 59) only applies when the two or more houses belong to different owners, and are connected with a public sewer by a single private drain. It therefore does not apply here, as the two houses do not belong to different owners; but if the contention of the respondent be right, this drain may become a sewer, and as such the local authority would be responsible for it. The local authority in this case adopted the proper and the only means of preventing that—namely, by requiring a separate drain for each house when they had notice that there was only one drain for the two houses. He also referred to

Hill v. Hair, 72 L. T. Rep. 629; (1895) 1 Q. B. 906; *Mayor, &c., of Eastbourne v. Bradford*, 74 L. T. Rep. 762; (1896) 2 Q. B. 205.

C. A. Russell, K.C. (*Courthope-Munroe* with him) for the respondent.—The justices were right in the view they took of the section. The respondent was not bound under sect. 25 to make a separate drain for each house; he was entitled to make a combined drain for the two houses, as they only constituted one building. Sect. 25 says that a person shall not erect any new house unless and until a covered drain be constructed. Sect. 4 defines a "drain" as meaning "any drain of and used for the drainage of one building only, or premises within the same curtilage," &c. In the present case the justices were not asked to determine the question whether these houses constituted one building only. The question as to what constitutes one building was considered by Cozens-Hardy, J. in *Hedley v. Webb* (*ante*, p. 182; 84 L. T. Rep. 526; (1901) 2 Ch. 126), and he, being judge of fact as well as of law, held that a pair of semi-detached houses constituted "one building only" within the meaning of sect. 4. He said: "Apart from authority, I should have thought that, as regards the drainage of one building only, it was a question of fact to be considered in each case, 'Aye or no, is this one building?'" The question was also considered in *Vestry of St. Martin-in-the-Fields v. Bird* (71 L. T. Rep. 868; (1895) 1 Q. B. 428), as to the Lowther Arcade; in *Kershaw v. Taylor* (73 L. T. Rep. 274; (1895) 2 Q. B. 471); and in *Pilbrow v. Vestry of St. Leonard, Shoreditch* (72 L. T. Rep. 135; (1895) 1 Q. B. 433). [Lord ALVERSTONE, C.J.—In the last case referred to, which was under the Metropolis Management Act,

and in the case of *Hedley v. Webb* (*ubi sup.*), before Cozens-Hardy, J., the word "building" was the word to be considered, not the word "house" as in this case under sect. 25]. There is no finding here that these two houses were more than one building. The justices were entirely wrong on the construction of the section. If the two houses were one building, then a combined drain would have been sufficient, and the justices would have had no power to order a separate drain for each house; but if they were two buildings then the statute gives them no power, either in sect. 23, which has some bearing on the matter, or in sect. 25, to sanction the drainage of two buildings by one drain.

Macmorran, K.C. in reply.—There is no power in the matter except under sect. 25. Sect. 23 deals with existing houses; sect. 25 with new houses, and that section does enable the local authority to say that there must be a separate drain for each house, and, if so, what it shall be. In sect. 25 "house" does not include or contemplate flats. These are two houses, and, if so, it is a case for which sect. 25 makes provision.

Lord ALVERSTONE, C.J.—This is a case stated in reference to an offence alleged to have been committed by the respondent under sect. 25 of the Public Health Act 1875, for not having complied with an order made under that section, inasmuch as he had constructed a house without effectual drainage. He had deposited a plan showing one drain which took away the drainage from the two houses. When the case came before the justices it was argued that there was no case against the respondent, as the district council had no power under the section to require a separate drain for each house. Upon that the justices took the view that the jurisdiction of the council under sect. 25 was limited to matters relating to the size, level, materials, and fall of the drain. In so deciding, it seems to me that the justices overlooked the point which they ought to have decided. The question which they ought to have decided was whether a house had been built without a drain constructed according to the section in a manner approved by the local authority. They could not decline to entertain the matter because the local authority showed that the drain drained two houses connected together. It was argued for the respondent that although this combined drain drained two houses, yet, as the two houses formed one building only, the one drain was sufficient, and that consequently there was no offence under the section. I think that is a wrong construction of sect. 25, and a wrong view of the legal obligation under the section. Whatever may be the true meaning of the word "building," I think that sect. 25 is a distinct enactment on the point that a person who rebuilds a house which has been pulled down, or who newly erects a house, must provide for that house a drain which shall empty into a sewer. I come to that conclusion chiefly on the ground that, if that were not the true view of the section, a person by making a combined drain of this kind would make a construction which might become a sewer, and which would then impose upon the local authority the obligation and cost of maintaining it, although it had been thrust upon them without their consent or against their will. In my opinion, therefore, sect. 25 does mean that

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there shall be for each house newly erected a separate drain, and the case must go back to the magistrates with the intimation of our opinion that they were not entitled to decline to entertain the informations on the ground that the complaint of the local authority was in respect of the fact that the drain was for more than one house.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I agree. I think that sect. 25 contemplates a separate drain for the "house," and that that drain is to go to the sewer.

Appeal allowed. Case remitted to the justices.

Solicitors for the appellants, *Pettiver and Pearkes*.

Solicitors for the respondent, *Vincent and Vincent*.

Friday, March 21, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

ANDERSON (app.) v. REID (resp.) (a)

Customs—Customs officer—Search of ship—Obstructing officer—Reasonableness of search—Right of magistrate to judge of—Service of notice of appeal and case—Sufficiency of service—Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12), s. 12, sub-s. 5—Summary Jurisdiction Act 1857 (20 & 21 Vict. c. 43), s. 2.

Where a person is summoned under sect. 12, sub-sect. 5 of the Customs and Inland Revenue Act 1881, for obstructing a customs officer in execution of his duty while on board a ship for the purpose of searching the same, the magistrate has no jurisdiction to inquire into the reasonableness or unreasonableness of the search, or to dismiss the information upon the ground that in his opinion the search was under the circumstances unreasonable, unless he finds that the search was a mere pretence for the purpose of justifying an interference or annoyance by the officer. The duty of deciding what search there shall be is by the Act imposed on the customs officer, and not on the magistrate.

The notice of appeal and copy of the case stated by the magistrate could not be personally served on the defendant, who was a master mariner and was at sea, within three days after the receiving of the case by the appellant, but within the three days the appellant served the notice and copy of the case on the solicitor who had represented the defendant before the magistrate, but who had ceased to represent him in the matter, and efforts were made to have the defendant personally served on his return, and he was personally served with the notice and case some months afterwards on his return to the United Kingdom.

Held, that the provisions of sect. 2 of the Summary Jurisdiction Act 1857, as to giving notice of appeal to the defendant, were sufficiently complied with to enable the court to hear the appeal in the absence of the defendant.

CASE stated by the stipendiary magistrate for the borough of Middlesbrough, being one of the justices of the peace for the borough, pursuant to

an order of *mandamus* in that behalf of the King's Bench Division dated the 24th April 1901.

The information, dated the 7th Dec. 1900, and signed by the magistrate, as amended at the hearing, was in the following terms:

Be it remembered that William Anderson, an officer of customs under the direction of the Commissioners of the Customs, informs me (police and stipendiary magistrate and one of Her Majesty's justices of the peace in and for the borough of Middlesbrough) that John Reid, master of the ship *Bankhall*, lying at Bolekrow, Vaughan, and Co.'s wharf in the river Tees, did on the 5th day of Dec. instant obstruct William Anderson, an officer of customs, who was acting in the execution of his duty on board the *Bankhall* aforesaid, contrary to sect. 12, sub-sect. 5, of the Customs and Inland Revenue Act 1881, whereby the said John Reid has forfeited the penalty of not exceeding one hundred pounds.

At the hearing before the magistrate on the 10th Dec. 1900 at the Middlesbrough police-court, the following facts were proved:

(a) That the ship *Bankhall* arrived at the port of Middlesbrough on the 28th Nov. 1900, and was searched on several occasions without anything dutiable being found, and that on the first of such occasions the captain's cabin and state room were searched and rummaged. The captain's state room was not again searched or rummaged, but his cabin was again searched and rummaged on the second and third of such occasions. The officers of the ship rendered every assistance to the customs officers in their search.

(b) On the 5th Dec. 1900, at about 7.45 p.m., the appellant William Anderson, who was an officer of customs, with two other officers of customs named Cottrell and Craven, went on board the *Bankhall*, and went first to the captain's cabin, but finding the respondent sitting down at a meal there with his wife and the mate, they proceeded to rummage the store-rooms and pantry; they afterwards returned to the cabin, but the respondent refused to allow them to enter his state room or to search there. Upon the appellant attempting to enter such state room for the purpose of searching it for prohibited or uncustomed goods, the respondent took him by the shoulders and pushed him out. The appellant then made a second attempt to enter the respondent's room to search it, but was again prevented and pushed out by the respondent.

(c) In cross-examination the appellant and his witnesses admitted that they had no suspicion that anything dutiable could be in the apartment which the officers desired to search, that is to say, the state room, unless it had been about the person of the respondent or some other person on board the vessel at the time of the previous searches, and had been placed in such apartment after such searches. They also admitted that they had no ground for suspicion that such had been the case.

The magistrate asked the respondent if the officers ever desired to search him, and he said "No," but had they wished to do so he would willingly have submitted to such search, and he was not cross-examined.

The magistrate thought that the evidence showed that the repeated rummaging of the ship was most unreasonable, and there was evidence to show that the officers had no reason for

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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believing that they were interfered with in the discharge of what they deemed their duty. He thought at the conclusion of the appellant's case that the conduct of the customs officer was an abuse of the power of search under the statutes, and hesitated as to whether he should dismiss the summons, or inflict a mere nominal penalty without costs. He adopted the former alternative, and dismissed the summons.

The question for the opinion of the court was whether, upon the facts above stated, the magistrate was right in dismissing the information.

If the court should be of opinion that his decision was right, the information was to stand dismissed; but if the court should be of the contrary opinion, then the court was to remit the case to the magistrate with the opinion of the court thereon.

The mayor sat on the bench during the hearing of the case, but took no part in it, leaving it to the police magistrate to decide.

The Customs Consolidation Act 1876 (39 & 40 Vict. c. 36) provides:

Sect. 182. Any officer of customs or other person duly employed for the prevention of smuggling may go on board any ship or boat which shall be within the limits of any port of the United Kingdom or the Channel Islands, and rammage and search the cabin and all other parts of such ship or boat for prohibited or uncustomed goods, and remain on board such ship or boat so long as she shall continue within the limits of such port.

The Customs and Inland Revenue Act 1879 (42 & 43 Vict. c. 21) provides:

Sect. 11. All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts, and the liability to forfeiture of any goods seized under the authority thereof, may be sued for, prosecuted, determined, and recovered by action, information, or other appropriate proceeding in the High Court of Justice in England, . . . or by information in the name of some officer of customs or excise, before one or more justice or justices in the United Kingdom, the Isle of Man, or the Channel Islands, &c.

The Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12) provides:

Sect. 12. Any officer of customs or other person duly employed in the prevention of smuggling may search any person on board any ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or any person who shall have landed from any ship or boat, provided that such officer or other person duly employed as aforesaid shall have good reason to suppose that such person is carrying or has any uncustomed or prohibited goods about his person. A person shall be guilty of an offence—(5) If he assaults or obstructs any officer of customs, or any officer of the army, navy, marines, coastguard, or other person duly employed for the prevention of smuggling, going, remaining, or returning from on board a ship or boat within the limits of any port in the United Kingdom or the Channel Islands, or in searching such a ship or boat, or in searching a person who has landed from any such ship or boat, or in seizing any goods liable to forfeiture under the Customs Acts, or otherwise acting in the execution of his duty. And a person so offending shall for each such offence forfeit the penalty of not exceeding one hundred pounds, and he may either be detained or proceeded against by information and summons.

As the respondent did not appear, a preliminary question arose as to whether there was a sufficient service of the case upon the respondent to satisfy the requirements of sect. 2 of the Summary

Jurisdiction Act 1857 (20 & 21 Vict. c. 43), which, after providing for the stating and signing of a case by the justice or justices, provides as follows as to the service of the case on the respondent:

And such party, hereinafter called "the appellant," shall, within three days after receiving such case, transmit the same to the court named in his application, first giving notice in writing of such appeal, with a copy of the case so stated and signed, to the other party to the proceeding in which the determination was given, hereinafter called "the respondent."

The facts in reference to the service of the case on the respondent, as appearing in the affidavits, were as follows:—

The case was dated and signed by the magistrate on the 28th Aug. 1901. It was received on the 3rd Sept. 1901 by the solicitor for the appellant at Middlesbrough, and on the same day, the 3rd Sept., the appellant's solicitor left at the office of the solicitor who had appeared for the respondent on the hearing of the information, and by way of service upon such solicitor, a notice that a case had been duly stated and also a copy of the case; and on the same day, subsequently to the service above referred to, the solicitor who had acted for the respondent wrote acknowledging that a copy of the case had on that day been left at his office; that he had represented the respondent on the hearing of the information, but that since that time he had had no instructions from him, and had long since ceased to have any connection with the matter. The respondent, being a master mariner, was at sea and could not be personally served, but a letter had been written to him in September giving him notice that a case had been stated, and this letter he acknowledged in Dec. 1901. Also, on the 23rd Sept., the appellant's solicitor wrote to the employers of the respondent requesting that immediately the respondent returned to the United Kingdom they would deliver to him a letter with the notice and copy of the case. Ultimately the case was personally served on the respondent on the 16th Jan. 1902, when he returned from sea.

Sir Robert Finlay, A.G. (*Dalry* with him) for the appellant.—As the respondent does not appear, it is necessary to show by the affidavits that there has been a sufficient notice and service of the case on the respondent to satisfy sect. 2 of the Act 20 & 21 Vict. c. 43, and to enable the court to hear the appeal. The material words of the section are that the appellant shall "within three days after receiving such case transmit the same . . . first giving notice in writing of such appeal, with a copy of the case, to . . . the respondent." The facts show a sufficient compliance with the section. [Lord ALVERSTONE, C.J. referred to *Edwards v. Roberts* (1891), 1 Q. B. 302, where it was held that the court had no jurisdiction to hear an appeal by case stated under sect. 2 of 20 & 21 Vict. c. 43, unless the case had been served on the respondent within three days.] There are several cases bearing on the point. The first and most important is in 1858, the case of *Syred v. Carruthers* (E. B. & E. 469), where it was held that sect. 2 is satisfied if the appellant within three days of his obtaining the case seeks to find the respondent and cannot do so, and within such three days gives notice to the solicitor who represented the respondent before the magistrate, and afterwards gives notice to the respondent, who does not object. Acting

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on that case, the appellant served the notice upon the solicitor within the three days, and tried to find the respondent. In *Woodhouse v. Woods* (1 L. T. Rep. 59; 29 L. J. 149, M. C.), the giving of the notice with a copy of the case to the respondent was held to be a condition precedent to the right to have the case heard; but there it was stated that if the appellant has done all he could to comply with the statute it is sufficient, so that that case really follows *Syred v. Carruthers* (*ubi sup.*). Then in *Local Board of Health of Gloucester v. Chandler* (7 L. T. Rep. 722), the present point did not arise. The only other case, besides that of *Edwards v. Roberts* (*ubi sup.*), is *Hill v. Wright and Wilson* (60 J. P. 312), where a notice sent to the respondents' solicitors and not to the respondents themselves, was held not to be sufficient. There is nothing in these cases throwing any doubt upon *Syred v. Carruthers* (*ubi sup.*), and the court ought to act upon it. [Lord ALVERSTONE, C.J.—We think the appellant is entitled to have the case argued.] The case raises a short but very important point. It is quite clear from the statute that a magistrate is not entitled to say that in his opinion the search is unreasonable, and for that reason to dismiss the information. The duty of deciding what search shall be made is cast on the customs officer. There are, no doubt, certain cases in which he is at liberty to search only if he has reasonable grounds for thinking there are smuggled goods there; for instance, under sect. 12 of the Act of 1881 the searching the persons of individuals can only be done by the officer if he has reasonable ground for suspecting that there are goods concealed; under sect. 203 of the Customs Consolidation Act 1876, the stopping and examining carts can only be done by the officer if he has reasonable suspicion that there are smuggled goods on those carts, and the same applies under sect. 205 as to the searching of houses. The power to search in other instances as regards the ship, conferred upon the officers, is necessarily not limited by any such condition, and it is the duty of the officer to decide whether there ought to be a search or not. If the magistrate found that under the pretence of exercising the power of the Act, it was a mere excuse and the officer did not want to search at all, but was gratifying an impertinent or malicious desire of annoyance, then it could not be disputed that he would be entitled to dismiss the information. Here it is not pretended that he was not acting in the exercise of the power of the Act; there is an express finding that the appellant was "attempting to enter such state-room for the purpose of searching it for prohibited or uncustomed goods." That being so, it is not for the magistrate to say that the officer was acting reasonably or unreasonably; it is quite enough that he was acting in pursuance of the power of the Act, and that the Act has thrown upon the officer the duty to decide. If once it were settled that the defendant was at liberty to go into evidence before the magistrate as to whether the officer was or was not acting reasonably, and to call evidence and to ask the magistrate to say that the search was unnecessary, a very serious blow would be struck at the administration of the Customs Act. The court ought therefore to send the case back.

The respondent did not appear.

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Lord ALVERSTONE, C.J.—When this case was before us on the occasion of the rule for a *mandamus* being moved, we certainly thought upon the affidavits that were then produced that the magistrate had not entertained the real question on which alone he would have been justified in dismissing the summons—namely, the ground, as pointed out by the Attorney-General in his argument, that there was a mere pretence of searching, and that the search was not *bond fide*, but was merely for the purpose of justifying the interference of the customs officer. A mere pretence of searching would not compel the magistrate to convict. In this case, however, it is found as a fact that the officer was purporting to search, and that he was intending to search. The ground on which the summons was dismissed by the magistrate was that he thought that it was unreasonable for the officer to be searching having regard to the circumstances that he had previously examined other parts of the ship, and that if there were anything dutiable in the apartment the officer desired to search, it must have been on the person of the respondent or some other person on board at the time of the previous searches, and must have been placed there since such previous searches, as to which the appellant had no suspicion that such was the case. I think there is in such cases no preliminary question of reasonableness or unreasonableness for a magistrate to deal with, and that the learned magistrate ought to have entertained this matter and have dealt with it on the basis that, there being a search, the customs officer was in fact obstructed in the execution of that search, and that therefore an offence against the Act had been committed. I think the case must go back to the magistrate with this intimation of our opinion thereon.

DARLING, J.—I am of the same opinion. It seems to me that the first impression of the learned magistrate in this case was the right one. He says: "I thought at the conclusion of the appellant's case that the conduct of the customs officer was an abuse of the power of search under the statutes, and hesitated as to whether I should dismiss the summons or inflict a mere nominal penalty without costs. I adopted the former alternative." If he had adopted the second alternative, it seems to me that he would have been perfectly right. If he really came to the conclusion that, although the customs officer was exercising his statutory power, he was exercising it in an unreasonable way, though with lawful excuse, but not with any real prospect of getting any good out of it, he could have convicted the respondent, and imposed a nominal penalty without any costs. That would have amounted to a censure of the conduct of the customs officer, and if the matter wanted to be made clearer the magistrate could have said so. That, it seems to me, would have been the proper course for the magistrate to have adopted, if he held the opinion, which he says he did, relative to this case.

CHANNELL, J.—I agree.

Appeal allowed. Case remitted to magistrate to convict the respondent of the offence.

Solicitor for the appellant, *The Solicitor of Customs.*

K.B. Div.] HORNSEY URBAN DISTRICT COUNCIL (apps.) v. HENNELL (resp.). [K.B. Div.]

March 25 and April 15, 1902.

(Before LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HORNSEY URBAN DISTRICT COUNCIL (apps.) v. HENNELL (resp.). (a)

Local government—Lands acquired for volunteer purposes—Land owned or occupied for Crown purposes—Apportionment of expenses for paving, &c., highway—Public Health Act 1875 (38 & 39 Vict. 55), s. 150.

Certain lands and premises were purchased by H. for the purposes of them being transferred to and used by the volunteer battalion of which he was commanding officer. They were afterwards mortgaged to the Public Works Loan Commissioners, and the money so received was used to repay the respondent and to fit up the premises, and they were held by the defendant and his successors, as commanding officer under the Volunteer Act 1863.

The premises have been used ever since as the headquarters of and for the purposes of the volunteer battalion, and for no other purpose.

Held, that the premises were owned and occupied by the respondent as a servant of the Crown for the purposes of the Crown, and that he was exempt from liability to pay any expenses in respect thereof apportioned under sect. 150 of the Public Health Act 1875.

CASE stated upon the hearing of a complaint made by the appellants on the 16th Oct. 1901 for the recovery from the respondent of a sum of 469*l.* 10*s.* 9*d.*, being the apportioned amount of expenses incurred by the appellants in sewerage, levelling, paving, metalling, flagging, channelling, and making good a certain street, called Nightingale-lane (being a street not repairable by the inhabitants at large), in the urban district of Hornsey, alleged to be payable in respect of the Elms, Priory-road, and land on the east side of Nightingale-lane, which premises abut on the street, together with interest on that sum at the rate of 5*l.* per cent. per annum from the 20th Feb. 1901.

The appellants are the urban district council of Hornsey, in the county of Middlesex.

The respondent is a colonel in His Majesty's Army, and was at all material times until the month of March 1901 the commanding officer of the 1st Volunteer Battalion (Duke of Cambridge's Own) Middlesex Regiment, formerly called the 3rd Middlesex Rifle Volunteers.

By an indenture made the 15th June 1896 between the Suburban Buildings Land Company Limited and the respondent, certain premises, therein called the Elms, and hereinafter called "the premises," were granted and conveyed unto and to the use of the respondent, his heirs and assigns, for the sum of 1910*l.* It was not disputed that the premises were acquired by the respondent for the purpose of transferring them to and in the meantime allowing them to be used by the volunteer battalion.

In or about the month of Dec. 1896 certain portions of the premises comprising an armoury and magazine were duly appointed by the respondent as such commanding officer, and approved by the Secretary of State for War as a store-house for arms, ammunition, and stores, in pursuance of sect. 26 of the Volunteer Act 1863,

sect. 6 of the Regulation of the Forces Act 1871, and an Order in Council made under the last-mentioned section. The armoury consists of one room in the basement of the portion of the premises described as the main building. Since that time these portions of the premises have been used solely as such store-house.

In or about Feb. 1897 the Secretary of State for War, on the application of the respondent, as such commanding officer, in pursuance of sect. 5 (1) of the Military Lands Act 1892, duly approved of the sum of 2200*l.*, repayable in thirty-five years, being borrowed by the volunteer battalion for the purposes of acquiring the freehold of the premises.

By an indenture of mortgage made the 1st April 1897 between the respondent and Robert Philpot, the Secretary of the Public Works Loan Commissioners, the respondent granted the premises and the grants made and to be made to the volunteer battalion out of moneys provided by Parliament unto Robert Philpot, as such secretary, and his successor secretaries, and his and their assigns, by way of mortgage for securing the sum of 2200*l.* and interest, and agreed that the premises should, subject to such mortgages, be held by him as such commanding officer and his successors under and by virtue of the terms of the Volunteer Act 1863.

The sum of 2200*l.* was advanced in pursuance of the mortgage by the Public Works Loan Commissioners, through the Commissioners for the Reduction of the National Debt, and was together with the sum of about 500*l.* which had been raised by voluntary subscriptions, applied by the respondent in repaying himself the purchase price of 1910*l.* for the premises, and in altering and fitting up the same for the use of the volunteer battalion.

The respondent thereupon ceased to have any interest in the premises otherwise than as such commanding officer.

The premises have since their acquisition by the respondent, been used as the headquarters of and for the purposes of the volunteer battalion, and for no other purposes. No rent and no money has ever been charged or received by the volunteer battalion or its commanding officer for the use of the premises or any part thereof.

The funds of the volunteer battalion consist of the grants made to them out of moneys provided by Parliament, subscriptions from officers, and some voluntary subscriptions subscribed by other persons for specific purposes.

The upkeep of the premises is paid for entirely out of the Parliamentary grants.

The premises abut on the east side of a street known as Nightingale-lane in the district. Nightingale-lane (hereinafter called the street) was at the date of the notices hereinafter mentioned a street (not being a highway repairable by the inhabitants at large within the meaning of sect. 150 of the Public Health Act 1875).

In Dec. 1899 the appellants duly resolved that notices should be served on the respective owners and occupiers of the premises fronting, adjoining or abutting on the street under the last-mentioned section, requiring them to sewer, level, pave, metal, flag, channel, and make good the street, and on or about the 24th Jan. 1900 notice under the section was duly served on (amongst others) the respondent.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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The notices were not complied with and the appellants executed the works therein mentioned themselves, and completed the same on or before the 15th Oct. 1900.

The expenses incurred by the appellants in executing the works were thereupon apportioned by their surveyor, and the sum of 409*l.* 10*s.* 9*d.* was so apportioned on the respondent in respect of the premises, and notice of such apportionment was duly served upon him, and he did not within the space of three months dispute the same.

On the 20th Feb. 1901 notice demanding payment of the said sum of 409*l.* 10*s.* 9*d.* by the respondent was duly served upon him but he refused to pay the same and the appellants commenced summary proceedings for the recovery of the sum with interest thereon at the rate of 5 per cent. per annum from the 20th Feb. 1901, which came on for hearing on the 16th Oct. 1901.

On behalf of the appellants it was contended that the respondent was the owner of the premises when the works were completed, and that he was liable accordingly to pay the appellants the share apportioned in respect of the frontage of the premises to Nightingale-lane of the expenses of executing such works.

On behalf of the respondent it was contended that the premises were owned and occupied by servants of the Crown, for the purposes of the Crown, and, consequently, that he was exempt from liability to pay any of the expenses so apportioned. The justices were of opinion that the respondent was not liable to pay the expenses so apportioned, and dismissed the summons.

The question for the opinion of the court was whether the respondent is liable to pay the share of the expenses apportioned upon him as aforesaid in respect of the frontage to Nightingale-lane of the premises.

Bray, K.C. (A. Glen with him) for the appellants.—The question here is whether the respondent is liable to pay a sum of 409*l.* 10*s.* 9*d.*, being expenses incurred by the urban authority, the appellants, under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55). The recovery of such expenses is provided for by sect. 257 of the same Act. The respondent is the owner of the land, and this is a rate levied not on an occupier, but on an owner. The Military Lands Act 1892 (55 & 56 Vict. c. 43), s. 8, provides that if a volunteer corps holding land under this Act is disbanded, the land shall, by virtue and subject to the provisions of this section, vest in the Secretary of State from the date of disbandment subject to the repayment of any money borrowed for the purchase of the land and not already repaid, and the sums required for such repayment shall, if and so far as not provided by the sale of the land, be paid out of moneys provided by Parliament for army services. It is clear, therefore, that until disbandment this land does not vest in the Crown, and therefore the respondent is the owner and liable for the rate. The case of the *United Vestry of the Parishes of St. Margaret and St. John the Evangelist, Westminster v. Hoskins* (81 L. T. Rep. 390; (1899) 2 Q. B. 474) shows that a building consisting of an armoury, store-house, and drill-hall of a volunteer corps which is vested in the commanding officer of the corps, and is intended for the use of the corps only, is not exempt from the operation of the sanitary provisions of the

Metropolis Management Act 1855, on the ground that it is occupied and used solely for the purposes of the Crown. If sect. 150 does not apply to the Crown, then for the urban sanitary authority to sewer and pave would be a trespass on the right of the Crown. The fact that it is used for Crown purposes is not sufficient:

Rayner v. Drewitt, 82 L. T. Rep. 718.

The case of *Pearson v. Assessment Committee of Holborn Union* (68 L. T. Rep. 351; (1893) 1 Q. B. 389) is not against the appellant's contention. It was held there that premises occupied by a volunteer corps for the purpose of the service of the corps, and being reasonably necessary for such service were occupied by servants of the Crown for the purposes of the Crown, and were therefore exempt from rates. But there are two distinctions in that case from the present one. First, there was an express exemption in sect. 26 of the Volunteer Act 1863 (26 & 27 Vict. c. 65); secondly, the rate was to be paid by the occupier, and were not expenses recoverable from the owner, as in the present case. He also referred to

Hawley v. Steele, 37 L. T. Rep. 625; 6 Ch. Div. 521.

Sir R. Finlay (A.G.) (H. Sutton and G. S. Robertson with him) for the respondent.—The land here is the property of the Crown, and it is just as much exempt from paying these expenses as it is from paying rates. The case of *Pearson v. Holborn Union* (*ubi sup.*) is directly in point. The Crown is not bound by any statute unless it is named in it or it can be assumed that it is intended by necessary implication. He referred to

Perry v. James, 64 L. T. Rep. 438; (1891) 1 Ch. 658.

The volunteers are just as much a part of the Crown forces as the regular army or militia. It is true that there are certain express exemptions of the Crown, but they were simply inserted as *abundanti cautela*, and the fact that no such exemption occurs in sect. 150 is no proof that the Crown is subject to its provisions, and no such intention can be gathered from the language of the Act. In *Smithett v. Blythe* (1 B. & Ad. 509; 35 R. R. 358), it was held an exception in a statute of His Majesty's ships of war from tolls did not by implication render the other King's ships chargeable, and in the *Mayor of Weymouth v. Nugent* (11 L. T. Rep. 672; 6 Best & Smith 22) stone brought for the use of His Majesty's navy was held exempt from wharfage dues created by statute upon the same principle notwithstanding the insertion of special exemptions in the Act in favour of certain Crown property. There is no distinction in principle between a rate levied on an occupier and an assessment on an owner:

Lord Advocate and Barber v. Lang, 5 Ret. 3rd series, 84.

The case of the *Westminster Vestry v. Hoskins* (*ubi sup.*) only refers to sanitary requirements, and was decided, as the judgments show, on very narrow grounds. He also cited

Coomber v. Justices of the Peace of Berks, 50 L. T. Rep. 405; 9 App. Cas. 61;

R. v. Cook, 3 Term Rep. 519.

Bray, K.C., in reply, cited

Felkin v. Herbert, 11 L. T. Rep. 173;

Lord Colchester v. Kewney, 14 L. T. Rep. 888; 16 L. T. Rep. 463; L. Rep. 1 Ex. 308; L. Rep. 2 Ex. 253.

Cur. adv. vult.

K.B. Div.] HORNSEY URBAN DISTRICT COUNCIL (apps.) v. HENNELL (resp.). [K.B. Div.]

April 15.—Lord ALVERSTONE, C.J. read the following written judgment of the court:—This was an appeal by the Hornsey Urban District Council against a decision of the justices of Middlesex, sitting at the Highgate petty sessions, dismissing a complaint against the respondent to recover the sum of 409*l.* 10*s.* 9*d.*, being the apportioned amount of expenses incurred by the appellants in sewerage, levelling, and paving a certain street called Nightingale-lane, under the provisions of sect. 150 of the Public Health Act 1895. The ground of the decision was that under the circumstances of the case the respondent, who had acquired the premises in question as colonel of a volunteer corps was not liable to pay the amount of the apportionment. In order to appreciate the point which arises upon this appeal, it is in our opinion necessary to state accurately the facts upon which the question arises. The respondent, Colonel Hennell, in His Majesty's Army, and was, up to the month of March 1901, the commanding officer of the 1st Battalion Middlesex Rifle Volunteers. In the year 1896 the respondent purchased the fee simple of certain land at Hornsey for the sum of 1910*l.* The land was purchased by him for the purpose of its being transferred to and used by the volunteer battalion. In the year 1897 the premises acquired were, pursuant to the provisions of the Military Lands Act 1892, mortgaged to the Public Works Loans Commissioners for the sum of 2200*l.* The money so received was applied to repaying the amount paid by the respondent in purchasing the premises and fitting them up for the use of the volunteer battalion. The premises abut upon Nightingale-lane. In Dec. 1899 the appellants duly served notices for the sewerage, paving, &c., of Nightingale-lane under the provisions of sect. 150 of the Public Health Act 1875. The work was subsequently executed by them. The amount apportioned was agreed to be the amount from the respondent as the legal owner of the premises if he is not exempt from payment. The lands in question were acquired under and by virtue of sects. 24, 25, and 26 of the Volunteer Act 1863, and the mortgage, as already stated, was made under the provisions of the Military Lands Act 1892. It was contended on behalf of the appellants that, inasmuch as by virtue of sect. 3 of the Military Lands Act 1892 the land could be let in any manner consistent with the use thereof for military purposes, and that it would not vest in the Secretary of State until after the disbandment of the corps, the respondent, as legal owner, was liable to pay to apportionment, and that the case of *United Vestry of St. James and St. John the Evangelist, Westminster v. Hoskins* (81 L. T. Rep. 390; (1899) 2 Q. B. 474) was an authority in the appellants' favour binding upon us. It was contended on behalf of the Attorney-General, for the respondent, that the land being in fact purchased, owned, and occupied solely for the purpose of the volunteer corps, it must be taken to be owned and occupied for Crown purposes, and that therefore the amount of the apportionment could not be recovered, as sect. 150 was not binding upon the Crown. We are of opinion that the contention of the Crown is right, and that the appeal should be dismissed. The liability to pay the apportionment depends upon the provisions of the Public Health Act Sect. 150, as has fre-

quently been pointed out, contemplates a notice being given to the owner or occupier to carry out the work specified themselves, and, upon their failure to carry it out, empowers the authority to execute the works and recover the expense from the various owners. Sect. 213 provides that the expense may be treated as private improvement expenses, and recovered by means of private improvement rates spread over a series of years. Sect. 257 provides for the recovery of the apportioned amount either at once or by instalments. Sect. 327, which was relied upon by Mr. Bray, contains certain protective clauses with reference to lands vested in the Admiralty or War Office. In our opinion, for the reasons given by Lawrance, J. and Collins, J. in *Pearson v. Assessment Committee of Holborn Union* (68 L. T. Rep. 351; (1893) 1 Q. B. 395, 397), these lands were being held for military purposes, and the respondent had no use or occupation of the premises other than as colonel commanding the corps, and in discharge of his duties of such, and so in fact a mere trustee for the corps having no personal beneficial interest. This is in our opinion an ownership and occupation for and on behalf of the Crown, and the appellants must show some words which impose upon the Crown an obligation to do the work or pay the expense of it. The principle that Acts of Parliament do not impose pecuniary burdens upon Crown property unless the Crown is expressly named, or unless by necessary implication the Crown has agreed to be bound, is in our opinion still applicable to such a case. No doubt the insertion in many Acts of Parliament of clauses to protect the Crown or save Crown rights has given rise to the impression that this rule has to some extent been trenchanted upon, and we are far from saying that there may not be provisions in public Acts of Parliament so framed as to bind the Crown, even though the Crown may not be specially named. But in our opinion the intention that the Crown shall be bound or has agreed to be bound, must clearly appear either from the language used or from the nature of the enactments, and there is in our opinion nothing of the kind in the provisions of the Public Health Act applicable to this case, which give rise to any such presumption. Nothing would be gained by considering in detail the various authorities which were cited in support of this view, but we would call attention to the judgment of Lord Tenterden in *Smithett v. Blythe* (1 B. & Ad. 509; 35 R. R. 358), in the year 1830, in which, where there was an express exemption of King's ships of war from light dues, other vessels of the Crown were held not to be liable, although they were not mentioned in the express exemption. In other words, it was held that the general doctrine of the immunity of the Crown applied, notwithstanding the insertion of an express exempting clause as to certain matters. Similarly, in the case of *Mayor of Weymouth v. Nugent* (6 B. & S. 35), stone brought for the use of His Majesty's navy was held exempt from wharfage duties created by statute upon the same principle, notwithstanding the exemption in favour of certain Crown property, and it was pointed out by Cockburn, C.J. that these exemptions were merely inserted *ex majore cautela* and the case of *Coomber v. Justices of Berks* (50 L. T. Rep. 405; 9 App. Cas. 61), which

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was a case of income tax, is strongly illustrative of the principle. It is, moreover, right to observe that in the case of *Lord Advocate and Barber v. Lang* (5 Ret. 3rd series, 84), Crown property was held exempt from any exactly similar burden. Having regard to the above authorities we cannot accept the argument that the limited exemption of certain Government lands in sect. 327 of the Public Health Act is sufficient to show that all other interests of the Crown were intended to be affected by the provisions of the Act. The limited language of the exceptions in sect. 327 appears to us to support the view that they were inserted *ex abundanti cautela* and we believe that if careful search is made there are many similar acts in which no clauses protecting Crown rights have been inserted. There is no such general practice as to lead us to the view that the original doctrine of Crown exemption has ceased to exist, or has been infringed upon or that the insertion of a particular clause is intended to show that only that class of Crown property was intended to be exempt. With reference to the case of *Vestry of Westminster v. Hoskins* (sup.), relied upon by Mr. Bray, it certainly is not an authority upon the point now raised before us, but after the argument which was addressed to us in this case, we are not prepared to say that we should have come to the same conclusion. The case of *Bayner v. Dravitt* (82 L. T. Rep. 718) does not apply, as in that case the premises were not solely used for Crown purposes. For the above reasons we are of opinion that the appeal should be dismissed.

Judgment accordingly.

Solicitors: Leonard J. Tatham; The Solicitor to the Treasury.

Saturday, May 3, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MANNERS (app.) v. TYLER (resp.). (a)

Adulteration—False warranty—Proceeding for giving warranty—Jurisdiction of justices—Successive warranties—Warranty not given in place where article was purchased for analysis—Sale of Food and Drugs Act 1875 (58 & 59 Vict. c. 63), ss. 25, 27—Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 20, sub-ss. 5, 8.

Sub-sec. 5 of sect. 20 of the Sale of Food and Drugs Act 1899, which extends the jurisdiction of justices in the hearing of proceedings for giving a false warranty, is confined in its operation to the warranty given to the person from whom the article was purchased for analysis, and does not contemplate or provide for the case of a series of successive warranties. Consequently, where proceedings for giving a false warranty are taken under sect. 27 of the Sale of Food and Drugs Act 1875, such proceedings must still be taken before a court having jurisdiction in the place where the warranty was given, unless the proceedings are in respect of the warranty given to the person from whom the article was purchased for analysis, in which case the proceedings for giving the false warranty may be taken before the court which has jurisdiction to hear the original information under sect. 6 of the Act of 1875, as well as before the court having juris-

isdiction in the place where the warranty was given.

CASE stated by justices of the peace for the county of Middlesex, sitting at Brentford.

At a petty sessions held at Brentford, in the county of Middlesex, on the 12th Dec. 1901 and 8th Jan. 1902, an information was preferred by W. Tyler (the respondent), an inspector of weights and measures, against Manners (the appellant), a farmer residing and carrying on business at Stratton St. Margaret's, Swindon, in the county of Wilts, under sect. 27 of the Sale of Food and Drugs Act 1875, as amended by sub-sec. 6 of sect. 20 of the Sale of Food and Drugs Act 1899, charging the appellant for that he, at the parish of Acton, in the district of Brentford and county of Middlesex, did, on the 14th Sept. 1901, unlawfully give a false warranty in writing to the Great Western and Metropolitan Dairies Limited in respect of new milk, sold by him as principal to the Dairies Company.

The appellant was convicted and was ordered to pay a fine of 5s. and 40s. costs.

The following facts were proved and found by the justices:—

The appellant was a farmer, and on the 14th Sept. 1901 he supplied to the Dairies Company two churns of milk, which churns of milk arrived at Paddington station at 10.30 p.m. on the 14th Sept. 1901, one of the churns having attached to it a label.

The churns of milk on arrival at Paddington station were received by a servant of the Dairies Company and remained at the station under his personal observation until the following morning, the 15th Sept., at 4 a.m., when one of the churns of milk was with other milk taken by a carman of the Dairies Company and delivered to Mrs. Dew, who carried on business as a milk seller at Shepherd's Bush, in the county of London, and the respondent at nine o'clock on the same morning of the 15th Sept. purchased from William Dew, the husband of Mrs. Dew, at Acton, in Middlesex, a pint of milk from the churn which on analysis proved to have been adulterated with water.

The analyst certified that the milk contained 8 per cent. of added water, and he stated in his certificate that his opinion was based on the fact that the sample only contained 7.74 per cent. of solids not fat, whereas genuine new milk should contain at least 8.5 per cent. of solids not fat.

The Dairies Company supplied the churn of milk (with other milk) to Mrs. Dew under a contract in writing, dated the 20th March 1901 and extending over twelve months, which stated: "All milk to be delivered by the vendors at the purchaser's address in a sweet, pure, and saleable condition and warranted by them pure with all its cream as received from the cow."

William Dew was summoned before the justices at Brentford on the 17th Oct. 1901, on the information of the respondent, for unlawfully selling an article of food—namely, the milk—which was not of the nature, substance, and quality of the article of food demanded by the respondent.

William Dew gave notice to the respondent (pursuant to sect. 25 of the Sale of Food and Drugs Act 1875, as amended by sect. 20, sub-sec. 4, of the Sale of Food and Drugs Act 1899) that he relied on a written warranty

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from the Dairies Company, and also gave notice to the Dairies Company that he intended to rely on such warranty. No notice was given by him to the appellant of his intention to rely on any warranty given by the appellant.

The summons against William Dew was heard by the justices on the 17th Oct. 1901, when they dismissed the summons against him on the ground that he had proved to their satisfaction that he was entitled to the protection of sect. 25 of 38 & 39 Vict. c. 63, as amended by sect. 20, sub-sect. 4 of 62 & 63 Vict. c. 51, he being a servant of the person who purchased the article in question with a written warranty, and that he had sold it in the same state as when it was purchased.

The appellant did not appear and was not represented before the justices on the hearing of that summons on the 17th Oct., and had no notice of the proceedings.

The respondent then (on the 17th Oct. 1901) laid an information before the justices against the Dairies Company, under sect. 27 of the Sale of Food and Drugs Act 1875, as amended by sect. 20, sub-sect. 6, of the Sale of Food and Drugs Act 1899, charging that they did on the 15th Sept. 1901, at Acton, in the county of Middlesex, unlawfully give a false warranty in writing to one Mrs. Dew in respect of a certain article of food—to wit, new milk—sold by them as principals.

The Dairies Company duly gave notice to the respondent, under the same sections as in the previous summons, that they relied on a written warranty from the appellant, and they also gave notice to the appellant that they relied on such warranty.

The summons against the Dairies Company was heard before justices on the 14th Nov. 1901, and was dismissed by them on the grounds that it had been proved to their satisfaction that the Dairies Company were entitled to the protection of sect. 25 of 38 & 39 Vict. c. 63, as amended by sect. 20, sub-sect. 6 of 62 & 63 Vict. c. 51, and that they purchased the article with a written warranty, and that they had sold it in the same state as when it was purchased.

The respondent thereupon applied for a summons against the appellant for that he did on the 15th Sept. 1901 (which was on the hearing amended to the 14th Sept. 1901), in the parish of Acton, in the county of Middlesex, "unlawfully give a false warranty in writing to the Dairies Company in respect of a certain article of food—to wit, new milk—sold by him as principal."

On the hearing of this summons the respondent produced the label attached to one of the churns of milk delivered to the Dairies Company on the 14th Sept. This label (dated the 14th Sept.) was directed to the Dairies Company by the appellant, and contained the words "Warranted pure, with all its cream."

It was proved that such label was removed from the churn at Paddington Station by the Dairies Company on the 15th Sept., and before it was dispatched for delivery to Mrs. Dew.

The appellant and his son were called as witnesses, and gave evidence that the milk when consigned by rail at Stratton St. Margaret's Station for carriage to Paddington was in the same state as given by the cows.

No evidence was called in reference to the milk whilst in transit. It was admitted that the

appellant paid for the carriage of the milk to Paddington station, where it was taken possession of by the Dairies Company, the consignees.

On behalf of the appellant it was objected (*inter alia*) that the offence was alleged in the summons to have been committed in the parish of Acton, but that the appellant had not committed any offence within the jurisdiction of the court; that the warranty by the appellant to the Dairies Company was given at Stratton St. Margaret's Station, in the county of Wilts, where the milk was placed on rail, and that the onus was on the respondent to produce evidence that the milk was then adulterated; that the facts proved before the justices disclosed no offence as having been committed by the appellant against the provisions of the Sale of Food and Drugs Acts; and that the appellant had given no warranty to William Dew or Mrs. Dew, and that therefore the warranty relied on by William Dew on the 17th Oct. 1901 was not one given by the appellant.

The justices overruled the objections on points of law raised by the appellant on the following (amongst other) grounds: That as it was admitted and proved to their satisfaction that the label warranty was given by the appellant at Stratton St. Margaret's, in Wiltshire, and remained affixed to the churn till removed by the consignees at Paddington, it was not for them to determine whether the appellant's warranty did or did not continue while the milk remained in bulk in an unopened churn during the transit in the ordinary course of trade by the consignees, the Dairies Company, to Mrs. Dew's shop in Acton, in the county of Middlesex, inasmuch as sect. 20, sub-sects. 5 and 6, of 62 & 63 Vict. c. 51, gives the justices jurisdiction whenever a false warranty was given, and over every person who writes such false warranty; that the churn during its transit to Paddington was constructively in the possession of the appellant, who as consignor had paid for its carriage, and as both the consignees and Dew when defendants had respectively proved to their satisfaction that they severally had purchased the milk as the same in nature, substance, and quality, and with a warranty to that effect, as that demanded by the respondent from Dew; and as the proceedings against the appellant were by way of having given a false warranty, and as the notice to the appellant by the Dairies Company required by sect. 20 of the Act of 1899 had been duly given, the onus of having the milk analysed during transit on the railway was not required by law in the case of a prosecution for having given a false warranty; and on the facts they convicted the appellant, as aforesaid.

The question for the court was whether the justices were right in law in so holding and convicting the appellant.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) provides:

Sect. 25. If the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be

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liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence.

SECT. 27. Every person who shall give a false warranty in writing to any purchaser in respect of an article of food or a drug sold by him as principal or agent, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding twenty pounds.

The Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), provides:

SECT. 20 (1). A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person. (2) The person by whom such warranty or invoice is alleged to have been given shall be entitled to appear at the hearing and to give evidence, and the court may, if it thinks fit, adjourn the hearing to enable him to do so. (4) Where the defendant is a servant of the person who purchased the article under a warranty or invoice he shall, subject to the provisions of this section, be entitled to rely on section twenty-five of the Sale of Food and Drugs Act 1875, . . . in the same way as his employer or master would have been entitled to do if he had been the defendant, provided that the servant further proves that he had no reason to believe that the article was otherwise than that demanded by the prosecutor. (5) Where the defendant in a prosecution under the Sale of Food and Drugs Acts has been discharged under the provisions of section twenty-five of the Sale of Food and Drugs Act 1875, as amended by this Act, any proceedings under the Sale of Food and Drugs Acts for giving the warranty relied on by the defendant in such prosecution, may be taken as well before a court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a court having jurisdiction in the place where the warranty was given. (6) Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be liable on summary conviction for the first offence, to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds, unless he proves to the satisfaction of the court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true.

Morton Smith for the appellant.—The justices had no jurisdiction to entertain the summons against the appellant, because the alleged offence was committed outside the jurisdiction of their court. The justices were wrong in assuming that the proceedings against the Dairies Company were taken under sub-sect. 5 of sect. 20 of the Act of 1899. They were taken, not under sub-sect. 5, but under sub-sect. 6 of that section. In *Reg. v. Smith* (74 L. T. Rep. 348; (1896) 1 Q. B. 596) it had been held that the justices, who had heard an information under sect. 6 against the ultimate seller to the purchaser for analysis, had no jurisdiction to entertain an information under sect. 27 against the person who had given a warranty to such seller where the warranty was given outside their jurisdiction. Sect. 20, sub-sect. 5, of the Act of 1899 was passed to remedy the difficulty raised in that case as to the jurisdiction of the justices in

such a case. The first summons was against Dew for selling in contravention of sect. 6 of the Act of 1875. Sect. 25 only contemplates the case of the defendant who is prosecuted as the seller to the purchaser who purchases for analysis, and applies only to the original prosecution by such purchaser. Before the Act of 1899 the person who had given that warranty could not have been prosecuted under sect. 27 for giving a false warranty before the justices who heard the original prosecution where the warranty was given outside their jurisdiction: (*Reg. v. Smith, ubi sup.*). Sub-sect. 5 of sect. 20 of the Act of 1899 has altered that, but its operation is confined entirely to such cases, and the extended jurisdiction of the justices is given only in respect of the warranty to the ultimate purchaser. The second summons, that against the Dairies Company, was taken out, not under sub-sect. 5, but under sub-sect. 6 of sect. 20 of the Act of 1899. In that prosecution the Dairies Company could not rely on the defence of a warranty under sect. 25, but they would say that they believed their own warranty which they gave was true at the time they gave it, and the evidence of that would be the warranty given to them by the appellant. That would be their statutory defence under sub-sect. 6. They could use that warranty as a defence under sub-sect. 6 of sect. 20 for the purpose of showing that when they gave the warranty to Dew they "had reason to believe that the statements contained therein were true." Sub-sect. 6 applies to the case; and under that sub-section there is no extension of the jurisdiction as in sub-sect. 5, and the offence must be prosecuted in the place where it was committed. As to the question of onus, there was no onus on the appellant to show that the milk had not been tampered with on the railway.

Lewis Richards (J. C. Earle with him) for the respondent.—The justices were right in holding that they had jurisdiction to entertain the proceeding against the appellant. Sub-sect. 5 of sect. 20 is express upon the point, and applies to this case. It says that where a defendant in a prosecution under these Acts has been discharged under the provisions of sect. 25 of the Act of 1875, proceedings for giving the warranty may be taken before the court having jurisdiction in the place where the article was purchased for analysis. This sub-section is in the most general terms, and under it the proceeding against the Dairies Company was properly taken in the Brentford court. The Dairies Company were charged with an offence, and they then became "the defendants in a prosecution under the Act" within sect. 25 of the Act of 1875 and sub-sect. 5 of sect. 20 of the Act of 1899, and as such they were entitled to set up any defence which the Act allowed, and they did set up as a defence the warranty which the appellant had given them, and they said that they themselves had bought with that warranty. That gave them a defence under sect. 25 of the Act of 1875, and they were clearly entitled to set up that defence and to be discharged under that section, and they were so discharged. The respondent therefore would be entitled, under sub-sect. 5 of sect. 20, to proceed against the appellant as he did. He is a public officer and has a public duty cast on him to follow the various sellers until he comes to the guilty party. The object of inserting the provision in sub-sect. 5, giving the justices

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an extended jurisdiction, was to get rid of the difficulty that arose in *Reg. v. Smith* (*ubi sup.*), and to enable the justices who heard the original information under sect. 6, to deal with the whole matter. Sub-sect. 5 applies, and under that sub-section the respondent could proceed against the appellant for giving the warranty before the justices at Brentford, as being the court having jurisdiction in the place where the article was purchased for analysis.

LORD ALVERSTONE, C.J.—The question raised in this case is undoubtedly an important one—namely, whether there was jurisdiction in the magistrates, before whom the proceedings had properly been taken under sect. 6 of the Sale of Food and Drugs Act 1875, also to hear the subsequent trial of an information against the original seller of the milk. The case is important because it might be thought desirable that all proceedings with regard to the same milk should take place before the same tribunal; but it must be remembered that in *Reg. v. Smith* (*ubi sup.*) it had been decided that, apart from special legislation, a metropolitan magistrate had no power to entertain a prosecution under sect. 27 of the sale of Food and Drugs Act 1875 in respect of the giving of a false warranty, where the warranty was given and where the sale and delivery had taken place outside the jurisdiction of his court. Then came the amending Act, the Sale of Food and Drugs Act 1899, which in sect. 20, sub-sect. 5, gives a certain extended jurisdiction, and if these proceedings were really in respect of a matter which came within sect. 20, sub-sect. 5, of the Act of 1899, then the objection to the jurisdiction of the justices could not prevail. That extended jurisdiction is given in these terms: "Where the defendant in a prosecution under the Sale of Food and Drugs Act has been discharged under the provisions of sect. 25 of the Sale of Food and Drugs Act 1875, as amended by this Act, any proceedings under the Sale of Food and Drugs Acts for giving the warranty relied on by the defendant in such prosecution, may be taken as well before a court having jurisdiction in the place where the article of food or drug to which the warranty relates was purchased for analysis as before a court having jurisdiction in the place where the warranty was given." I call attention to the fact that the statute still recognises that there is original jurisdiction to try a proceeding for giving a false warranty in the place where the warranty was given and the offence committed, but it also provides that there shall be jurisdiction in the place where the article was purchased for analysis. We have got to consider what persons come within those words, and to do so we have to turn back to sect. 25 of the Act of 1875, which provides that "if the defendant in any prosecution under this Act prove that he had purchased the article in question as the same in nature, substance, and quality, as that demanded of him by the prosecutor and with a written warranty to that effect, . . . he shall be discharged from the prosecution." Therefore it is to be observed that sect. 25 deals with the special individual who has sold the milk to the prosecutor. Then sect. 20, sub-sect. 1, of the amending Act of 1899, says that a warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts, unless the defendant has sent to the pur-

chaser a copy of the warranty with a written notice stating that he intends to rely on it, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to that person. Now, it is quite clear that the magistrates thought that the second proceedings here, which were taken against the Dairies Company, were either within sect. 25, or could be treated by them as being within sect. 25. It is not unnatural that they did so, as the Dairies Company had given the notice contemplated by sect. 20, sub-sect. 1, of the Act of 1899. When we look at the information against the Dairies Company, it was for unlawfully giving a false warranty in writing to one Mrs. Dew in respect of new milk sold by them as principals, contrary to sect. 27 of the Act of 1875, as amended by sect. 20, sub-sect. 6, of the Act of 1899. I think it is quite right, as has been pointed out by counsel for the appellant, that in addition to the right to be discharged on producing a written warranty under sect. 25 of the Act of 1875, which is dealt with in sect. 20, sub-sect. 5, of the Act of 1899, there is a substantive offence created and power given to try it in the succeeding sub-section—namely, sub-sect. 6 of sect. 20 of the same Act. It is quite clear that there may be different considerations applying to charges made under different sections. I think that the Dairies Company were really charged under sub-sect. 6 of sect. 20 for giving a false warranty, and all that it was necessary for them to show under that sub-section was that when they gave the warranty they "had reason to believe that the statements or descriptions contained therein were true," and the sub-section does not give the same extended jurisdiction where the court has given effect to the defence and has discharged the defendant, as sub-sect. 5 of the same section does where the defendant is discharged under sect. 25 of the Act of 1875. The defence allowed by sub-sect. 6 of sect. 20 is quite a different matter from setting up as a defence a written warranty under sect. 25 of the Act of 1875. Under sect. 20, sub-sect. 6, the warranty received by the defendant is only evidence that he had reason to believe that the statements contained therein were true. Therefore, although the magistrates may have thought that in discharging the Dairies Company they were acting under sect. 25 of the Act of 1875, yet they were really acting under sect. 20, sub-sect. 6, of the Act of 1899; and I think, therefore, that, this being a charge of giving a false warranty and the case not coming within the language of sect. 20, sub-sect. 5, the magistrates had no jurisdiction in this case under sect. 20, sub-sect. 5, of the Act of 1899. The magistrates, therefore, had no jurisdiction to entertain these proceedings against the appellant, and this appeal must consequently be allowed and the conviction quashed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion. It seems to me that in the Act of 1899 the Legislature have sought to remedy various defects in procedure under the previous Acts, and amongst others the difficulty that arose in *Reg. v. Smith* (*ubi sup.*), as to proceedings in respect of a false warranty which was relied upon by the defendant in the original proceedings. They did that in

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the language which appears in sub-sect. 5 of sect. 20, but they did not consider the case of successive warranties, and have not provided for it.

Appeal allowed. Conviction quashed.

Solicitors: for the appellant, *W. T. Ricketts and Son*; for the respondent, *Sir Richard Nicholson*.

Wednesday, March 26, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. CROMPTON URBAN DISTRICT COUNCIL. (a)

Highway—Repairable by inhabitants—Substitution—Disrepair—Order under sect. 10 of Highways and Locomotives Act 1878—Width not specified in indictment—Liability of defaulting highway authority.

In 1891, by an order of quarter sessions, a highway was stopped and a new road substituted for it, which was made by the owner, at whose instance the change was made. The certificate stated that the new road was 12yds. wide, but in fact it was 14yds. or 15yds. wide.

The new road having got into bad repair, an order was made under sect. 10 of the Highways and Locomotives Act 1878 on the defendants, and an indictment was preferred.

After the order the defendants served notices on the frontagers under sect. 150 of the Public Health Act 1875.

The width of the road was not specified in the indictment, and the jury found that the old road was a highway repairable by the inhabitants at large before 1835.

Held, that judgment was rightly entered for the Crown.

CASE SHOWN why a verdict obtained by the Crown at the Lancashire Assizes should not be set aside, and judgment entered for the defendants *non obstante veredicto*, or why a new trial should not be granted.

The grounds upon which the application was made by the defendants were (1) that the whole length of the diverted parts of Linney-lane was repairable by the frontagers under sect. 150 of the Public Health Act 1875 by reason of the proviso at the end of that section; (2) that the whole of the length was a new street, and that it was the duty of James Henry Lees Milne to pitch and pave and construct the new street in accordance with the bye-laws of the Crompton Local Board and the amended plan and section submitted him to and approved by the Crompton Local Board; (3) that the diverted road substituted for the old road was not made of the width of 12yds. in accordance with the order of quarter sessions and plan annexed thereto, but was made of the width of 14yds. to 16yds., in accordance with the plan and section of the new street deposited by James Henry Lees Milne, and approved by the Crompton Local Board, or that the case did not fall within the provisions of sect. 92 of the Highways Act 1835, and the Crompton District Council were not made liable for the repair of the street; (4) that the burden of repairing Linney-lane was therefore removed from the Crompton District Council and placed upon the frontages of J. H.

Lees Milne; (5) that the power of the Lancashire County Council to order the district council to repair a road did not extend to an old highway converted into a new street within the meaning of the bye-laws; (6) that the power of a county council to order a district council to repair a road only applied to a road which is throughout its whole breadth repairable by the inhabitants at large by reason of the same being widened by the owners of land adjoining thereto throwing additional land into it; and (7) that the power of a county council to order a district council to repair a road does not apply to a road where the character of the repairs required to keep the road in order had been altered and made more expensive by adjoining owners widening the same and laying the same out as a new street.

The indictment was for the non-repair of a certain road of a certain length which was specified in the indictment. The width of that length of the road was, as is usual, not specified in the indictment.

In May 1889 a Mr. Crompton Milne, a landowner on each side of the road in question, applied to the Crompton Local Board, the highway authority and the defendants' predecessors, to get them to apply to quarter sessions to make the new road and stop up the old one.

On the 22nd July 1889 two magistrates had a view under the Highways Act, and on the 4th Sept. they made their certificate, that having viewed the old road and the proposed new road, which they described as being 12yds. wide, they certified that the new road was more commodious, and that the old one might be stopped up.

Mr. Crompton Milne, after correspondence with the authority, in which he stated he intended to pitch and pave the road, in fact made it an ordinary road with boulders, and on the 28th Nov. 1890 the order of quarter sessions was made to divert the road. On the 3rd May 1891 the justices gave a certificate of the completion of the road, and on the 6th July 1891 the order of quarter sessions was enrolled.

The certificate of the completion of the new road stated it was to be 12yds. wide. As a matter of fact, it was 14yds. or 15yds. wide.

After that the road got into bad repair, and proceedings were taken under sect. 10 of the Highways and Locomotives Act 1878, and an indictment was preferred.

After the order was made by the County Council, and after the defendants under the Highways and Locomotives Act had demanded a jury, they served notices on the frontagers to pave, sewer, channel, &c., under sect. 150 of the Public Health Act 1875. No notice was taken by the frontagers, who denied liability, and the defendants did the work after the indictment was preferred.

The question left to the jury at the trial of the indictment was, Was the old highway a roadway repairable by the inhabitants at large before 1835? They found that it was.

At the termination of the trial the defendants applied for judgment to be entered for them, but the learned judge refused to do so, and delivered judgment as follows:—

WILLS, J.—On the best consideration I can give to this matter, I think it is much better

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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that I should decide it now, especially as, my decision being in favour of the prosecutors, it will leave it open to the defendants to question it if they think on consideration that the view I have taken is wrong. I begin with the diversion and the enrolment of the certificate, which took place in July 1891. After that, by sect. 92 of the Highways Act 1835, a new road was subject to exactly the same incidents with respect to repair as the old road. The consequence is that the road, whatever it was which was shown on the deposited plan which was approved by the justices and enrolled at the quarter sessions, became a road which the parish were liable to repair. The parish have allowed it to go out of repair. That is an admitted fact, and I must look at the facts as they existed at the time to which this indictment refers, which is down at the time at which the order of the county council was made. This indictment was a proceeding against them for disobeying the order made by the county council, and that, therefore, is the time to look at. At that time, unless there was something to interfere with it, clearly there was a liability on the parish to repair. The argument that they ought not to repair, as I understand it, is this: It is said that one of the public, not the public itself but the contiguous landowner, had put himself into such a position that the defendants might, if they had been so minded, at any time between 1891 and the present time, have put in force the provision of sect. 150 of the Public Health Act 1895, and might have compelled Mr. Lees Milne, who is no party to this litigation—not a party representing the public—to do a good deal more than the parish would ever be compelled to do, because it is quite clear that under the circumstances with which I have to deal in the present case there could be no obligation on the defendants to pitch and pave or do anything of the kind. Their only obligation would be to do to the new portion of the road which was substituted for the old portion just what was sufficient to make a decent repair to such a road as this was apart from any question of the Public Health Act. Now, I cannot say that because a particular individual might have been made to do repairs which he has not done there has been any transfer of liability from the defendant to someone else. But to do Mr. Sutton's argument justice, that is not quite the way he puts it. He does not say that there was a transfer of liability, but he says something ought to have been done which has not been done which would put the road into a good state of repair, after which, and only after which, the liability of the parish would arise. I cannot follow that, but it lay with the parish to take proceedings under sect. 150 if they chose to do so. What answer is that to the public? What answer is that to the Crown, who prosecute because this order to repair the road was not complied with? I think it is none. The Crown in a prosecution of this kind represents the community at large, and it is no answer to the public when they cannot use the road to say that if the district council had chosen to take some steps which they have not chosen to take they might have made the landowners pay for a good deal, and probably for a good deal more than they are bound to do, after which a heavier liability would have laid upon them than can lie upon them now. I therefore think that there is nothing in

the facts which have been brought before us, and the very able argument which has been addressed to me by Mr. Sutton, for which I thank him, which would prevent me directing a verdict and judgment being entered for the Crown.

Thereupon the defendants made the present application.

Pickford, K.C. and *Byrne* showed cause.

E. Sutton and *James Openshaw* in support of the application.

Lord ALVERSTONE, C.J.—This was a rule moved by Mr. Sutton to set aside a conviction in a road indictment case, in which the only question left to the jury was liability of the defendants to repair an ancient highway. If, as I understand, Mr. Sutton asks for judgment for the defendants or for a new trial, on the ground, as he says, that the effect of the verdict is that they will be held liable to repair 14yds. or 15yds. width of the road, as the case may be, whereas, as a matter of fact, they ought only to repair 12yds. width, I have the greatest possible difficulty in following his point. I will deal in a moment with another point that he makes about the liability of another gentleman; but I have the greatest possible difficulty in following his argument with regard to the point I have mentioned. As I understand before the Act of 1878, if this question of liability to repair was required to be raised, it was done by means of sect. 19 of the Highway Act. There an order was obtained from justices for the trial by indictment of the liability to repair, and nobody disputes of course that the liability to repair the road would have been tried in that way. Then came sect. 10 of the Highway and Locomotives Act, which provides that prior to the indictment there should be preliminary proceedings of complaint before the county authority, and an order made, and the obligation to obey the order suspended until this question of liability had been tried. In this case such an order was made, and the liability being disputed, they went down to trial. I cannot myself understand how, when the question which is to be tried is the liability to repair, and the only evidence or the only material point in the evidence is with regard to whether or not it was a public highway, it can be said that this verdict involves some special construction or some special obligation being placed upon the order, and that there ought to be a new trial to try the question of liability or judgment entered for the defendants, because, that question of liability having been tried and found against them, there will be some uncertainty as to what road or what extent of road the defendants are to be bound to repair. It seems to me that that is the consequence of the order. If the order is bad it may be attacked on some other grounds, but why there should be judgment entered for the defendants because there has been some uncertainty as to the width of the road they were to repair, or why we should enter a new trial to try that question I cannot understand. The other point that Mr. Sutton raises is this: There had been contemporaneous proceedings by Mr. Crompton Milne either to get the sanction to a wider road which he was going to metal or pave, or possibly an idea of proceedings to compel the frontagers to do it; and it is contended before us that the circumstances that the road had been laid out by Mr. Crompton Milne.

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and that he had deposited plans which implied that he was going to pave it, and that possibly there had been an undertaking by him to put the road in its proper condition, and that the circumstances that there were these strips at the side of the road, in respect of which proceedings had been taken under sect. 150, all ought to be taken into consideration at the trial of this indictment. I agree that the only way in which they could be taken into consideration would be to press the jury that they ought not to convict the defendants. But why this obligation of someone else, or the rights which the local authority had to take proceedings under sect. 150, either in respect of the whole of the road or any part of it, is any reason why we should grant a new trial, or why the liability of the defendants should be negated by our entering judgment for them I am really at a loss to understand. If it had been contended that on the face of these proceedings the result of the verdict was that there was an order on the defendants to repair more road than in law they were admitted to be liable to repair, possibly some question may have arisen. I do not know at the present time what the effect would be of the order standing which was made under sect. 10, except that, whether that the order is now to be operative or inoperative, the liability of the defendants to repair the old highway is established. It seems to me that none of the grounds which have been urged by Mr. Sutton afford the least reason for entering judgment for the defendants as regards liability to repair, or for ordering a new trial to try that liability. Therefore I think this rule should be discharged.

DARLING, J.—I am of the same opinion. It seems to me that the defendants were convicted for not doing that which they were bound to do. When one looks to see what they were bound to do, one looks at the indictment. It is presented that: "From time to time, whereof the memory of man runneth not to the contrary, there was and yet is a common and ancient highway called Linney-lane, and that the defendants were bound to maintain the said common and ancient King's highway." They have not repaired it, and of that they have been convicted. They were bound to repair that, whatever was the width of it. It is said to have been 12yds. If that were so, they have been convicted of not repairing that which they were bound to repair—that is, 12yds. wide of that highway. Now, it is said that there ought to be a new trial, as I understand it, because, owing to what has been done, they will be said by someone to be liable to repair 14yds. width of highway. Well, if anybody tries to impose that burden upon them, it seems to me that their proper answer is to repair the ancient King's highway whatever it was, and they are not to do any more. Then, if any proceedings are taken against them for not doing more than that, this conviction will not hurt them at all. They will have to be proceeded against again. It may be that if they do adopt this process there will be a very nice ancient King's highway with a swamp on each side of it, and, in accordance with ancient maxims, it will be safest to go along the middle. We cannot help that. If they carry out the duty imposed upon them, this indictment will not hurt them. It is no good anticipating what will be the result

of those proceedings, because we do not know what may then be alleged.

CHANNELL, J.—I agree. This rule is to enter the verdict for the defendants. I see no ground whatever for doing that. The liability of the defendants to repair at least 12yds. of this road, which is in point of fact 14yds. or 15yds. wide, is quite clearly established on the facts that the jury found, upon the only questions that went to the jury. There was no application at the trial, nor is there now, to enter the verdict specially as to so much road, 12yds. on one side or anything of the sort. I am not very familiar with criminal proceedings. I do not know whether it could have been entered distributively, as in civil action, but at any rate that is not the application before us, and the substance of the matter is found for the prosecution.

Judgment accordingly.

Solicitors: E. Bogue, for Worth and Worth, Rochdale; Chester, Broome, and Griffiths, for Hesketh Booth and Sons, Oldham.

Tuesday, April 8, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MASKELYNE AND COOKE v. SMITH; PALMER (Claimant) (a)

Fraudulent conveyance—Deed of arrangement—Registration—Affidavit—Exclusion of creditor from operation of deed—Omission of creditor's name and address in affidavit on registration—Validity of deed—Deeds of Arrangement Act 1887 (50 & 51 Vict. c. 57), ss. 5, 6, sub-s. 1—13 Elis c. 5.

A deed of arrangement is not necessarily void under sect. 5 of the Deeds of Arrangement Act 1887 merely by reason of the intentional omission of the name and address of a particular creditor in the affidavit required upon the registration of the deed under sect. 6, sub-sect. 1 of the Act, and because it reserves some benefit to the debtor.

A deed of arrangement, being an assignment by a debtor of his property to a trustee for the benefit of creditors, is not necessarily void under 13 Elis. c. 5, by reason only of the intentional exclusion of a particular creditor from the operation of the deed.

Spencer v. Slater (39 L. T. Rep. 424; 4 Q. B. Div. 13) commented on.

APPEAL from the Westminster County Court in an interpleader issue sent from the High Court to try the right to goods seized in execution by the plaintiffs under an execution against John Smith (the defendant) and claimed by the claimant Palmer, who claimed as trustee under a deed of assignment executed by the defendant Smith for the benefit of his creditors.

The issue was tried in the Westminster County Court on the 19th July 1901 by the deputy judge of that court, who found for the plaintiffs (the execution creditors) holding that the deed of assignment was fraudulent and void as against them.

The defendant was a florist and nurseryman carrying on business at Windsor.

On the 11th May 1900 the defendant, being

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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then in embarrassed circumstances, executed a deed of composition or arrangement for the benefit of his trade creditors. The claimant was the trustee under this deed.

The deed was expressed to be made between the defendant of the first part, John A. Palmer (the claimant) of the second part, and the several persons, companies, and partnership firms (being creditors of the debtor) whose names were set out in the schedule thereto and who were therein called the creditors of the third part. It recited that it had been agreed by the parties thereto of the third part (the creditors) to accept an offer made by the debtor for payment to the creditors of the composition of 20s. in the pound upon the amount and in full discharge of their respective debts due from the debtor and set out in the schedule, such composition to be paid by monthly instalments of 10s. by the debtor to the trustee commencing on the 1st June 1900, and that it had been further agreed that the composition should be secured by the assignment of the estate of the debtor to the trustee.

The deed witnessed that in pursuance of the agreement the defendant covenanted with the trustee and with the scheduled creditors respectively to pay to the trustee the sum of 10s. each month, so that the trustee should every three months divide the sums so received from the debtor amongst the creditors entitled thereto *pro rata*; and that the debtor thereby conveyed and assigned all his real and personal estate (except leaseholds) to the trustee upon trust, until default should be made by the debtor in payment to the trustee of any of the instalments so agreed to be paid, to allow the debtor to use, employ, deal with and dispose of the estate for the purposes of his business, or for such other purposes as the trustee might think proper, but subject to the control and supervision of the trustee, and from and after such default upon trust to take possession of and realise the estate, and to apply the net proceeds towards immediate payment to the creditors of so much of the composition as should be then unpaid, and to pay the surplus (if any) of such proceeds, and assign or deliver the remainder of the estate to the debtor; and there was a proviso that the trustee should not be bound in any way to interfere with the debtor in the conduct of his business, or dealing with his estate further than he should think necessary or proper, and should not be liable for any losses which the estate might sustain by reason of the acts or defaults of the debtor, but that if during the continuance of the time during which the instalments were payable the trustee should be of opinion that it would be expedient to forthwith wind-up the estate and realise and divide the same, the trustee should with all convenient speed wind-up and realise the estate, and apply the net proceeds thereof as if they had been moneys arising from the exercise of the trust for sale; and in consideration of the premises the creditors thereby released the debtor from the debts due to them, and from all actions and demands in respect thereof.

At the date of this deed the debtor was indebted to the plaintiffs in the sum of 12l. 12s., in respect of an entertainment given by them, but the deed, being for the benefit of the debtor's trade creditors who did not include the plaintiffs, did not apply to, and was not intended to apply to,

the plaintiffs, and the plaintiffs were not inserted in the schedule of the list of creditors, as the debtor considered that two other persons, who were joined with him in inviting the entertainment, were the proper persons to pay for it.

The deed of arrangement was registered on the 17th May 1900 under the Deeds of Arrangement Act 1887, s. 5, and an affidavit was made upon such registration as required by sect. 6, sub-sect. 1, of that Act, but this affidavit verifying the list of creditors did not contain the names or addresses of the plaintiffs.

In June 1901 the plaintiffs brought an action in the Mayor's Court for their debt of 12l. 12s., and recovered judgment for the amount. This judgment was removed to the High Court for the purpose of execution.

A writ of *fi. fa.* was subsequently issued, and the sheriff of Berks seized the defendant's goods, stock, &c., on his premises.

The claimant on the 8th June 1901 gave notice that he claimed the whole of the goods seized under the deed of arrangement. The sheriff interpleaded, and on the 24th June an order was made that the interpleader proceedings should be transferred to the Westminster County Court, and that the issue should be tried in that court as between the claimant (the trustee under the deed) and the plaintiffs, the execution creditors.

At the hearing before the deputy judge, it was contended for the claimant that there was nothing on the face of the deed to exclude any particular creditor from coming in and assenting; that although the plaintiffs' names were admittedly not inserted in the affidavit required under sect. 6 of the Deeds of Arrangement Act 1887, that did not invalidate the deed, and that the intention of the deed was not to defeat the plaintiffs; that the deed was therefore valid, and the title of the claimant under it good.

For the execution creditors it was contended that the deed was not for the benefit of all the creditors; that, as the plaintiffs' names were omitted from the affidavit verifying the deed the registration was not a proper registration under sect. 6, sub-sect. 1, of the Act, and that, therefore, the deed itself was void under sect. 5.

The learned deputy judge, in giving his judgment, said that the deed of arrangement was somewhat suspicious on its face, and that certain only of the creditors—namely, executing and assenting creditors, were of the third part, and none were scheduled, and yet the deed recited an agreement between the debtor and such non-existent creditors for a composition. He found as a fact that there was no collusion between Smith and Palmer to defraud or delay creditors by the deed. He thought that the motives of the debtor were honest, but with respect to Maskelyne and Cooke (the plaintiffs), he thought and found as a fact upon the evidence that the debtor deliberately intended to treat them as not on the same footing as the rest of his creditors, and to exclude them from the benefit of the deed of arrangement. The debtor said that they were not his "business creditors," and he therefore deliberately did not give their names as those of creditors to Palmer, and deliberately omitted their names from the list required under the Deeds of Arrangement Act 1887, s. 6.

The judge then held that the deed was fraudulent and void under the statute of Elizabeth;

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and that it was also rendered void under sect. 5 of the Deeds of Arrangement Act 1877, by reason of the omission from the affidavit verifying the list of creditors required under sect. 6, sub-sect. 1, of the names of the plaintiffs; and he gave judgment for the execution creditors (the plaintiffs) with costs.

The claimant appealed.

The Deeds of Arrangement Act 1887 (50 & 51 Vict. c. 57) provides:

Sect. 5. From and after the commencement of this Act a deed of arrangement to which this Act applies shall be void unless the same shall have been registered under this Act within seven clear days after the first execution thereof by the debtor or any creditor, or if it is executed in any place out of England or Ireland respectively, then within seven clear days after the time at which it would, in the ordinary course of post, arrive in England or Ireland respectively, if posted within one week after the execution thereof, and unless the same shall bear such ordinary and *ad valorem* stamp as is under this Act provided.

Sect. 6. The registration of a deed of arrangement under this Act shall be effected in the following manner: (1) A true copy of the deed, and of every schedule or inventory thereto annexed, or therein referred to, shall be presented to and filed with the registrar within seven clear days after the execution of the said deed (in like manner as a bill of sale given by way of security for the payment of money is now required to be filed) together with an affidavit verifying the time of execution, and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of the composition (if any) payable thereunder, and the names and addresses of his creditors.

Herbert Reed, K.C. (Pritchett with him) for the appellant.—The learned judge was wrong upon both points. The mere fact that the plaintiffs were excluded from the deed of arrangement does not make the deed void. Upon that point the case is really concluded by the case of *Alton v. Harrison* (21 L. T. Rep. 282; L. Rep. 4 Ch. 622). That case decides that the mere fact that the whole of the debtor's property is conveyed for the benefit of some of the creditors only does not render the deed fraudulent and void under 13 Eliz. c. 5. Apart from the Bankruptcy Acts there is nothing to prevent a person preferring certain creditors to others, so long as there is *bona fides*; and if the person does so by assigning his property by deed, that does not make the deed void. In *Alton v. Harrison* (*ubi sup.*), Giffard, L.J. says: "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bona fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." This deed was made *bona fide* and for valuable consideration, and it therefore was not void under 13 Eliz. c. 5. Even if there were an intention to defeat these particular creditors (the plaintiffs), that would not of itself constitute a fraud, or render the deed void under the statute of Elizabeth:

Wood v. Dixie, 5 L. T. Rep. O. S. 286; 7 Q. B. 892.

Secondly, the deed was not void under sect. 5 of the Deeds of Arrangement Act 1887, by reason of

there not being a sufficient registration under sect. 6, sub-sect. 1. There was a sufficient affidavit to satisfy that section. A complete list of the creditors in the affidavit to be made under sect. 6, sub-sect. 1, is not necessary to the validity of the deed. Few deeds would be valid if that were necessary. The information to be given by the registration need not include information as to all the creditors:

Re Batten; Ex parte Milne, 22 Q. B. Div. 685 per Fry, L.J., at p. 699.

Macaskie, K.C. (Thorn Drury with him) for the execution creditors.—The deed is void under the statute of Elizabeth, though not on the ground taken by the judge. The mere fact of the exclusion of the plaintiffs would not necessarily render the deed void; but it is void because of the benefits which it reserves to the debtor himself and by means of which it tends to defeat and delay the creditors. The deed gives no information how long it would take to pay off the debts, and the effect of it is that so long as the debtor pays the instalments of 10l. a month, he is to have possession of the estate, and he may sell or dispose of it as he likes for the benefit of his business, and the property is taken out of the hands of the creditors whether they assent or do not assent, and the whole creditors are thereby delayed. Though the deed may be good, although it excludes a certain class of creditors, yet this deed is bad on the ground that it reserves a benefit to the debtor himself. The deed is more mischievous than that which was held void in *Spencer v. Slater* (39 L. T. Rep. 424; 4 Q. B. Div. 13), where the objection to the deed was that the creditors had to indemnify the trustees. Upon that point *Spencer v. Slater* (*ubi sup.*), concludes the case in favour of the execution creditors. Secondly, the deed is also void in consequence of the omission of the plaintiffs' names in the affidavit made under sect. 6, sub-sect. 1 of the Act. It is clear that at the date of the deed the plaintiffs were creditors, that it was known to the debtor that they were creditors, and that they were intentionally omitted from the affidavit. Sect. 6 shows what the registration means. It includes an affidavit setting out "the names and addresses of his creditors." This provision goes far beyond the requirement under the Bankruptcy Act 1869, under which (sects. 125, 126) it was necessary that the debtor should set out a list of his creditors and the amounts due to them, and it has been many times held that unless that were done the creditors would not be bound. In the case of *Re Batten; Ex parte Milne* (*ubi sup.*), Lord Esher (22 Q. B. Div. at p. 694), speaking of this Act, says: "Then the Act provides for another affidavit to be made by the debtor stating, not the number of creditors who have assented or executed, but the total estimated amount of property and liabilities included under the deed . . . and the names and addresses, not of the creditors, parties to the deed, or who have executed or assented thereto, but 'of his creditors,' that is, of all his creditors." That is a dictum only, but it is a dictum in favour of the view that "his creditors" means not a part or a class of his creditors, but all his creditors. To read the section in the way contended for by the appellant is really to repeal a part of the section. It is at all events necessary to set out the names

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and addresses of all the unsecured creditors, and the omission to do so renders the deed void:

Chaplin v. Daly, 71 L. T. Rep. 569.

The plain language of the Act requires that the names and addresses of the plaintiffs should have been set out in the affidavit, and, that not having been done, the deed is void.

Herbert Reed, K.C. in reply.—There is no other case which proceeds on the same lines as *Spencer v. Slater* (*ubi sup.*), because, although it may be good law, it went on the particular words of that particular deed, and is not an authority in this case. The deed there was a very peculiar deed, and was really intended to put into the pockets of the debtor what ought to have gone to the creditors. [CHANNELL, J.—*Alton v. Harrison* (*ubi sup.*) was not cited in that case; it was cited in the next case and made a difference.] The principle is that if a deed reserves a substantial benefit to the debtor, or is to protect the debtor, then it is void under the statute of Elizabeth. That is to be determined by looking at the deed itself; it is not necessary to go outside the deed to decide that. But the deed is perfectly good if made to protect creditors or the property for the purpose of paying a composition. [DARLING, J. referred to *Boldero v. London and Westminster Loan and Discount Company Limited* (42 L. T. Rep. 56; 5 Ex. Div. 47).] That case and *Alton v. Harrison* (*ubi sup.*) are enough to show that *Spencer v. Slater* (*ubi sup.*) cannot be regarded as of general application. [He was stopped on the second point.]

Lord ALVERSTONE, C.J.—This case is not without difficulty. It is an appeal from the decision of a County Court judge, who gave judgment in favour of the execution creditors, the judge having held that the claimant, the trustee under this deed of arrangement, was not entitled to say that the deed was valid as against the execution creditors. I think in the first instance I ought to deal with the two grounds on which the learned County Court judge decided in favour of the execution creditors. The first ground upon which he so decided was that the debtor, in executing the deed, had not in his mind and did not include or intend to include the plaintiffs, who at the date of the deed must be taken to have been creditors, although not trade creditors. The learned judge decided against the claimant on the ground that the fact that the debtor intended to exclude the plaintiffs from the operation of the deed made the deed void. That conclusion seems to me not to be right, and since the case of *Alton v. Harrison* (*ubi sup.*) it cannot be supported. Therefore, on that particular ground, the reason given by the learned judge was not sufficient. The next ground upon which he decided against the claimant was that the deed was bad, because the affidavit required on its registration by sect. 6, sub-sect. 1, of the Deeds of Arrangement Act 1887 omitted the names and addresses of the execution creditors. It has been argued that the deed is therefore void under sect. 5. I cannot agree with that argument. It seems to me to go too far. I think that there is nothing in the statute which states that an honest omission—an omission which is not a fraudulent one—from the list of creditors makes the deed void. The language of Lord Esher, M.R. and Fry, L.J. in *Re Batten*; *Ex parte Milne* (*ubi sup.*) shows that it was not the

intention of the Legislature that the names of the creditors should appear in the register, and that some limitation must be put on the words "his creditors" in the affidavit required under sect. 6, and that those words do not necessarily mean "all his creditors." Take, for instance, the case put during the argument. If two partners in a firm, wishing to make a composition with their creditors, execute a deed of arrangement, it could not be said that the deed would be void unless the affidavit contained the names, not only of the joint but of the separate creditors of the partners. Therefore I cannot think that the mere omission of a creditor's name and address in the affidavit required on registration renders the registration void. I think, therefore, that the judgment of the learned judge was wrong, and that it ought to be reversed. A third point was raised by counsel for the execution creditors—namely, that the deed was void on the face of it as tending to defeat and delay creditors within the meaning of the statute of Elizabeth. That point was not taken or argued before the County Court judge, and as to it there are no further facts than the deed itself and the intentional omission of the execution creditors. It was contended by counsel for the execution creditors that looking at the deed itself, the deed was void under 13 Eliz. c. 5, as tending to defeat and delay creditors, because on the face of it it reserved a benefit to the debtor himself, and in support of that contention he cited the case of *Spencer v. Slater* (*ubi sup.*), where a deed which was precisely framed for the purpose of defeating any execution, was held by the court to be void under 13 Eliz. c. 5, as tending to defeat or delay creditors. I think it is quite clear that that case of *Spencer v. Slater* (*ubi sup.*) cannot be regarded as laying down any general principle apart from the particular facts of that case. That it cannot be so regarded is clear from the case of *Boldero v. London and Westminster Loan and Discount Company Limited* (*ubi sup.*). Another reason why I think that *Spencer v. Slater* (*ubi sup.*) was not intended to be of general application, is the fact that *Alton v. Harrison* (*ubi sup.*) was not cited in that case, and it is difficult, to reconcile it with *Alton v. Harrison* (*ubi sup.*), and many others, if it decides that any benefit reserved to the debtor makes the deed void. I think that the real question in such cases is that stated by Giffard, L.J. in *Alton v. Harrison* (*ubi sup.*), where he says: "If the deed is *bona fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." Therefore the question is, is the deed *bona fide*, and not a mere cloak for obtaining a benefit for the debtor? If so, it is a good deed, and not void under the statute of Elizabeth. Many composition deeds provide for the carrying on of the debtor's business and reserve some ultimate benefit to the debtor. We are asked to say that we ought to hold the deed bad on the face of it under the statute of Elizabeth. I am not prepared to go so far as that. Having regard to the cases of *Alton v. Harrison* (*ubi sup.*) and *Boldero v. London and Westminster Loan and Discount Company Limited* (*ubi sup.*), if the deed were going to be set aside on that ground further hearing would be necessary. We must assume *bona fides*, and we ought not to decide the point raised by counsel for the execution creditors

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without further evidence in the matter. I think that this is a deed which is not void on either of the two grounds on which it was held by the County Court judge to be void, and I further think that there is not enough evidence before us to deal with it on the ground raised by counsel for the execution creditors. For the reasons I have stated I think that the deed ought not to be held void on a ground not taken before the County Court judge, but upon the two grounds which were taken before him I think the appeal should be allowed.

DARLING, J.—I am of the same opinion, and I merely wish to add that I cannot reconcile the principle of *Spencer v. Slater* (*ubi sup.*) with that of *Alton v. Harrison* (*ubi sup.*). *Spencer v. Slater* (*ubi sup.*) has already been distinguished in *Boldero v. London and Westminster Loan and Discount Company Limited* (*ubi sup.*), and unless our decision be reversed it must take its place in the Apocrypha.

CHANNELL, J.—I agree. I venture to think that the explanation of *Spencer v. Slater* (*ubi sup.*) is that there were things said in that case which would not have been said if *Alton v. Harrison* (*ubi sup.*) had been cited to the court, and which perhaps cannot now be supported. But yet there were things said which in that case might still be supported with considerable force. However that may be, I prefer to put my judgment, so far as that point is concerned, on the ground, not that *Spencer v. Slater* (*ubi sup.*) is wrong, but that there is not enough in this deed itself to show that the deed is bad under the statute of Elizabeth.

Appeal allowed. Leave to appeal.

Solicitors for the appellant, *Wood and Sons*.
Solicitors for the respondents, *Seal and Edgelow*.

Wednesday, April 23, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

STOKES (app.) v. MITCHESON (resp.). (a)

Coal mine—Rules—Enforcement by agent—Breach—Coal Mines Regulation Act 1887 (50 & 51 Vict. c. 58), ss. 49, 50—*Inspector of mines—Dismissal of information—Summary Jurisdiction Act 1857* (20 & 21 Vict. c. 43), s. 2—"Person aggrieved"—*Summary Jurisdiction Act 1879* (42 & 43 Vict. c. 49), s. 33.

M., an agent of a coal mine, appointed a duly qualified manager and under-manager. Owing to the negligence of such manager and under-manager, a breach of sect. 49, r. 1 of the Coal Mines Regulation Act 1887 was committed, but such breach was an occasional irregularity and not one which had been continuous.

The justices found that M. had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager, who knew the rules and whose duty it was to carry them out, and that the breach was in no way caused by M. omitting to enforce the rules. They therefore dismissed the information preferred against him under sect. 49.

Held, that they were right.

An information having been dismissed, the justices

on the application of the informant stated a case which purported to be stated under the Summary Jurisdiction Act 1879 only.

On an objection taken that the informant was not a "person aggrieved" within sect. 33 of that Act: Held, that it could not be assumed that, because the Act of 1879 was only referred to, the case was not stated under both that Act and the Summary Jurisdiction Act 1857; and, further, that, under the Act of 1857, a person who was a party to the proceedings could apply for a case to be stated.

CASE stated by justices for the county of Warwick under the Summary Jurisdiction Act 1879.

The respondent was charged on the information of the appellant, one of His Majesty's inspectors of mines, which alleged that the respondent on the 1st Nov. 1901, at the parish of Baxterley, being the agent of the Baddeley mines there, the same being a mine within the meaning of the Coal Mines Regulation Act 1887, unlawfully did fail to cause an adequate amount of ventilation to be constantly produced in the mine to dilute and render harmless noxious gases to such an extent that the working places, levels, and workings of the mine would be in a fit state for working therein, contrary to the Coal Mines Regulation Act 1887.

Information for a similar offence had also been laid against the manager, who held a first class certificate, and against the under-manager, who held a second class certificate of the mine, and information for further offences under the Act had also been laid against the manager. The three defendants were separately represented, and all the charges were heard together with the consent of all the parties.

The respondent was admitted to be the agent of the Baddeley mines within the meaning of the Coal Mines Regulation Act 1887.

The evidence for the prosecution consisted only of the evidence of Mr. Henry Richardson Hewitt, the assistant inspector of the mines. He stated in effect that he had visited the mine, which was a dry and dusty one, and more liable therefore to explosions, on the 1st Nov. last, and then found an accumulation of gas in a certain heading, No. 29 and no sufficient ventilation, and that no entry of the gas was made in the report-book.

He also proved certain admissions by the manager and under-manager which collectively showed that the non-ventilation had been going on for several days previously, during which period the heading had been roughly fenced off, but not so as to prevent the escape of gas. Such admissions, however (as the justices considered), were not evidence against the respondent, and therefore in deciding the charge against him they had regard only to the state of things on the 1st Nov. But with that limitation the justices considered that the evidence showed that there was evidence of want of ventilation on the 1st Nov. which amounted to a violation of the general rules.

The non-ventilation of the heading No. 29 was caused by the temporary diversion of the air-pipes at the entrance thereto into an adjacent heading which was then being driven. The report books stated that the ventilation was satisfactory and that there was no gas.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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MASKELYNE AND COOKE v. SMITH; PALMER (Claimant).

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and addresses of all the unsecured creditors, and the omission to do so renders the deed void:

Chaplin v. Daly, 71 L. T. Rep. 569.

The plain language of the Act requires that the names and addresses of the plaintiffs should have been set out in the affidavit, and, that not having been done, the deed is void.

Herbert Reed, K.C. in reply.—There is no other case which proceeds on the same lines as *Spencer v. Slater* (*ubi sup.*), because, although it may be good law, it went on the particular words of that particular deed, and is not an authority in this case. The deed there was a very peculiar deed, and was really intended to put into the pockets of the debtor what ought to have gone to the creditors. [CHANNELL, J.—*Alton v. Harrison* (*ubi sup.*) was not cited in that case; it was cited in the next case and made a difference.] The principle is that if a deed reserves a substantial benefit to the debtor, or is to protect the debtor, then it is void under the statute of Elizabeth. That is to be determined by looking at the deed itself; it is not necessary to go outside the deed to decide that. But the deed is perfectly good if made to protect creditors or the property for the purpose of paying a composition. [DARLING, J. referred to *Boldero v. London and Westminster Loan and Discount Company Limited* (42 L. T. Rep. 56; 5 Ex. Div. 47).] That case and *Alton v. Harrison* (*ubi sup.*) are enough to show that *Spencer v. Slater* (*ubi sup.*) cannot be regarded as of general application. [He was stopped on the second point.]

Lord ALVERSTONE, C.J.—This case is not without difficulty. It is an appeal from the decision of a County Court judge, who gave judgment in favour of the execution creditors, the judge having held that the claimant, the trustee under this deed of arrangement, was not entitled to say that the deed was valid as against the execution creditors. I think in the first instance I ought to deal with the two grounds on which the learned County Court judge decided in favour of the execution creditors. The first ground upon which he so decided was that the debtor, in executing the deed, had not in his mind and did not include or intend to include the plaintiffs, who at the date of the deed must be taken to have been creditors, although not trade creditors. The learned judge decided against the claimant on the ground that the fact that the debtor intended to exclude the plaintiffs from the operation of the deed made the deed void. That conclusion seems to me not to be right, and since the case of *Alton v. Harrison* (*ubi sup.*) it cannot be supported. Therefore, on that particular ground, the reason given by the learned judge was not sufficient. The next ground upon which he decided against the claimant was that the deed was bad, because the affidavit required on its registration by sect. 6, sub-sect. 1, of the Deeds of Arrangement Act 1887 omitted the names and addresses of the execution creditors. It has been argued that the deed is therefore void under sect. 5. I cannot agree with that argument. It seems to me to go too far. I think that there is nothing in the statute which states that an honest omission—an omission which is not a fraudulent one—from the list of creditors makes the deed void. The language of Lord Esher, M.R. and Fry, L.J. in *Re Batten*; *Ex parte Milne* (*ubi sup.*) shows that it was not the

intention of the Legislature that the names of the creditors should appear in the register, and that some limitation must be put on the words "his creditors" in the affidavit required under sect. 6, and that those words do not necessarily mean "all his creditors." Take, for instance, the case put during the argument. If two partners in a firm, wishing to make a composition with their creditors, execute a deed of arrangement, it could not be said that the deed would be void unless the affidavit contained the names, not only of the joint but of the separate creditors of the partners. Therefore I cannot think that the mere omission of a creditor's name and address in the affidavit required on registration renders the registration void. I think, therefore, that the judgment of the learned judge was wrong, and that it ought to be reversed. A third point was raised by counsel for the execution creditors—namely, that the deed was void on the face of it as tending to defeat and delay creditors within the meaning of the statute of Elizabeth. That point was not taken or argued before the County Court judge, and as to it there are no further facts than the deed itself and the intentional omission of the execution creditors. It was contended by counsel for the execution creditors that looking at the deed itself, the deed was void under 13 Eliz. c. 5, as tending to defeat and delay creditors, because on the face of it it reserved a benefit to the debtor himself, and in support of that contention he cited the case of *Spencer v. Slater* (*ubi sup.*), where a deed which was precisely framed for the purpose of defeating any execution, was held by the court to be void under 13 Eliz. c. 5, as tending to defeat or delay creditors. I think it is quite clear that that case of *Spencer v. Slater* (*ubi sup.*) cannot be regarded as laying down any general principle apart from the particular facts of that case. That it cannot be so regarded is clear from the case of *Boldero v. London and Westminster Loan and Discount Company Limited* (*ubi sup.*). Another reason why I think that *Spencer v. Slater* (*ubi sup.*) was not intended to be of general application, is the fact that *Alton v. Harrison* (*ubi sup.*) was not cited in that case, and it is difficult to reconcile it with *Alton v. Harrison* (*ubi sup.*), and many others, if it decides that any benefit reserved to the debtor makes the deed void. I think that the real question in such cases is that stated by Giffard, L.J. in *Alton v. Harrison* (*ubi sup.*), where he says: "If the deed is *bona fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." Therefore the question is, is the deed *bona fide*, and not a mere cloak for obtaining a benefit for the debtor? If so, it is a good deed, and not void under the statute of Elizabeth. Many composition deeds provide for the carrying on of the debtor's business and reserve some ultimate benefit to the debtor. We are asked to say that we ought to hold the deed bad on the face of it under the statute of Elizabeth. I am not prepared to go so far as that. Having regard to the cases of *Alton v. Harrison* (*ubi sup.*) and *Boldero v. London and Westminster Loan and Discount Company Limited* (*ubi sup.*), if the deed were going to be set aside on that ground further hearing would be necessary. We must assume *bona fides*, and we ought not to decide the point raised by counsel for the execution creditors

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without further evidence in the matter. I think that this is a deed which is not void on either of the two grounds on which it was held by the County Court judge to be void, and I further think that there is not enough evidence before us to deal with it on the ground raised by counsel for the execution creditors. For the reasons I have stated I think that the deed ought not to be held void on a ground not taken before the County Court judge, but upon the two grounds which were taken before him I think the appeal should be allowed.

DARLING, J.—I am of the same opinion, and I merely wish to add that I cannot reconcile the principle of *Spencer v. Slater* (*ubi sup.*) with that of *Alton v. Harrison* (*ubi sup.*). *Spencer v. Slater* (*ubi sup.*) has already been distinguished in *Boldero v. London and Westminster Loan and Discount Company Limited* (*ubi sup.*), and unless our decision be reversed it must take its place in the Apocrypha.

CHANNELL, J.—I agree. I venture to think that the explanation of *Spencer v. Slater* (*ubi sup.*) is that there were things said in that case which would not have been said if *Alton v. Harrison* (*ubi sup.*) had been cited to the court, and which perhaps cannot now be supported. But yet there were things said which in that case might still be supported with considerable force. However that may be, I prefer to put my judgment, so far as that point is concerned, on the ground, not that *Spencer v. Slater* (*ubi sup.*) is wrong, but that there is not enough in this deed itself to show that the deed is bad under the statute of Elizabeth.

Appeal allowed. Leave to appeal.

Solicitors for the appellant, Wood and Sons.
Solicitors for the respondents, Seal and Edgelow.

Wednesday, April 23, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

STOKES (app.) v. MITCHESON (resp.). (a)

Coal mine—Rules—Enforcement by agent—Breach—Coal Mines Regulation Act 1887 (50 & 51 Vict. c. 58), ss. 49, 50—*Inspector of mines—Dismissal of information—Summary Jurisdiction Act 1857* (20 & 21 Vict. c. 43), s. 2—"Person aggrieved"—*Summary Jurisdiction Act 1879* (42 & 43 Vict. c. 49), s. 33.

M., an agent of a coal mine, appointed a duly qualified manager and under-manager. Owing to the negligence of such manager and under-manager, a breach of sect. 49, r. 1 of the Coal Mines Regulation Act 1887 was committed, but such breach was an occasional irregularity and not one which had been continuous.

The justices found that M. had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager, who knew the rules and whose duty it was to carry them out, and that the breach was in no way caused by M. omitting to enforce the rules. They therefore dismissed the information preferred against him under sect. 49.

Held, that they were right.

An information having been dismissed, the justices

on the application of the informant stated a case which purported to be stated under the Summary Jurisdiction Act 1879 only.

On an objection taken that the informant was not a "person aggrieved" within sect. 33 of that Act: Held, that it could not be assumed that, because the Act of 1879 was only referred to, the case was not stated under both that Act and the Summary Jurisdiction Act 1857; and, further, that, under the Act of 1857, a person who was a party to the proceedings could apply for a case to be stated.

CASE stated by justices for the county of Warwick under the Summary Jurisdiction Act 1879.

The respondent was charged on the information of the appellant, one of His Majesty's inspectors of mines, which alleged that the respondent on the 1st Nov. 1901, at the parish of Baxterley, being the agent of the Baddesley mines there, the same being a mine within the meaning of the Coal Mines Regulation Act 1887, unlawfully did fail to cause an adequate amount of ventilation to be constantly produced in the mine to dilute and render harmless noxious gases to such an extent that the working places, levels, and workings of the mine would be in a fit state for working therein, contrary to the Coal Mines Regulation Act 1887.

Information for a similar offence had also been laid against the manager, who held a first class certificate, and against the under-manager, who held a second class certificate of the mine, and information for further offences under the Act had also been laid against the manager. The three defendants were separately represented, and all the charges were heard together with the consent of all the parties.

The respondent was admitted to be the agent of the Baddesley mines within the meaning of the Coal Mines Regulation Act 1887.

The evidence for the prosecution consisted only of the evidence of Mr. Henry Richardson Hewitt, the assistant inspector of the mines. He stated in effect that he had visited the mine, which was a dry and dusty one, and more liable therefore to explosions, on the 1st Nov. last, and then found an accumulation of gas in a certain heading, No. 29 and no sufficient ventilation, and that no entry of the gas was made in the report-book.

He also proved certain admissions by the manager and under-manager which collectively showed that the non-ventilation had been going on for several days previously, during which period the heading had been roughly fenced off, but not so as to prevent the escape of gas. Such admissions, however (as the justices considered), were not evidence against the respondent, and therefore in deciding the charge against him they had regard only to the state of things on the 1st Nov. But with that limitation the justices considered that the evidence showed that there was evidence of want of ventilation on the 1st Nov. which amounted to a violation of the general rules.

The non-ventilation of the heading No. 29 was caused by the temporary diversion of the air-pipes at the entrance thereto into an adjacent heading which was then being driven. The report books stated that the ventilation was satisfactory and that there was no gas.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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The under-manager in evidence stated that he first discovered gas on the 19th Oct., and that on that day he fenced the heading off, as hereinbefore mentioned, and reported the presence of gas to the manager either on the 25th or 28th Oct.

The respondent was personally present at the hearing, but his advocate called no witnesses. There was no evidence as to any visits to the mine by the respondent.

The justices convicted the manager and the under-manager on all the charges against them.

It was contended for the appellant that if the justices came to the conclusion that a contravention of, or non-compliance with the rules existed, they were bound to convict the respondent unless he proved that he had taken all reasonable means by publishing, and to the best of his power enforcing, the general rules to prevent such contravention or non-compliance as mentioned in sect. 50 of the Act, and that no evidence to that effect had been given by or on behalf of the respondent.

It was contended for the respondent that all the requirements as to the publication of the rules had been complied with, and that there was a certificated manager and a certificated under-manager both experienced and acquainted with the rules, and that the non-ventilation of heading No. 29 was due to the temporary diversion by the under-manager of the otherwise adequate means of ventilation of such heading.

In deciding the case the following considerations were present to the minds of the justices: (a) The manager was the person primarily responsible for the conduct of the mines; (b) no evidence was given of personal negligence by the respondent. The evidence showed that the violation of the rules took place by the personal negligence of the manager and the under-manager, who had also failed to enter the cause of the violation in the report-book, but, on the contrary, had stated in the report that the mine was free from gas; (c) no evidence was given of the publication of the rules, nor was such publication admitted, but they considered that the respondent had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager who knew the rules and whose duty it was to carry out the rules without further interference from him. The violation of the rules therefore was in no way caused by the respondent omitting to enforce the rules; (d) in the present case as against the respondent only an occasional irregularity was proved and not one which had been continuous.

They therefore considered that the charge was not proved against the respondent, and they dismissed it.

The question of law for the opinion of the court therefore was whether, having regard to sect. 50 of the Coal Mines Regulation Act 1887, the justices were or were not justified upon the evidence before them in dismissing the charge against the respondent.

B. C. Brough for the respondent.—This case is stated under the Summary Jurisdiction Act 1879, and I take the preliminary objection that the appellant here whose information was heard and determined and dismissed is not a "person aggrieved" within the meaning of sect. 33 of that Act. The point was taken in *Stokes v.*

Checkland (68 L. T. Rep. 457), but was not decided. He also referred to

Reg. v. Justices of London, 63 L. T. Rep. 243; 25 Q. B. 357.

H. Sutton for the appellant.—The question does not rest merely on sect. 33 of the Act of 1879. One must go back to the original statute under which cases are stated—viz., 20 & 21 Vict. c. 43. The word "aggrieved" must include a party to the proceedings. [CHANNELL, J.—You commonly find in these cases a statement that they stated under both Acts.] It ought so to be stated. I submit that the term "aggrieved" is put in as a general term, certainly to include those who had originally by the principal Act a right of appeal, and also possibly to cover cases where this court might hear a person if he showed he was aggrieved in some way, or was affected by the order. Instead of cutting down the former Act it really enlarges the right of appeal. The case of *Reg. v. Justices of London (sup.)* was not a case under these Acts at all; that was a case of an appeal to quarter sessions. As to the merits of the case, the respondent here was the agent of the mine, and by sect. 75 of the Coal Mines Regulation Act 1887 "agent" means any person appointed as the representative of the owner in respect of any mine or any part thereof, and as such superior to a manager appointed under the Act. The justices here refused to convict because they thought the respondent had brought himself within sect. 50 of that Act, which provides that every person who contravenes or does not comply with any of the general rules of this Act shall be guilty of an offence against this Act, and in the event of any contravention or non-compliance with any of the general rules in the case of any mine to which this Act applies by any person whatsoever, the owner, agent, and manager shall be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the rules as regulations for the working of the mine to prevent such contravention or non-compliance. My contention is that upon the facts found there was no evidence whatever that the agent had done anything under the section. [Lord ALVERSTONE, C.J.—Do you say the appointing of a duly qualified manager by the agent is not sufficient under sect. 50?] Certainly, for there is a separate penalty if he does not do that. Simply appointing a manager will not do. [Lord ALVERSTONE, C.J. referred to *Baker v. Carter* (3 Ex. Div. 132).] In *Wynne v. Forrester* (40 L. T. Rep. 524; 5 C. P. Div. 361) it was decided that the agent of a mine, subject to the Coal Mines Regulation Act 1872, may be convicted for the breach of the regulations prescribed by sects. 51 and 52 of that Act, although the mine is under the control of a duly certified manager. [Lord ALVERSTONE, C.J.—It says "may" be convicted, but that does not show that he "must" *Baker v. Carter (sup.)* decided that if the owner had appointed a properly qualified certified manager he was not bound personally to interfere, and that the justices might find that the respondent had taken all reasonable means of publishing and to the best of his power enforcing the rules. Why does that not apply to an agent?] The agent, as defined by sect. 75, supervises the

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manager, and is in a different position to the owner. In *Wynne v. Forrester* (sup.) Lord Coleridge said: "In my opinion it is plain from both the 51st and the 52nd sections that it was intended to compel strict and constant attention by the heads of these establishments by making them, agent as well as manager, personally liable unless they can show that they have done their best to enforce the performance of the regulations by their subordinates. If they show this they will be exempt from liability, but *prima facie* they are to be held responsible." I submit here that there was a *prima facie* case for the prosecution, and there was no evidence to rebut the *prima facie* liability of the respondent.

Brough was not called upon to argue upon the merits.

LORD ALVERSTONE, C.J.—I think it is as well that we should say just one word upon this preliminary objection. The Summary Jurisdiction Act 1857, by sect. 2 gave power to state a special case; and expressly provided that either party to the proceedings before the justices might, if dissatisfied with the determination as being erroneous in point of law, apply in writing within three days. It is not disputed that in those circumstances the person who has laid the information is a party to the proceedings and can apply for a case. Then came sect. 33 of the Summary Jurisdiction Act 1879, which purported to amend the procedure, which gave the power to a person aggrieved to apply to the court to state a special case, and if the court decline, he may apply to the High Court of Justice for an order requiring a case to be stated. Sub-sect. 2 of that section is:

The application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act, and the case shall be heard and determined in a manner prescribed by rules of court, and in pursuance of the Supreme Court of Judicature Act 1875 and the Acts amending the same, and subject as aforesaid the Summary Jurisdiction Act 1857 shall, so far as it is applicable, apply to any special case stated under this section as if it were stated under that Act. Provided that nothing in this section shall prejudice the statement of any special case under that Act.

I do not think there was any intention by sect. 33 to cut down the right of the party to the proceedings to apply to a case. Mr. Brough suggested to us that because at the heading of this case there was no assertion or statement that the case was stated under both Acts, therefore it must be taken to be stated only under the Act of 1879, and that a "person aggrieved" would not include an unsuccessful prosecutor, and he referred to the case of *Reg. v. Justices of London* (sup.) before Lord Coleridge. That case did not arise under these two Acts at all; it arose under the Highway Act, which gave a right of appeal to quarter sessions. I think it is probable that some question may arise as to who has a right to come and ask for a case under sect. 33, or ask the court to order a case to be stated, but I am clearly of opinion that a person who was a party to the decision of the magistrates is within the first Act and within these two Acts together, and I do not think that this case could have been stated except under the two Acts. It cannot be taken that because only one Act is referred to that the case was not stated under both Acts. I

therefore think the preliminary objection ought not to prevail. The point was raised in *Stokes v. Checkland*, and it has not been raised since. It seems to me that one cannot assume that because the heading of the case stated only refers to one Act of Parliament therefore you must assume that the case was not stated under both. I think the inspector had a right to raise this point under sect. 2 of the Act of 1857, and that we are entitled to entertain the appeal. Now, upon the merits. The magistrates have found "that the respondent had taken the proper steps to enforce the rules by appointing a duly qualified manager and under-manager who knew the rules, and whose duty it was to carry out the rules without further interference from him. The violation of the rules, therefore, was in no way caused by the respondent omitting to enforce the rules." They further find that "the non-ventilation of the heading No. 29 was caused by the temporary diversion of the air pipes at the entrance thereto into an adjacent heading which was then being driven;" and, lastly, they find that only an occasional irregularity was proved, and not one which had been continuous. Under those circumstances it is contended by Mr. Sutton that under sect. 50 of the Coal Mines Regulation Act 1887 the respondent who was acquitted, being the agent, has not discharged the onus which is thrown upon him. I think it is very material to observe that all three men were prosecuted, and that the manager and the sub-manager were convicted. The agent was acquitted. It cannot be contended that the agent of the person charged must be called. That was practically negatived by *Baker v. Carter* (sup.), which was recognised as good law in *Stokes v. Checkland* (sup.). Further, it cannot be said in this case that no rules were published. It is obvious from the statement in the case that the rules had been published, and at any rate no point was made against the respondent in that particular respect. Therefore Mr. Sutton is driven to say this, that you must apply a different rule when you are dealing with the onus of proof under sect. 50 in the case of an agent to what you are to apply in the case of an owner. There are, I think, agents and agents. There may be an agent who is doing part of the duties of a manager. There may be an owner who is taking such part in the supervision that he will have some of the duties cast upon him which are ordinarily cast upon either owner or agents; but to say that the magistrates must convict because the agent has not done more than appoint a fully competent and qualified certified manager and under-manager, and must convict in respect of an offence, which is found in fact to be due to the negligence, on a single occasion, of the manager, seems to me to be going a great deal further than we ought to go, or any proper construction of this section would lead to. I have already pointed out that in *Baker v. Carter* (sup.) it was found in favour of the owner that it was sufficient that he had appointed a competent manager. I do not think that is in any way altered by anything that was said in the judgment of the Queen's Bench Division in the case of *Stokes v. Checkland* (sup.), in which *Baker v. Carter* (sup.) and *Wynne v. Forrester* (sup.) were both referred to. That strongly supports the view that the magistrates might find such finding as they have come to in

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this case. I will only add one further word. I think this case brings out in strong relief the distinction between a case stated after acquittal and a case stated after conviction. As my brother Channell pointed out in another case, where there has been acquittal, you have to show upon the facts stated that there must have been a conviction. In this case all we have to say is we must be satisfied that the magistrates could not have come to the conclusion they did upon the facts before them; or that upon the evidence and case before them, it not being necessary to call the agent, they were satisfied that the agent had taken all reasonable means. I think the latter is the right view, and I think we should be wrong if we threw any doubt upon their decision, and I therefore think that this appeal must be dismissed upon its merits.

DARLING, J.—I am entirely of the same opinion. With regard to the preliminary point which was taken, I think an appeal does lie here. With regard to the other point, the magistrates have found that the agent of the mine took proper steps to enforce the rules. What he had done was this: he had appointed a manager; he had appointed an under-manager. The rules were broken in this, that in making a new heading the under-manager had by his negligence allowed a temporary diversion of a ventilating pipe, the ventilations of the headings being found by the magistrates to be otherwise adequate. Now, it seems to me impossible that anyone with any acquaintance of a colliery manager such as I have no doubt these magistrates had, could have come reasonably to any other conclusion than that to which they came. They knew perfectly well what the agent of a colliery does. He may be agent for a very large extent of property. He appoints a manager and an under-manager. Why? To see after the very things to which it is not reasonable to suppose that he can be giving his own personal constant attention. He will have to go away. He has to manage not only the engines and the workings, but all the men, the labour question, and such things he has to deal with. How is it possible that a man in a position like that can see that the ventilation is not temporarily interfered with? It seems to me not only was there evidence here upon which the magistrates could have come to the conclusion to which they came, but that if sensible men, they could not have come to any other. To hold otherwise would be to hold this, that if you have a general in command it is his duty to go round to every corporal and see that he is doing his duty. I think this appeal should be dismissed.

CHANNELL, J.—I am of the same opinion upon both points. I have a strong opinion that there is some case—I suppose not reported—upon this preliminary objection. These minor points arising in cases very often do not get reported, and if they are reported they are sometimes a little difficult to find, as they do not get into the headnote. At any rate we ought to decide it now, and although we are doing here the same as was done in *Stokes v. Checkland* (sup.)—namely, dismissing the case upon its merits—so that it may be said our decision upon the preliminary point is not necessary, I think we must be taken to have decided it. My opinion is that the two powers to state a case, given by the

Acts of 1857 and 1879, are not separate powers, although there is slightly different machinery, and in substance the two Acts are to be read together. There is, as my Lord has pointed out, just a slight doubt whether, when a person comes to get a rule here to order a magistrate to state a case, such a person must not be a person who is aggrieved, and whether it applies therefore to a prosecutor. That question may arise at some time. I do not think it has been noticed, and I think there are numerous cases to be found in which orders have been made upon magistrates to state cases under such circumstances. Then, as to the other point, the point under the merits, I think it is quite clear that the magistrates did not in any way make any mistake. I think they were aware when they gave their decision that the onus was upon the defendant, but they held, and I think rightly, that although the onus was upon him it might be, and in fact had been, made out upon the evidence that had been given for the prosecution, and that here, upon the evidence for the prosecution, there was abundant reason why they should come to the conclusion that that onus had been made out upon the evidence given on the other side. The substantial point is that they find the negligence in question was a mere casual piece of negligence which nobody could have anticipated, and it was therefore unnecessary for the respondent to go into the witness-box and swear that he did not know of it.

Appeal dismissed.

Solicitors: *The Solicitor to the Treasury; Sharpe, Parker, and Co., for V. H. Jackson, Hanley.*

April 23 and 24, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

BURTON AND SONS (apps.) v. MATTINSON (resp.). (a)

Food and Drugs—Margarine—Excess of water—Sale not of nature, substance, and quality demanded—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6—Margarine Act 1887 (50 & 51 Vict. c. 29),

Margarine having been purchased and analysed, evidence was given that it contained 21 per cent. of water, which was at least 5 per cent. in excess of water that margarine should contain.

Held, that the vendor was rightly convicted of selling to the prejudice of the purchaser margarine not of the nature, substance, and quality demanded, contrary to sect. 6 of the Sale of Food and Drugs Act 1875.

CASE stated upon an information charging the appellants under sect. 6 of the Sale of Food and Drugs Act 1875 with selling margarine not of the nature, substance, and quality demanded by the purchaser.

On the 9th Dec. 1901 the appellants exposed for sale at their shop at Rushden a substance labelled margarine, and ticketed for sale at 6d. a pound.

The respondent entered the shop and asked for 1lb. of margarine, to be supplied out of the margarine so exposed for sale, and he was served with 1lb. of the substance, for which he paid 6d.

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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The formalities required by the Act were carried out, and the substance was duly analysed. It was admitted that the appellants had complied with all the requirements of the law as to labelling and selling the substance sold as margarine.

The analyst's certificate stated that the sample contained the percentage of foreign ingredients as follows:

Water, 21 per cent. [and this was at least 5 per cent. in excess of the amount of water which margarine should contain].

It was objected on behalf of the appellants that the words in brackets were no proper part of the analyst's certificate, but were a mere expression of opinion which was in no way receivable in evidence.

It was stated by the analyst, who was called as a witness for the respondent on the requisition of the appellants, that the average percentage of water contained in margarine was from 8 to 10 per cent., so that, in stating in his certificate that this sample contained at least 5 per cent. in excess of the maximum amount which should be present in margarine, he was dealing with the margarine leniently, and allowing the same maximum as is allowed in butter—namely, 16 per cent.; that margarine, in his experience, should contain rather less moisture than butter; that well-made butter contains 10 to 12 per cent. of water on an average; that the principal or valuable constituent of butter was fat, of which the percentage should be from 80 to 85; that the only valuable constituent of margarine was also fat, of which it should contain at least 85 per cent.; that this particular sample contained only 70 per cent. of fat, so that what was lacking in fat was made up in water and salts; that margarine was made from various fats, either animal or vegetable—it was usually made from the more liquid portions of animal fat mixed with various vegetable fats; that margarine should, in his opinion, imitate butter, not only in appearance, but also in its constituent elements.

It was admitted that there was nothing in the substance sold injurious to health, and that margarine was sold at times in the district for as much as 8d. to 10d. per pound, and for as little as 4d. per pound, so that 6d. per pound was the price of a comparatively cheap quality of margarine.

It was admitted by the two witnesses of the respondent that the sample sold was in outward appearance an imitation of butter.

No evidence was given on the part of the appellants, but it was contended by counsel for them on the above facts that they had committed no offence in point of law because (1) the term margarine was not a conventional term or one affixed by usage to any substance, but was a statutory term affixed by the Margarine Act, 1887, to all substances whether compounds or otherwise prepared in imitation of butter, and that the substance then in question being prepared in imitation of butter was rightly sold as margarine, and was, therefore, of the nature and substance demanded by the purchaser; (2) the quality of the substance supplied was that demanded by the purchaser, being the margarine at 6d. per pound then exhibited for sale in the appellants' shop at Rushden; (3) the Legislature had not fixed any standard for margarine nor enacted

of what ingredients it should be composed nor the proportions in which they should be combined; (4) if it be necessary that a substance sold as margarine should imitate butter, not only in outward appearance and nature, but in the ingredients used in its composition, the substance then in question being not only similar to butter in such outward appearance, but also being composed of the same ingredients as butter—namely, fat, water, and salts—was margarine and an article of the nature, substance, and quality demanded.

It was contended for the respondent that, although the Legislature had not fixed any standard for margarine, neither had it fixed any standard for butter, and yet there had been several convictions for selling butter which contained more than 16 per cent. of water, and such convictions had been upheld on appeal, and that if it was illegal to sell butter with more than 16 per cent. of water it was also illegal to sell margarine with more than the same percentage. That if it was lawful to sell as margarine a substance containing 21 per cent. of water there was no reason why such substance should not be sold containing 40 or 50 per cent. of water. That water was not a substance prepared in imitation of butter within the definition of margarine contained in the Margarine Act 1887.

The justices overruled the appellants' objections, being of opinion that the water found in the margarine was excessive, and that, therefore, the article sold was not of the nature, substance, and quality demanded, the same being adulterated with water, and they convicted the appellants.

Avory, K.C. (W. H. Stevenson with him) for the appellants.—Here the magistrates have convicted under sect. 6 of the Sale of Food and Drugs Act 1875, because of the water in the margarine. The magistrates have made a standard for margarine themselves. The preamble of the Margarine Act 1887 says: "Whereas it is expedient that further provision should be made for protecting the public against the sale as butter of substances made in imitation of butter, as well as of butter mixed with any such substances." Then by sect. 3 it goes on to say "the word 'butter' shall mean the substance usually known as butter, made exclusively from milk or cream or both, with or without salt or other preservative and with or without the addition of colouring matter. The word 'margarine' shall mean all substances whether compounds or otherwise prepared in imitation of butter, and whether mixed with butter or not, and no such substance shall be lawfully sold except under the name of margarine." Therefore margarine means everything that is sold in imitation of butter without regard to its composition. There cannot be a conviction under sect. 6 of the Act of 1875, for the purchaser has not been prejudiced. In asking for margarine he has asked for something in imitation of butter and has got it. Margarine is by statute an authorised adulteration. He referred to

Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51.

There was no evidence that the article sold was other than what was asked for. The words of the definition, I submit, mean that every article of

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food which is in fact an imitation of butter must be called and sold as margarine. [Lord ALVERSTONE, C.J.—But why should not a man be convicted for selling what is not margarine under the name of margarine?] There was no evidence that this was not margarine.

Swinburne Hanham for the respondent.—The evidence shows that the margarine was adulterated with excessive water. The definition in the Margarine Act 1887 is not an exclusive one at all. [He was stopped.]

Lord ALVERSTONE, C.J.—In this case, the sale being a sale of margarine, and all the provisions of the Margarine Act having been complied with, the magistrates found that the water in the margarine was excessive, and that therefore "the article sold was not of the nature, quality, and substance demanded, the same being adulterated with water." As I understand, that means that it was margarine and water, not margarine. We have been pressed by Mr. Avory to say that that is wrong, that there can be no finding of the magistrates to that effect, because there was no evidence on which they could come to the conclusion that it was margarine and water. It is a little difficult quite to follow the reason of his argument. He has contended, in the first place, that the whole thing is governed by the Margarine Act of 1887, s. 3, the last part of which says that "the word margarine shall mean all substances, whether compounds or otherwise, prepared in imitation of butter, and whether mixed with butter or not, and no such substances shall be lawfully sold except under the name of margarine." He has in effect contended that if stuff is sold in imitation of butter and called "margarine" there can be practically no inquiry as to what its contents are and what its composition is. I think the objection to that argument is that it overlooks what I may call the other existing legislation as to the adulteration of food, under which a purchaser is entitled to get what he asks for. I am not saying, and I do not wish to be understood as expressing the opinion, that of necessity the presence of any particular percentage of water in margarine would prevent it being margarine; it is not on that ground that I think this case should be decided. I think we have to say whether there was evidence upon which the magistrates could rightly come to the conclusion, as they thought fit to do, that it was not margarine, but was margarine and water. The facts are that the inspector says: "I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under—viz., water 21 per cent. This is at least 5 per cent. in excess of the maximum amount of water which margarine should contain." I need not do more than remind those who have to deal with these matters that, unless the analyst is called, that certificate is sufficient evidence of the facts therein stated, but he can be called, as he was in this case, at the request of the defendant. The analyst is called, and no doubt he stated the ground of reasoning which has led him to come to the conclusion that he was right in stating that at least 5 per cent. in excess of the maximum amount of water was present. His reasons have been criticised. It is said that he ought not to compare margarine and butter. That may be perfectly true as a matter of argument as to what is

the proper method of arriving at what is margarine and what is not margarine. But no evidence has been called about this, and it seems to us impossible to say that the magistrates were not justified in acting on a certificate supplemented by the evidence of the analyst that there was such an extra amount of water in this margarine that they have described it, I think, as margarine and water, or margarine adulterated with water, and not margarine. I must say, speaking for myself, that when you look at the Act there certainly was intended to have been a good deal of similarity between margarine and butter, and while I am far from saying that it of necessity follows that the percentage was the same, it seems to me quite impossible to say that the analyst was wrong in forming his conclusion as to how far margarine should be adulterated with water by reference to what his experience had taught him as to what the amount of water was that there was in butter. But, be that as it may, it is impossible for us, in my opinion, to say that the magistrates had not evidence before them on which they were justified, if they so thought fit, in coming to the conclusion that the stuff was not margarine or was margarine adulterated with water. Therefore I think this appeal should be dismissed.

DARLING, J.—I am of the same opinion. It seems to me that the argument which Mr. Avory used would lead to attributing to the Legislature an intention which I feel certain they never had when they passed this Act of Parliament. Mr. Avory contends that margarine is a thing of statutory creation; that any substance prepared in imitation of butter, he said at first, no matter what it was made of, if it looked like butter, was properly described as margarine and could be sold as margarine. He amended that definition to this extent, that the imitation, in order to come within the Act of Parliament, must be capable of being eaten, or otherwise it is not a food, and that therefore a block of wood or a lump of plaster of Paris made up to look like butter would not be statutory margarine, but that if you made the imitation of anything that could be eaten, anything which was a food, then it would be properly described as margarine, no matter how unwholesome or deleterious it might be. Take a sample case. It would come to this, that if you could make a block of flour and colour it to look like butter, so that to the eye it imitated butter, then, according to Mr. Avory, you would be perfectly safe in labelling that margarine and selling it as margarine; and selling it at a price hardly below butter as butter is now understood, the price at which margarine is commonly sold. If the Legislature meant to bring about that state of things they put a very odd preamble to the Act of Parliament by which they did it, because the Act is called "An Act for the better prevention of the Fraudulent Sale of Margarine." It says, "Whereas it is expedient that further provision should be made for protecting the public against the sale as butter of substances made in imitation of butter, as well as of butter mixed with any such substances." They go on to enact that "the word 'margarine' shall mean all substances, whether compounds or otherwise, prepared in imitation of butter, and whether mixed with butter or not." I think that what they were

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doing there was, they were not only providing that you might sell any imitation of butter if you called it margarine, provided that it was an imitation of butter to the eye, but I think they were dealing with a good deal more. I think they were dealing with things which professed to imitate butter in other respects than in appearance, because every article of food or other has qualities besides those which the eye can appreciate. There are some things which are made chiefly to please the eye—many things—one knows even places where they are made. But if it is a matter of food those who make imitations generally take care to imitate other properties of the article which they are imitating than those which the eye can appreciate. An artificial flower, for instance, you simply look at; you do not try to eat it; you would be satisfied if it looked like a flower. If a man is going to sell something for food it is quite certain that he will take care in the imitation, and that the Legislature understood that he would take care in the imitation to imitate it in some other of its qualities besides those which appeal to the eye. What did this man do? He made up a thing which would pass as butter to the palate. I think if he does that you are entitled to consider what is butter for the sake of finding out what is imitating butter. Therefore I think you let in the evidence of the analyst, and the evidence of the analyst is that this thing possessed all this quantity of water, which would prevent it properly being considered as butter at all, and because of that would prevent it being considered an imitation of butter, and therefore prevent it being considered as margarine, and prevent it being properly described and sold as margarine. I have thought it necessary to add these words, but otherwise I entirely agree with the judgment that my Lord has delivered.

CHANNELL, J.—I am of the same opinion. I think the fallacy of Mr. Avory's ingenious argument is in using an interpretation clause for a purpose for which it never was intended, and for which it is not legitimate. The object of an interpretation clause is to assist in the interpretation of the particular Act in which it is placed, and to prevent having to repeat long sentences in half a dozen different places in the Act of Parliament. For the purposes of this Margarine Act, which was an Act intended to prevent imitations of butter being sold as butter, there is a definition which practically says that everything which is made to look like butter and is not butter is margarine, and that is a sensible and useful interpretation for the purpose of interpreting that Act; but you cannot apply that generally, and say that everything which is not butter but a little like it is margarine. It leads to all the absurd results which my brother Darling has pointed out very effectively, and the truth is that you never can use an interpretation clause for that purpose. If I may refer to an interpretation clause which I have often heard of but have never been able to find, but which I believe does exist, the interpretation in a local Act of "street music as including a bear and a performing monkey," it is very obvious that you cannot use that for general purposes, and to say what music is, although it is a very useful definition, I daresay, for the purposes of that particular Act, in preventing annoyances in the street which might be

even worse than music. It illustrates the object and abuse of a common interpretation clause. Mr. Avory is saying that because that is what "margarine" is intended in the Margarine Act to be, when you come to apply another Act and find a person going into a shop and asking for "margarine," therefore you must assume that he asks for "margarine" as defined by the Margarine Act. I think it is a question of fact for the magistrates what margarine is, whether there is such a substance as margarine to begin with, and, if so, what it is. Assuming that is so, to begin with, these magistrates had to find out what margarine was, and they had a witness before them who said that margarine at any rate is a substance which contains at least 5 per cent. less water than this does. He said at any rate that this substance contained 5 per cent. in excess of the maximum of water which margarine should contain. That being so, the magistrates had some evidence of what margarine was and some evidence that the substance sold was not margarine within the true meaning of the word "margarine," therefore they were entitled to convict, as it seems to me. I think in substance there was evidence before the magistrates, and that this conviction should stand.

Appeal dismissed.

Solicitors: Bernard Wright, Nottingham; Heygate and James, Wellingborough.

April 25 and 28, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.).

REX v. KENNEDY, a Metropolitan Magistrate. (a) *Justices—Application for summons—Offence under the Roman Catholic Relief Act 1828—Discretion of magistrate to refuse summons—Roman Catholic Relief Act 1829 (10 Geo. 4, c. 7), s. 34.*

Upon a rule nisi for a mandamus to command a metropolitan magistrate to hear and determine an application for a summons for an offence under sect. 34 of the Roman Catholic Relief Act 1829:

Held, that though the information disclosed a prima facie case that the offence was committed, nevertheless the magistrate was entitled in the exercise of his discretion to refuse to issue a summons, and, if he did so, the court had no jurisdiction to compel him to review his decision unless the discretion was exercised on improper and extraneous grounds.

Held, further, that, in prosecutions under sect. 34 of the Roman Catholic Relief Act 1829, the fact that there had never been any prosecutions under the section, and that the magistrate was of opinion that if any prosecutions under it were now to be commenced they should be commenced by the Crown, were not improper and extraneous grounds in considering an application by a private person for a summons under sect. 34.

Held, further, that there is nothing in that Act to prevent private persons from commencing prosecutions under sect. 34.

RULE nisi for a mandamus commanding a metropolitan magistrate to hear and determine the matter of an application by one the Rev. C.

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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Stirling for three several summonses against the Rev. Sydney Smith, the Rev. Herbert Thurston, and the Rev. John Gerard respectively, charging them with having been admitted and become Jesuits within the United Kingdom since 1829, contrary to sect. 34 of the Roman Catholic Relief Act 1829.

Roman Catholic Relief Act 1829 (10 Geo. 4. c. 7):

Sect. 34. In case any person shall after the commencement of this Act within any part of this United Kingdom be admitted or become a Jesuit or brother or member of any other such religious order, community, or society as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanour, and being thereof lawfully convicted shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

The application for the summonses was heard by the learned magistrate on the 17th Jan. The information on which it was based merely stated that the gentlemen against whom the applicant desired to proceed had within the United Kingdom become Jesuits since 1829, without giving any particulars as to the place or time of their becoming Jesuits.

On the 24th Jan. the magistrate gave judgment refusing the summonses.

In the affidavits on which the rule *nisi* for a *mandamus* had been obtained it was alleged that the magistrate refused the summonses on two grounds—namely, (1) that the sections of the Roman Catholic Relief Act 1829 under which the application was made was practically obsolete; and (2) that under it proceedings could only be taken by information to be filed by the Attorney-General. The learned magistrate, however, put in an affidavit to show that this was a mistaken view of his decision.

From the magistrate's affidavit it appeared that he in giving judgment, after referring to sects. 28 to 36 of the Roman Catholic Relief Act 1829, proceeded as follows:

Now, it may be observed, first of all, that all those sections are practically obsolete and no records of any proceedings under them are accessible, and, in the words of the late Sir James Stephen in his History of the Criminal Law, "these provisions ever since they have been passed have been treated as a dead letter." It would seem to be gathered from them that membership of this religious order is not a criminal condition in itself, and is only made so under certain circumstances. It must be more, in my view, than a mere matter of policy, especially when such serious consequences as banishment for life and transportation are involved; and there are moreover, provisions which, in my opinion, should be enforced by the Crown and not by a private informer. The confirmation of this view is, I think, to be found in sect. 38 of the Act, which says that all penalties imposed by this Act shall and may be recovered as a debt due to His Majesty, by information to be filed in the name of His Majesty's Attorney-General. It may be said that banishment, which is the penalty enacted by sects. 29, 31, and 34, is not one of the penalties which is indicated in sect. 38, but the provisions are so far allied to the common subject-matter that the procedure to enforce any of them should be by way of information from the Crown Office itself. Therefore, in my judgment, the application should be refused upon the ground that it is wrongly instituted. The third ground arises on the initiation of the proceedings themselves on the words of sect. 34, because it says that after the passing of the Act one of the gentlemen was

admitted and became a Jesuit, contrary to the provisions of sect. 34 of the Act. Now, I think that information is too scanty and too bare a statement, and insufficient to support an application for a criminal process. Therefore, in the exercise of the discretion which is conferred upon me by the Indictable Offences Act, I dismiss the information.

After this judgment was delivered, *Avory*, K.O., for the applicant, asked the magistrate whether it would be of any avail to present an amended information giving further particulars, or whether he might take it that the learned magistrate refused it on all the grounds stated in the judgment.

The learned magistrate replied that *Avory* might take it that he should refuse the application because the second ground—namely, that the Crown should be the informer—would still stand.

Avory then said:

That objection would still stand, and would, I understand from you, apply to any amended information.

The magistrate replied that it would apply to any amended information.

Avory then asked if the first ground would stand too—that in the magistrate's view the statute was obsolete?

The magistrate replied:

With regard to that, I used the words "practically obsolete" because it is not actually obsolete. I do not put it as a ground. I put that rather as influencing my discretion.

The rule *nisi* for a *mandamus* was now argued on the assumption that the information was so amended as to give sufficient particulars to support a criminal charge.

Sir *Edward Clarke*, K.O. and *Hugo Young*, K.C. (*Dennis O'Connor* with them) showed cause.—We submit that the magistrate was right in holding that proceedings under these penal sections of the Roman Catholic Relief Act can only be taken by the Crown. The whole scheme of these sections shows that they were to be enforced, if enforced at all, at the discretion of the executive, and that the penalties they prescribe are such as could be made effective only by executive action. The words of the sections are not apt to proceedings by a private informer. Thus all the fines are to go to the Crown, the Crown can license breaches of the Act, and the punishment for some, at any rate, of the breaches is banishment—a punishment which the court has no machinery to enforce. The effect of the sentence of the court merely is that the King may "lawfully cause" his deportation. That, we submit, gives the King a discretion in the matter, and, if the King does not choose to deport him, then the Jesuit would, even after conviction, be legally here. [*DARLING*, J.—Surely that merely means this, that if the banished Jesuit does not leave the country the King may deport him, or if he comes back, in an aggravated case, may transport him.] We submit that, on such a reading, "lawfully cause" has no meaning. However, assuming the magistrate was wrong in thinking that prosecutions under these sections could be initiated only by the Crown, we submit that he has exercised his discretion in this application; that the grounds on which he has exercised it are that as a matter of expediency he thinks any proceedings should

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be initiated by the Crown, and that the statute is practically obsolete and has never been enforced, though to the Government's knowledge Jesuits have been long established and admitted in the country; and, lastly, that these are good grounds for exercising such discretion:

Ex parte Lewis, 59 L. T. Rep. 338; 21 Q. B. Div. 191;

Ree v. Bros, 85 L. T. Rep. 581;

Reg. v. Byrde, 60 L. J. 17, M. C.;

Reg. v. Ootham, 78 L. T. Rep. 468; (1898) 1 Q. B. 802.

H. Sutton, for the learned magistrate, referred to

Stephen's History of Criminal Law, vol. 2, p. 493;
Holliday's Life of Lord Mansfield, at p. 176.

[Lord ALVERSTONE, C.J.—Mr. Avory, we are all agreed that a private person is entitled to initiate proceedings under these sections. You may confine your argument to the question of discretion.]

Avory, K.C. (*Biron* with him) in support of the rule.—In that case I submit that in purporting to exercise his discretion the learned magistrate has in fact declined jurisdiction. The law gives private persons a right to commence proceedings for criminal offences, and the magistrate says that because he thinks the Crown alone is entitled to initiate them in this case, and because in any event the statute is old and practically obsolete, he will refuse to permit private persons to begin proceedings. That surely is doing what the Legislature is alone competent to do—altering the rule of law that a private person may prosecute, and altering it too on grounds which as a matter of fact are both mistaken. The Crown is not alone entitled to prosecute. The penal sections of the statute are not practically obsolete. Returns were made under them of the Jesuits residing in England for many years. Their validity and force have been recognised quite recently in other Acts of Parliament, as, for example, in the Promissory Oaths Act 1871. And so late as 1898 Parliament refused to repeal them. Counsel also referred to

Reg. v. Adamson, 33 L. T. Rep. 840; 1 Q. B. Div. 201;

Reg. v. Ingham, 14 Q. B. 396;

Reg. v. Boteler, 8 L. T. Rep. 514; 4 B. & S. 959;

Ex parte Wason, L. Rep. 4 Q. B. 303;

Stephen's History of the Criminal Law, vol. 1, at p. 495.

Hugo Young, K.C. in reply.

Lord ALVERSTONE, C.J.—This case certainly presents very considerable difficulty, and it is one which has given us very anxious consideration. I do not think the principles of law which have to be applied are at all difficult of statement, but of course when you come to apply them very different and more difficult considerations arise. If an inferior tribunal has declined jurisdiction or thought that it has no jurisdiction through wrongly construing an Act of Parliament, there is no doubt that under ordinary circumstances the *mandamus* will go to order the magistrate or the inferior tribunal to exercise its jurisdiction. If, on the other hand, a magistrate not misunderstanding the law, and not improperly applying the law in the matter of his jurisdiction, exercises a discretion that he will or will not allow the process of the court, then, at any rate in cases under the Indictable Offences Act (11 & 12 Vict. c. 42),

which is the Act we have to consider, his discretion cannot be inquired into. It is not necessary to go through all the cases, but I think it desirable to call attention to one or two of the cases which illustrate the law before I proceed to apply that law to the facts of this case; and I think it is the more necessary, because it has been suggested by Mr. Avory, in his able argument in support of the rule, that the case of *Reg. v. Ingham* (*sup.*), which was decided in the year 1849, and has been recognised as good law in recent cases, could only be supported on some different principle to that which I referred to in the course of the argument. In the case of *Reg. v. Ingham* (*sup.*) it was decided that "when an information is laid before justices of the peace for an indictable misdemeanour, it is in the discretion of the justices to hear it, or refuse to hear and leave the complaining party to originate his prosecution before a grand jury." The case was an attempt to indict a person for perjury. It cannot be said that there was doubt as to there being *prima facie* evidence of the offence. The magistrate had declined to allow the case to go on, on the ground of the pending of some proceedings in the Ecclesiastical Court; the court declined to interfere with that discretion; and Coleridge, J. at the end of the trial, and I think it is important in reference to this case, says: "The refusal of this rule does not prevent a trial if the prosecutor chooses to go before a grand jury. We only say that we will not oblige the justices to hear an information." In the case of *Reg. v. Adamson* (*sup.*), which was a case in which the court did make the rule absolute, the rule laid down by Cockburn, C.J. was that "the court has, in the absence of express statutory provision, no appellate jurisdiction to review the decision of magistrates who have once heard a case and decided it, in a matter within their jurisdiction. If I could see my way to the conclusion that the magistrates had considered this evidence and given a decision upon it, I should certainly say that the court could not act upon the matter further, or send the case back." Then the Chief Justice went on to point out that he came to the conclusion that the magistrates in that case acted on extraneous and extra-judicial matter, and that they were influenced by their distaste for the views and doctrines promulgated at a certain meeting which was the subject of, and which led to, the proceedings. Blackburn, J., who concurred with the Chief Justice's judgment in that case, practically said that they could not interfere with the discretion; they could interfere, and should interfere, if the justices had declined to exercise their jurisdiction on an improper ground. That case and the case of *Reg. v. Ingham* (*sup.*) were referred to in the judgment in *Reg. v. Byrde* (*sup.*), and I will read one passage from the considered judgment of Williams and Stephen, JJ., who, having referred to the principle to which I have made short reference, said this: "This seems to be the outcome of the decisions, and in particular of *Reg. v. Adamson* (*sup.*) and *Ex parte Lewis* (*sup.*). Blackburn, J. in his judgment in the former case, points out that the words in 11 & 12 Vict. c. 42, s. 9, 'if they shall think fit'—which are the words in this section also, it being under the same Act—"show that the justices have a discretion—and the *mandamus* in that case was granted expressly on the ground that the justices had not

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exercised their discretion. The justices may, however, it would seem, in the exercise of their discretion, refuse to issue a summons even though there is evidence before them of an alleged indictable misdemeanour, if they consider that the issue of the summons would be vexatious or improper." These cases seem to me to be illustrations of the rule which I endeavoured to state for myself at the beginning of my judgment. Now, when the rule was moved before us—and I make no complaint against anybody, because one can understand how it arose—all that was stated in the affidavit was that the learned magistrate had refused to grant the summons upon the following grounds: That the statute of 10 Geo. 4, c. 7, was practically obsolete, and that proceedings under sect. 34 of the Act could only be taken according to the provisions of the Act at the instance of the Crown by information at the Crown Office or otherwise, and could not be initiated by a private individual. That was supplemented by a statement made perfectly accurately by Mr. Avory that, after the decision of the magistrate upon the point, the information before him stating no more than that three gentlemen had, after the year 1829, been admitted and become Jesuits within the United Kingdom, the learned magistrate being asked whether any alteration in the form of the information would remove his objection or lead him to entertain it, said No; and I am deciding this case from the point of view of assuming that Mr. Avory had stated in greater detail in his information anything which could be cured as a statement of fact, although I must not be supposed to say that even if I had taken a different view to that which I take in this case, there might not be a duty to exercise a discretion, or a right to exercise a discretion, arising upon the particular circumstances which were brought before the magistrate in any particular case. Now, that being so, I have done my best to see if I could get at what was the real decision of the magistrate. I will read the passage of the learned magistrate's judgment which seems to me to show that in reality he dealt with this case as a question of discretion, and did not deal with the case upon the ground either that the Act was obsolete or that the Act could not be put in force by a private individual. He says: "It would seem to be gathered from them that membership of this religious order is not a criminal condition in itself, and is only made so under certain circumstances. It must be more in my view than a mere matter of policy, especially when such serious consequences as banishment for life and transportation are involved, and they are moreover provisions which in my opinion should be enforced by the Crown, and not by a private informer. The confirmation of this view is, I think, to be found in sect. 38 of the Act, which says: 'That all penalties imposed by this Act shall and may be recoverable as a debt due to His Majesty by information filed in the name of His Majesty's Attorney-General.' It may be said that banishment, which is the penalty enacted by sects. 29, 30, and 34, is not one of the penalties that is indicated in sect. 28, but the provisions are so far allied to the common subject-matter that the procedure to enforce any of them should, I think, be by way of information from the Crown Office itself. Therefore, in my judgment, this application should be refused upon the ground

that it is wrongly initiated. The third ground arises on the initiation of the proceedings themselves on the words of sect. 34, because it says that after the passing of the Act one of the gentlemen was admitted and became a Jesuit contrary to the provisions of sect. 34 of the Act. Now, I think that information is too scanty and too bare a statement, and insufficient to support an application for a criminal process. Therefore, in exercise of the discretion which is conferred upon me by the Indictable Offences Act, I dismiss the information." Mr. Avory then asks him as to "whether it would be of any avail to present an amended information giving further particulars, or whether we may take it that you refuse it on all the grounds which you have stated? The magistrate: I think you may take it that I should refuse the application because the first ground—namely, that the Crown should be the informer—would still stand. Mr. Avory: That objection would still stand, and that would, I understand from you, apply to any amended information. The magistrate: Yes, that would apply to any amended information. Mr. Avory: Also, I presume, the ground which you first stated—that in your view the statute was obsolete. The magistrate: With regard to that, I used the words 'practically obsolete' because it is not actually obsolete. I do not put that as a ground. I put that rather as influencing my discretion. Mr. Avory: I thought it right to ask you that, because if you intended to base your decision upon that ground, I ought to tell you that I have since discovered that as late as 1898 a Bill was introduced into Parliament for the purpose of repealing these sections, and Parliament refused to do so. The magistrate: I am much obliged to you; I had not found that out. It is a question of discretion. I do not put that as the ground of my decision at all. Mr. Avory: That leaves it open, of course, to test the question in a superior court. The magistrate: Yes; there may be other remedies open to the applicants to proceed in a different way no doubt." Reading that fairly, I think that is a statement that upon the circumstances of the case before him the magistrate came to the conclusion that he ought not to issue a summons. Now, that I may not be thought to be merely covering the matter up with what I call general observations, I should like to state what I understand from the earlier part of the magistrate's judgment to have been the matters he took into his consideration. He took into his consideration, first, that the Act had never been put in force. I mean by the Act never having been put in force that these sections of the Act had never been put in force. Having gone through these sections of the Act he comes to the conclusion, which I think was the right conclusion, that the Act was for the purpose of getting the Jesuits out of the country, and not for punishing criminally, if I may use the expression, the individual Jesuit. I think all the sections show that. He further took the view that it was not an Act, or at any rate, these sections of the Act were not provisions that a private person ought to institute proceedings in respect of, but that those proceedings should be taken by the Crown or by representatives of the Crown. Now, it seems to me that all those three matters were matters that he was entitled to take into his consideration in

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exercising his discretion. I do not want to repeat anything that I have said in the course of the argument, but I think that some of the cases that I put to Mr. Avory would indicate that it is impossible to say that there is no discretion simply because there is *prima facie* evidence that an indictable offence has been committed, and the authorities to which I have referred in my opinion negative any such proposition. I must also say, for myself, that I think the fact that proceedings were not within the Vexatious Indictment Act has a very material bearing upon this Act. I quite agree with Mr. Avory that under ordinary circumstances it is not convenient that there should be an ordinary criminal prosecution without the preliminary proceedings by summons, and by committal for trial; but, upon the other hand, when you have such cases as this I think the magistrate, as was pointed out in *Beg. v. Ingham (sup.)*, is entitled to take into his consideration the fact that his decision is not final, but that a bill can be preferred by any person, and that a private person can present that bill of indictment, if he is disposed to do so. The fact is that this in any point of view is a very special Act of Parliament. Its provisions are, of course, unique, and we have no practice under it, which can be said to be any contemporaneous exposition or interpretation of it, and therefore the discretion which a magistrate should apply to such a case must be of necessity different to that which he should apply to ordinary crimes and ordinary criminal offences. For myself I wish to say that I by no means suggest that it is any legal bar to proceedings in the case that they are taken by a private individual. If the magistrate had proceeded upon the view that the Crown, and the Crown only, could take proceedings, I think he would have been wrong, and I think he would have been declining jurisdiction, but, on the other hand, I think he was perfectly entitled to take into consideration, having regard to the provisions of the Act, that this was not a proceeding in which he was bound to issue a summons at the instance of an ordinary informer. I mention that because I am as anxious as anyone can be that the provisions of the criminal law should be put in force, and that magistrates should not be tempted to say that they refuse to entertain proceedings by any outside considerations or any distaste or dislike for any Act of Parliament. That is not what, in my opinion, arises in this case. I have said already that the fact that they had never been put in force, the fact that its provisions point to persons being got out of the country, and not to what I may call ordinary offences against private individuals, are circumstances which the magistrate could take into his consideration, and also he could take into his consideration that this was a summons taken out by a private individual, and that was one of the circumstances upon which he might exercise his discretion. In coming to the conclusion as I do that the real substance of this is that the magistrate exercised his discretion, and declined to grant the summons in the exercise of his discretion, I think we ought not to interfere with it, and that therefore this rule must be discharged.

DARLING, J.—I am of the same opinion, but I think the magistrate really affected here to do two things. I think he did understand, and I

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think he did express in one part of his judgment the opinion that proceedings could not under this Act of Parliament be initiated at the instance of a private person, but only by the Attorney-General acting as such. In that I desire to say I think he was wrong. If he held that opinion, and I think he did, and I think in one place he expressed it, I think he was wrong. To my mind it is clear that the Act is open to enforcement by a private individual, and I make this observation for this reason, that it may be that upon an application for a summons under this Act made to some other magistrate, another magistrate might take the view if this were not said very plainly, that this court understood the magistrate to be right when he expressed that opinion that only the Crown acting by the Attorney-General, could put the Act in force. I do not think any other magistrate could take that view. It seems to me a private person may be entitled to a summons, and a magistrate in proper circumstances might lawfully and properly grant one, and the case might be heard. But I think here in this case the magistrate did exercise his discretion upon matters as to which he was entitled to exercise it. The kind of discretion that a magistrate should exercise, and the kind that he is not entitled to exercise, has so often been laid down, and I do not think really there is a much better example of it to be found than is given in the quotation from Lord Coke, which is in the Rep. 3, at p. 203, where he says: "For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections, for as one saith, *Talis discretio discretionem confundit*." If the magistrate here had acted simply upon his own will or private liking for an Act of Parliament, or dislike for an Act of Parliament, he would then not have exercised his discretion in a proper way. But here I think, having regard to all the matters which he had regard to, and to which my Lord has specially directed attention, he did exercise his discretion in the sense in which a magistrate may lawfully exercise the discretion of a judge, and not of a mere private individual. I desire, however, to go a little further. I desire expressly to say this, that I think a magistrate may claim and may exercise a wider discretion in the case of proceedings under such statutes as this one is, statutes banishing people for their opinions, than any other statutes that I am acquainted with which appear on the statute books. Whatever may be the reason why they were passed, they were statutes which persecute opinion, and Acts that are, to my mind, against the genius and spirit of this age. For example, here is a statute which says: The Jesuit shall not exist in this country—that the Jesuit is to be banished. At the same time a Catholic school may earn a grant of public money, and, so far as I know, a Jesuit may teach in a Catholic school and may help to earn that grant. All these things I think the magistrate may fairly bear in mind when he is asked to grant a summons in such a case as that. Now, the words of Lord Mansfield have been referred to, and I think there is justification for the kind of thing he said in what Lord Mansfield said. Lord Mansfield was one of the greatest judges who ever

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sat in this court—he is described, and properly described, in his epitaph in Westminster Abbey, as his country's pride. What did he say? Here in this book are two instances given of his laying down the law upon penal statutes—statutes persecuting opinion. One is in the case of a statute directed against the Quakers, the other is in the case of a statute directed against the Roman Catholics; and in each case it is perfectly plain that Lord Mansfield had regard to the enforcement of this law not only by laws and statutes in the books, but having regard to the circumstances of the time in which he was called upon to enforce it, and he says he does not dispute the necessity for these laws against the Catholic religion. The case was Payne's case, where Payne sued for a penalty as a common informer, and Lord Mansfield goes through the statutes and says: "There are statutes against priests—the first is that of Elizabeth," and so on. "There was another made after enacting that if a priest was convicted of saying mass he was to forfeit two hundred marks and suffer one year's imprisonment, but neither does Payne go upon this statute, for here there is no reward for the informer. The third was made in King William's reign (11 & 12 Will. c. 4), soon after the revolution. This is the statute Payne aims at, because here is one hundred pounds the country is to pay him if he can convict the defendant." Lord Mansfield draws attention there to the fact that that statute was made soon after the revolution. It may have been very necessary to make it, and it may have been very reasonable to make it; but how does he go on? He says as to the Jesuits and so on: "Neither was it ever the design of Legislatures to have these laws enforced by every common informer, but only at proper times and seasons," such as immediately after the revolution, obviously, "when they saw the necessity for it, and by proper persons appointed by themselves for that purpose"; and then he concludes with these very remarkable words: "And yet, more properly speaking, they were never designed to be enforced at all, but were made *in terrorem*." If Lord Mansfield might have regard to all that, it seems to me, looking at the statutes of this peculiar character, so may I, and so might the learned magistrate; and I do think that he was justified, having regard to the kind of statute under which he was asked to issue a summons, having regard to the circumstances which are a matter of history, and which he must know, of how the statute came to be passed, having regard to the fact that the Crown had never attempted to put it in force, and that since it was passed people had been allowed to take part in public life and public opinion in this country holding the opinions that these people are charged with holding—I think having regard to all this, and having regard to all the circumstances to which my Lord has specially directed attention, that he was justified in exercising his discretion, and that he did not exercise it simply according to his own will or caprice, but that he exercised it for good reasons which can be given, and that he was entitled especially to do so when he was asked to enforce such a statute, and a statute of such a class as the class to which this statute belongs. I am therefore of opinion that there is no danger in holding—and that was the only thing I was anxious about in this case—as we hold to-day, that the law upon other statutes may be strained

to allow magistrates to refuse proceedings which they ought to allow to be properly initiated.

CHANNELL, J.—I agree in the judgment of the court. I prefer to base my judgment upon the grounds stated by the Lord Chief Justice, and upon those alone. With reference to those which my brother Darling has just laid down, the matters were not brought before us in the argument, and I prefer to express no opinion upon those matters except that in my view this statute is not a statute merely directed against opinions, nor do I think that Lord Mansfield, in the passages that have been quoted to us from his life, was laying down the law in a way that we ought to recognise. The opinions of an eminent man, as he was, of course deserve our respect; but so far as I understand it, the views that he laid down to this jury have never got into the Law Reports, and have never been treated as a statement of the law. He was not trying, as I understand it, a criminal case, but an action brought by a common informer to recover and put into his own pocket a penalty; an action which has never met with a great amount of favour, and has seldom, I suppose, succeeded in recent years—at any rate unless the judge summed up in a very different way from that in which Lord Mansfield seems to have summed up in this case. One is not surprised that the jury found for the defendant in that case. But the matters which we have to consider in this case seem to me to be very different indeed from that, but I do think that these were matters that this magistrate, in the exercise of his discretion, was entitled to take into consideration. I should content myself entirely with a statement that I agree with the judgment of the Lord Chief Justice, if it were not that matters had been introduced in argument in this case as to which I think it is extremely desirable that there should be no mistake hereafter as to what it is that we do in fact lay down. Now, these clauses in this statute appear to have been passed, as the preamble to sect. 28 states, for the purpose of the gradual suppression and final prohibition of these religious orders, and one sees that the object is to get all members of those orders gradually expelled from this country. Persons who were resident here at the time, whether natural born subjects or foreigners, and who were members of any of these religious orders, were to be allowed to stay here conditionally upon their registering themselves. Natural born subjects who were at the time members of the order were entitled to come here and to get the same protection as if they had happened to be here at the time of the passing of the Act, provided that within a certain time after their coming here they registered themselves. All those persons in the course of time would die, and the persons to whom the special privileges of staying here were given by the Act of Parliament would in the course of a great number of years disappear: and these provisions were made that no persons being admitted to these religious orders elsewhere should come here, or that they should be admitted here and be here. The effect of those would be, as stated in the preamble, to effect the gradual suppression and final prohibition of these religious orders, and it seems to me it would have been done, not because of their opinions, but because they were

supposed at that time, rightly or wrongly, to be mischievous persons; to be persons whom it was desirable not to have in this country; and the mode in which this was done was to say that their being here should be a misdemeanour, and that upon their being lawfully convicted they were to be sentenced and ordered to be banished. That is a peculiar sentence, not punishing them for being members of these religious orders, but directing that they, being members of these religious orders, and not coming within the privilege of persons who were here at the time of the passing of the Act of Parliament, they should be told to leave the country. Now, it is put in the form of a criminal offence, and as it is put in the form of a criminal offence, it appears to me that a private individual is entitled to prosecute for it. As Mr. Ivory said, it is an important constitutional principle that a private individual may set the criminal law in motion—at his own risk in certain cases, of course, but that he may do so. To hold the contrary appears, to use an illustration of which one is reminded by the special subject of this kind of prosecution, is very like reviving—if that is the proper expression for something which I suppose on the best authority never existed—reviving the dispensing power of the Crown that was the subject of so much trouble in the days gone by. I think it is an important principle to hold that except where the special terms of the Act of Parliament direct the contrary (of which there are some instances) a private individual may institute criminal prosecutions, and if this magistrate held, and I think he did express his opinion to the contrary of that as regards this Act of Parliament—if he had proceeded upon that alone I should think we ought to direct the *mandamus* to go. But in my view, although he expressed that opinion and stated it as one of the grounds of his decision, he stated it only as one of the grounds, and he went on as it were to say: Even if I am wrong in saying that a private individual cannot initiate these proceedings, at any rate I am entitled to take it into account as one of the matters to be dealt with when I come to consider whether I should exercise my discretion. In that view I think he was right, and taking that into account, and taking into account the fact that proceedings had not in fact been taken during the seventy odd years since the Act of Parliament was passed, he was entitled to take into consideration those matters, and to say: "I will not issue this summons. If I were preventing you from taking these proceedings and raising the question at all, possibly I might, but I am not doing so. You are entitled to present a bill to the grand jury, and if the bill is presented there will be a direction of the learned judge to the grand jury upon the law applicable to this matter, as to which my opinion is what I have expressed, but as to which I agree there may be doubts, and in the exercise of my discretion I think that is the better way of dealing with the matter." If he has said that, I think it is impossible for us to say that he is wrong, and that if we were to issue a *mandamus*, we should be doing that which the court never does upon *mandamus*—namely, directing a man how to do his duty. The function of a *mandamus* is to direct the person to whom it is addressed, whether a magistrate or anyone else, to do his duty, but not to direct him to do his duty in any particular

mode. The *mandamus* which we should issue, if we issued one here, would be to hear and determine this application for a summons. In my view he has heard it and determined it, because he has taken into consideration matters which he was entitled to take into consideration, and, having taken them into consideration, he has decided not to issue the summons.

Rule discharged.

Solicitor for the prosecutor, *John Othen*.

Solicitors for the respondents, *Witham, Boskell, Munster, and Weld*.

Solicitor for the magistrate, *The Solicitor of the Treasury*.

April 21 and May 3, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GREAT NORTHERN AND CITY RAILWAY COMPANY (apps.) v. TILLET (resp.). (a)

Lands Clauses Acts—Compensation—Tenancy from year to year—Jurisdiction of justices to inquire into title of claimant—Requirement to give up possession before expiration of term—Condition precedent to right to compensation—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 121.

Where a claim for compensation is made under sect. 121 of the Lands Clauses Consolidation Act 1845 by a person who has no greater interest than as a tenant for a year or from year to year, and the claimant alleges such an interest, the justices have no jurisdiction under that section to inquire into the title of the claimant to the interest which he alleges, but they are bound to assess the compensation upon the basis of his alleged interest, if there be no other objection to their jurisdiction.

It is a condition precedent to the right to obtain compensation under sect. 121 that the claimant should have been required to give up possession before the expiration of his term or interest in the premises, and the justices have jurisdiction to inquire and must ascertain whether the claimant has been so required to give up possession before the end of his term, as the question of the amount of compensation for the claimant's unexpired term will depend upon that, and if there be no evidence of a requirement to give up possession the justices ought not to assess compensation.

CASE stated by an alderman and justice of the peace of the city of London.

On the 10th Oct. 1901 the respondent made application to the court of summary jurisdiction sitting at the Guildhall that the court should determine the amount of compensation to be paid to the respondent under the Lands Clauses Consolidation Act 1845 by the Great Northern and City Railway Company (the appellants) in respect of 32, Finsbury-pavement, in the city of London.

The respondent applied as the receiver and manager for himself and others trading as Messrs. Tillet and Yeoman, auctioneers, 38, Finsbury-pavement.

On the 28th Oct. the summons was heard at the Guildhall by the alderman (having by law the

(a) Reported by W. W. OAK, Esq., Barrister-at-Law.

authority of two justices), when he determined the amount of compensation to be paid by the appellants to the respondent to be 560l.

The following facts were either proved or admitted on the hearing:—

In the year 1899 the respondent James Tillett, with Yeoman and Andrews, carried on the business of auctioneers and surveyors in part of the basement of No. 32, Finsbury-pavement, which they held from their immediate landlord, Matthew Jarvis, who acted as solicitor for them and the respondent with reference to the claims and proceedings hereinafter mentioned. When the tenancy upon which Messrs. Tillett and Yeoman held the premises was created, it was agreed that it should expire on the 25th Dec. 1899, but Messrs. Tillett and Yeoman remained in possession after the 25th Dec. 1899.

Negotiations were entered into between Messrs. Tillett and Yeoman, and their landlord, Mr. Jarvis, with a view to the termination of the tenancy, the result of which was at issue between the respondent and the appellants, but the correspondence was not produced before the magistrate.

On the 12th June 1899 notice to treat was served on behalf of the company on Mr. Jarvis, and on the 14th June a like notice was served upon the members of the firm of Messrs. Tillett and Yeoman.

On the 3rd July 1899 Messrs. Tillett and Yeoman sent in a claim for compensation on the basis of an interest which they were ultimately unable to support.

Messrs. Tillett and Yeoman, in the month of March 1900, for their own purposes went out of actual occupation of the premises, but retained the keys.

On the 1st Jan. 1901 Mr. Jarvis assigned to the appellants his lease of No. 32, Finsbury-pavement. The assignment recited that the agreement for the sale of the lease was subject to the rights as against the appellants (if any) of Messrs. Tillett and Yeoman, who were stated therein to have been until recently in occupation of part of the basement.

The above assignment recited an alleged underlease, dated the 6th March 1900, from Mr. Jarvis to Messrs. Tillett and Yeoman, the validity of which was in the assignment stated to be disputed by the appellants, and the assignment was expressed to be made subject to the rights as against the appellants (if any) of Messrs. Tillett and Yeoman under the said underlease, or any other shorter tenancy (if any) there were, but the appellants did not thereby admit any rights.

The appellants, on or about the 22nd Jan. 1901, commenced to pull down the premises.

The before-mentioned claim was abandoned, and on the 29th Aug. 1901 the respondent James Tillett, as the receiver and manager of the business of Messrs. Tillett and Yeoman, sent in a claim for 560l. on the basis of a tenancy from year to year of a portion of the basement of No. 32, Finsbury-pavement. This claim was in respect of a "tenancy from year to year at 130l. per annum, and the loss sustained by reason of the removal of the business therefrom, which has been carried on by the claimants there and next door for the last seven years," and for some small sums in respect of the expenses of removing.

It was for the purpose of assessing the compensation under the above, claim that the

summons was issued, and the magistrate was asked to determine, under sect. 121 of the Lands Clauses Consolidation Act 1845, the amount of such compensation.

On the hearing of the summons it was objected on behalf of the appellants that the magistrate had no jurisdiction to determine the amount of the compensation claimed, and that the summons ought to be dismissed on the grounds (1) that the premises in respect of which compensation was sought were not in the possession of the respondent or Messrs. Tillett and Yeoman within the meaning of sect. 121; and (2) that the respondent and Messrs. Tillett and Yeoman on the facts before the magistrate were not within sect. 121, or entitled to issue the summons or to claim to have compensation assessed.

The alderman decided to assess the compensation as required by the summons on the ground that the respondent and Messrs. Tillett and Yeoman could only obtain compensation and get it assessed under sect. 121, and on the authority of *Reg. v. Kennedy* (68 L. T. Rep. 454; (1893) 1 Q. B. 533) and *Bealey Heath Railway Company v. North* (71 L. T. Rep. 533; (1894) 2 Q. B. 579), and he assessed the compensation at 560l.

The question for the opinion of the court was whether the respondent and Messrs. Tillett and Yeoman were entitled to have the compensation, the subject of the claim of the 29th Aug. 1901, determined under sect. 121 of the Lands Clauses Consolidation Act 1845, and whether the alderman was right in proceeding to assess the same accordingly.

If the court should be of opinion in the affirmative, the award of 560l. was to stand; if the court should be of opinion in the negative, then the award was to be set aside and the summons dismissed.

The Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) provides:

Sect. 121. If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such land be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation all such persons shall respectively deliver up to the proprietors of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act.

Hansell for the appellants.—The question is whether the respondent is within sect. 121, and is entitled to have compensation assessed under that section. He is not entitled to have any compensation assessed. Originally Tillett and Yeoman were in possession for a term which expired on the 25th Dec. 1899. The notice to treat was served before that date, so that the tenancy which was existing at the date of the notice to treat expired at Christmas 1899. They remained on in possession for some three months, and then

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voluntarily went out of possession. Upon those facts they were not tenants at all; they were either holding over or were tenants at will. The sequence of events was the following: There was the notice to treat; there was the tenancy going on at the time; the tenants were not required to give up possession during the tenancy; the tenancy expired, and the tenants, holding over, went voluntarily out of possession. Whatever may have been the nature of the respondent's occupation after the 25th Dec. 1899, it was not a tenancy in respect of which compensation could be claimed, and, in fact, Tillett and Yeoman were not turned out at all during the existence of any tenancy which existed at the date of the notice to treat; and the date of the notice to treat fixes the rights of the parties:

Ex parte Edwards, 25 L. T. Rep. 149; L. Rep. 12 Eq. 389.

A tenancy created after the date of the notice to treat is not a subject for compensation: (*Ibid*). Secondly, it is a condition precedent to the right of a claimant to compensation under sect. 121 that he must be in possession and be required to give up possession before the expiration of his term or interest. There must be a requiring of possession, and a notice to treat is not a requiring of possession or a demand for possession:

Reg. v. Stone, 14 L. T. Rep. 552; L. Rep. 1 Q. B. 529.

The claimants had to show a right to compensation under the section. They are not within the section at all, because they were not required to give up possession, as they gave it up voluntarily. The alderman was wrong in proceeding to award compensation, and the award ought to be set aside.

Park Goff for the respondent.—The alderman was right in assessing the compensation. Where a claim is made for compensation under sect. 121 the justices have no right to inquire into the title of the claimant, but they are bound to assess the compensation on the basis of the title which he alleges. In the case of *Re East London Railway Company* (63 L. T. Rep. 147, at p. 148; 24 Q. B. Div. 507, at p. 511) Lord Esher, M.R. says that under the Lands Clauses Act it is clear that no question could be raised as to the title of the claimant until the amount of the compensation has been settled by means of a trial before the sheriff and a compensation jury summoned under that Act. That was followed by the case of *Reg. v. London and North-Western Railway Company* (1894) 2 Q. B. 512. The compensation must be assessed by two justices under sect. 121, as there is no other section applicable in cases where the claimant has a less interest than a tenancy from year to year (*Reg. v. Manchester, Sheffield, and Lincolnshire Railway Company*, 23 L. T. Rep. O. S. 287; 4 E. & B. 88), and the question whether the claimant has such an interest cannot be dealt with by the justices under that section. The question of liability can only be raised as a defence to an action on the award, and the question whether the claimant has the title which he alleges can be determined in an action on the award, which is the proper way to raise the question:

Brierley Hill Local Board v. Pearsall, 51 L. T. Rep. 577; 9 App. Cas. 595.

[CHANNELL, J.—The question really is whether

the smaller amounts which can be assessed before justices under sect. 121 stand in the same position as the larger sums where the arbitrator or jury only assess the amount, and the question of title is dealt with elsewhere.] The two cases stand in the same position; the justices can only determine the amount, and the question of title must be dealt with elsewhere. With regard to the second point, although it is found that the respondent went out of actual occupation in March 1900, they never really gave up possession until the appellants entered, as they retained the keys of the premises.

Hansell in reply.—The magistrate had no jurisdiction at all to entertain the claim or deal with the case unless the claimant brought himself within the section. There was absolutely no tenancy from year to year proved. None of the cases cited as to there being no jurisdiction to inquire into the title were under sect. 121, and do not conclude this case. The claimant must show some title and some right to take out the summons. He must show that he has some interest which comes within the section and, as the section indicates, he has to prove occupation. If he shows no interest at all, he is not within the section, and if he shows too large an interest he is outside the section. If he merely shows a tenancy from year to year created after the notice to treat, then he shows that there is nothing to assess under the section, as a tenancy from year to year created after the notice to treat is not within the section. The second point is conclusive for the appellants as there was no demand for possession.

Cur. adv. vult.

May 3.—The judgment of the court (Lord Alverstone, C.J., Darling and Channell, JJ.) was read by

LORD ALVERSTONE, C.J.—This was a case stated by an alderman of the city of London on an application made to him to assess compensation under sect. 121 of the Lands Clauses Act. That section requires that the amount of compensation payable to persons who have no greater interest than as tenant for a year or as from year to year, shall be determined by justices. The facts raise two questions, whether in such a case the justices have power to inquire and determine—first, whether the claimant has the interest which he alleges, and, secondly, whether the claimants were required to give up possession before the expiration of their term within the meaning of the section. As regards the first point—namely, whether the justices have any jurisdiction to inquire into the title of the claimant to the interest which he alleges, we are clearly of opinion that they have no such right. The duty of the justices is, in this respect, practically the same as that which is, under other sections of the Act, to be discharged by juries and arbitrators. As was pointed out in the case of *Reg. v. Lord Mayor of London* (16 L. T. Rep. 280; L. Rep. 2 Q. B. 292) the 121st section of the Act comes by way of proviso taking out of the previous general enactment a particular branch for which it makes a particular provision, and, therefore, on principle, the same rules as to investigation of title should apply, although the tribunal for assessing the amount of compensation is different. A long series of authorities, commencing with *Reg. v.*

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London and North-Western Railway Company (22 L. T. Rep. O. S. 346; 3 E. & B. 443), and followed by many subsequent cases, has conclusively established that the jury or arbitrator has no right to try a question of the claimant's title to the interest which he alleges; any such question must be raised in subsequent proceedings. Although there is no authority expressly dealing with the case under sect. 121, the same principle is in our opinion practically recognised in the case of *Reg. v. Hannay* (31 L. T. Rep. 702; 44 L. J. 27, M. C.), and *Cranwell v. Mayor, &c., of London* (22 L. T. Rep. 760; L. Rep. 5 Ex. 284). Therefore upon the first point raised we are of opinion that, the claimants alleging that they had an interest as tenants from year to year, the justices were bound to assess compensation upon that basis, assuming no other objection could be taken to their jurisdiction. It is, however, a condition precedent to the right to claim compensation under sect. 121 that the claimant shall have been required to give up possession before the expiration of his term or interest therein, and that in that case he shall be entitled to compensation for the value of his unexpired term or interest. It is, we think, obvious from this language that the justices must ascertain whether or not the claimant has been required to give up possession before the expiration of his term, because the question of compensation will depend upon that fact. If the claimant was required to give up possession only a few days before the expiration of his term, the compensation would be very different from that which he would receive if he was required to give it up more than six months, or it might be nearly eighteen months, before his interest could be determined, and the cases of *Reg. v. London and Southampton Railway Company* (10 A. & E. 3) and *Reg. v. Stone* (14 L. T. Rep. 552; L. Rep. 1 Q. B. 529), are in our opinion authorities to show that requirement to give up possession is an essential condition of the right to claim an assessment of compensation under sect. 121. Applying this rule to the facts of this case, it appears that notice to treat having been given to the claimants on the 14th June 1899, the term on which they were then holding expired on the 25th Dec. 1899, that they held over upon conditions which are not agreed, but which, as the claimants claimed to be tenants from year to year, would, as we have already said, compel the justices to assess compensation on that basis; and in the month of March 1900 the claimants went out of occupation, merely retaining the key. Nothing further happened, as far as they were concerned, until the 22nd Feb. 1901, when the company having taken an assignment of the landlord's interest, pulled the house down. Under these circumstances we are of opinion that there was no evidence that the claimants were required by the company to give up possession of lands occupied by them before the expiration of their term or interest, and upon this ground the magistrate ought to have held that he could not assess any compensation. If the claimants have any claim against the company based upon the fact that when they went out of possession they retained the key, this would not, in our opinion, be matter for compensation under sect. 121, but if any claim could be founded thereon, as to which we express no opinion, it would have to be dealt with by action, as pointed out in the case of *Cranwell v.*

Mayor, &c., of London, (*ubi sup.*), to which we have already referred. For the above reasons we are of opinion that our judgment must be for the appellants.

Appeal allowed. Judgment for the appellants.

Solicitors for the appellants, *Le Brasseur and Oakley*.

Solicitor for the respondent, *Matthew J. Jarvis*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Tuesday, March 4, 1902.

(Before Sir F. JEUNE, President, and BARNES, J.)

HILL v. HILL. (a)

Appeal from justices—Allowance—Stepchildren—Liability of husband—Discretion of justices—Poor Law Amendment Act 1834 (4 & 5 Will. 4, c. 76), s. 57—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), s. 4.

A husband is liable under the Poor Law Amendment Act 1834, for the support of his stepchildren and the liability is fully recognised by sect. 4 of the Summary Jurisdiction (Married Women) Act 1895. In assessing the amount of the allowance which a husband is to be ordered to pay for the support of his wife, who has obtained a separation order against him, and her family, the justices ought to consider the circumstances of the case—the number of children, whether of the second or a former marriage, and the principles and practice of the High Court in cases of judicial separation upon which allotments of alimony are made. If the court is of opinion that the justices have acted reasonably under all the circumstances of the case the allowance ordered by them will not be interfered with.

THIS was an appeal of the husband from an order of the justices of Southampton, made on the 19th April 1901 and confirmed on the 31st Jan. 1902, by which the appellant, Frederick Penton Hill, was ordered to pay to his wife, Matilda Alice Hill, the sum of 30s. a week, 17s. being for the maintenance of her children by a former husband.

The order was made under the Summary Jurisdiction (Married Women) Act 1895.

The grounds of appeal were (1) that the husband ought not to have been ordered to pay anything towards the maintenance of his stepchildren; and (2) that the amount ordered was excessive, being more than one-third of his earnings.

Pritchard for the appellant.—The order for the maintenance of children ought not to have been made. At common law a man was not liable for the support of his stepchildren. He only became liable if they were chargeable to the parish under the Poor Law Acts. Neither the Matrimonial Causes Act 1878 nor the Summary Jurisdiction (Married Women) Act 1895 gave the justices power to order maintenance at all for the children of the marriage. The father would become liable if they became chargeable to the rates. Under

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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the circumstances there was just a possibility that the father might have to pay twice over. He ought not to be placed in such a position. In any case the amount ordered was excessive. The husband had been earning 3l. a week, but his wages were now only 50s. and out of that sum he had to pay 5s. a week for the support of his own child. He cited

Mortimore v. Wright, 6 M. & W. 482;
Tubb v. Harrison, 4 T. R. 118;
Cooper v. Martin, 4 East, 76;
Cobb v. Cobb, (1900) P. 294;
Nott v. Nott, 84 L. T. Rep. 573; (1901) P. 241;
 43 Eliz. c. 2, s. 6;
 4 & 5 Will. 4, c. 76, s. 56;

Barnard for the respondent.—The justices were right in their order. The facts of the case were somewhat suspicious, and the justices evidently did not believe the evidence of the husband. As to his liability, so long as the mother lives the husband was liable to maintain his stepchildren. She had an implied authority to pledge his credit for necessaries for them. There is no doubt of the liability under the Poor Law Acts:

Baseley v. Forder, 18 L. T. Rep. 756; L. Rep. 3 Q. B. 559.

There was no hard-and-fast rule that the court must not award more than one-third of the joint income.

The PRESIDENT.—I do not think that it is now necessary to decide what is the exact liability of a husband at common law for the children of his wife by a former marriage. This seems to be so to me, because it is quite clear that there is a liability attaching to him by virtue of the Poor Law Acts, although it is not quite certain what is the extent of that liability. The Matrimonial Causes Act 1886 clearly made the husband liable not only for his wife but also for his wife's family, and this was extended by the Act of 1895. Sect. 4 of the latter Act leaves no doubt whatever in my mind upon the subject. The words are "any married woman whose husband shall have been guilty of persistent cruelty to her, or wilful neglect to provide reasonable maintenance for her or her infant children whom he is legally bound to maintain." The words "whom he is bound to maintain" clearly must include the stepchildren, and I am of opinion that the husband is bound to provide for them. In estimating the amount to be paid by the husband to the wife, the justices must take into consideration the number of children to be provided for, and exercise their discretion having regard to the whole facts of the case. The principles upon which they should act in fixing an allowance should, as far as possible, be the same as those which guide this court in the allowance of alimony. But so long as they exercise their discretion properly this court will not interfere with the amount of the order made. In the present case we do not think that the sum of 30s. a week is an excessive one, and the appeal will, therefore, be dismissed with costs.

BARNES, J. concurred.

Solicitors for the appellant, *Bramall, White, Sanders, and Roberts*, for *Page and Gulliford*, Southampton.

Solicitor for the respondent, *W. W. Stocken*, for *E. D. Godwin and Son*, Southampton.

CROWN CASES RESERVED.

May 10 and June 4, 1902.

(Before LORD ALVERSTONE, C.J., WRIGHT, BRUCE, DARLING, AND JELF, JJ.)

REX v. PLUMMER. (a)

Conspiracy—Joint indictment—Plea of guilty by one defendant—Acquittal of co-defendant—Withdrawal of plea of guilty—Practice—Stating case notwithstanding plea of guilty—11 & 12 Vict. c. 78.

One person cannot be convicted of conspiracy by himself.

If on a joint indictment for conspiracy one defendant pleads "guilty," but his co-defendants plead "not guilty" and are acquitted, the defendant who pleaded guilty must be allowed to withdraw his plea and must also be acquitted.

The court has jurisdiction to consider a case stated where a defendant has pleaded guilty.

Reg. v. Brown (61 L. T. Rep. 594; 24 Q. B. Div. 357; 16 Cox C. C. 715) followed.

CASE stated for the consideration of the court by the chairman of the Berkshire Quarter Sessions.

The defendant Plummer was indicted with Fenton and Wheeler on a joint indictment which charged that they had conspired together to obtain certain sums of money by false pretences from the Conservators of the river Thames.

Plummer pleaded "guilty," Fenton and Wheeler pleaded "not guilty," were tried and acquitted. It was then contended on behalf of Plummer that he could not be convicted of conspiracy because his co-defendants had been acquitted.

The chairman overruled this contention, and counsel for Plummer then applied for leave to withdraw his plea of "guilty" and to plead "not guilty." The chairman, being of opinion that he had no jurisdiction to grant leave, refused to allow the withdrawal of the plea, and passed sentence, reserving the following points for the consideration of the court: (1) Whether under the above circumstances a conviction could be recorded and judgment passed against Plummer; (2) whether the Court of Quarter Session had jurisdiction to permit him to withdraw his plea and plead "not guilty"; (3) if the Court of Quarter Sessions was wrong in giving judgment and passing sentence, what course ought to have been taken?

Dickens, K.C. (with him *A. J. David*).—If Plummer had not pleaded guilty he could not have been convicted, for the jury found that the other defendants had not conspired with him. A man cannot be guilty of conspiring by himself, any more than he can be guilty of a riotous assembly by himself:

Harrison v. Errington, Poph. 202;

Vaux case, 4 Co. 45a;

Reg. v. Manning, 51 L. T. Rep. 121; 12 Q. B. Div. 241.

Here Plummer was not indicted for conspiring with any persons except those who were acquitted. If he had been convicted for conspiring with persons who were not tried or with persons unknown, the conviction would stand:

R. v. Sudbury, 12 Mod. 262.

But directly the other defendants were tried and

(a) Reported by A. A. BETHUNE, Esq., Barrister-at-Law.

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acquitted Plummer's conviction would have been annulled, as in the case of an accessory where the principal offender was acquitted:

Lord Sanguhar's case, 9 Co. Rep. 211;
Reg. v. Ahearns, 6 Cox C. C. 6.

The Court of Quarter Sessions should, directly the co-defendants were acquitted, have permitted the plea of guilty to be withdrawn:

Reg. v. Cooke, 5 B. & C. 538; 7 D. & R. 673.

A plea of guilty does not act as an estoppel. In *Reg. v. Brown* (61 L. T. Rep. 594; 24 Q. B. Div. 357; 16 Cox. C. C. 715) the prisoner had pleaded guilty to something which it was argued could not be an offence; and the court held that notwithstanding the plea of guilty, it had jurisdiction to entertain a case stated for its consideration. *R. v. Clark* (1 O. C. R.) was brought to the notice of the court and distinguished. As to the second point, the court had jurisdiction to allow the withdrawal of the plea.

Biron (with him *Frampton*), for the Conservators of the river Thames, did not argue.

Cur. adv. vult.

WRIGHT, J.—The appellant and two other persons were indicted together upon an indictment which contained five counts charging the obtaining of money by false pretences, and also a sixth count alleging a conspiracy between the three defendants to defraud the prosecutors. The sixth count did not allege that there were any other or unknown parties to the conspiracy. All three defendants were included in one arraignment. All pleaded "not guilty" to the five counts; the appellant pleaded "guilty" to the sixth count, the other defendants pleading "not guilty" to that count as well as to the five. Thereupon, it is stated in the case, a verdict of "not guilty" was returned in favour of the appellants on the first five counts, and the trial of the other defendants proceeded, and the appellant was called as a witness against them. We must therefore infer that the appellant was given in charge to the jury upon the five counts in order that, no evidence being offered against him upon these counts, the jury might find a verdict in his favour upon them. The jury acquitted the other defendants upon all the six counts. Counsel for the appellant therefore claimed that no judgment could pass upon the appellant in respect of his plea of guilty to the count for conspiracy, inasmuch as the jury by their verdict in favour of the only other alleged parties to the conspiracy had negatived any conspiracy. So far as we have been able to discover, there is no reported precedent which on the facts is exactly in point. There is much authority to the effect that if the appellant had pleaded "not guilty" to the charge of conspiracy, and the trial of all these defendants together had proceeded on that charge, and resulted in the conviction of the appellant and the acquittal of the only alleged co-conspirators, no judgment could have been passed on the appellant because the verdict must have been regarded as repugnant in finding that there was a criminal agreement between the appellant and the others and none between them and him. See *Harrison v. Errington* (Popham, 202) where upon an indictment of three for riot two were found "not guilty" and one "guilty," and upon error brought

it was held a "void verdict" and said to be like to cases in 11 H. 4, 2. "Conspiracy against two and only one of them is found guilty, it is void, for one alone cannot conspire." So in *R. v. Sudbury* (1698, 12 Mod. 262) when only two out of three were found guilty of riot and no allegation of *cum aliis* the judgment was arrested. So in Chitty's Criminal Law, vol. 3, p. 1141, on the authority of those cases, "the conviction will be invalid, and no sentence can be passed." So in *Reg. v. Thompson* (16 Q. B. 832), per Lord Campbell, "the acquittal of two involves the acquittal of the third." In *Reg. v. Manning* (51 L. T. Rep. 121; 12 Q. B. Div. 241) this doctrine was perhaps somewhat extended. There two persons were put on their trial together at Nisi Prius for a conspiracy, no other parties being alleged. The jury convicted one with the sanction of the judge, although they were unable to agree, and were discharged as to the other; and upon a rule moved for a new trial it was held by Lord Coleridge, C.J., and Mathew and Stephen, JJ. that there had been a misdirection. The issue, Mathew, J. said, was whether both were guilty; and the jury had not agreed on that issue. It is true that the judgment in *Reg. v. Manning* purports to be based mainly on the opinion of the judges in *O'Connell v. The Queen* (1844, 11 Cl. & F. at pp. 236-7), which does not seem to us to affect the present question; but the decision itself is in accordance with the previous authorities, which appear to establish that the mere possibility of the one defendant having been acquitted by reason of evidence not being forthcoming or admissible against him which was forthcoming or admissible against the other who has been tried with him, is not enough to cure the inconsistency apparent on the record. It is equally clear, on the other hand, that if the appellant had been arraigned and tried alone for the conspiracy and had been convicted, his conviction would have been good at the time, and judgment could have been pronounced against him, although the other persons included in the indictment had not appeared, or were dead, or the trial of them had been postponed. See Bro. Abr. Conspiracy, 21; *R. v. Nichols* (1742, 13 East 412, n.), *R. v. Scott* (1761, 3 Burr. 1282), *R. v. Cooke* (1826, 5 B. & C. 538), *Reg. v. Ahearns* (1852, 6 Cox C. C. 6), in which case, however, it is difficult to see how the question really arose at all, since the indictment was not for a mere conspiracy to murder, but for actual murder, though laid into an averment of conspiracy, as appears from the sentence of death reported in H. C. L. 381. It is, however, not clearly settled whether, in such a case of separate trials, a subsequent acquittal of the other defendants upon their separate trial would or would not avoid the effect of the previous conviction of the appellant. So if, in the present case, the appellant had been sentenced, as he might have been, immediately upon his pleading guilty to the charge of conspiracy, the sentence would have been right when passed, but it is not certain whether, upon the acquittal of the other defendants, the sentence upon him must have been vacated or treated as erroneous, just as judgment against an accessory passed during the attainder of the principal was good during the attainder, but was *ipso facto* avoided when the attainder was removed (1 Hale 523, etc., *Lord Sanguhar's case*, 9 Rep. 207, 215-6). In *R. v. Cooke*

(*sup.*) Littledale, J. suggested that a similar consequence might follow from an acquittal of the alleged co-conspirators at his own separate trial, and the same suggestion is made in the headnote to *Reg. v. Ahearne* (*sup.*), though not so distinctly in the judgments. This suggestion is questioned by Mr. Greaves (Russell on Crimes, vol. 3, p. 146, 4th edit.), but on grounds which would be to a large extent equally applicable to the case of a joint trial, and are therefore insufficient upon the authorities which have been cited. The present case may be regarded as intermediate between the case of a wholly joint trial and the case of separate trials of the alleged co-conspirators. The appellant and his co-defendants were jointly indicted; they were arraigned together; they all pleaded "not guilty" to the five principal counts; there was only one *venire*; they were all apparently given in charge (as we have pointed out) to the same jury. If error had been brought, one record would have been made up (as in *Lord Sanquhar's* case (9 Rep. 207), where the plea of guilty by one prisoner, and the verdict of the jury as to the other, are set out), and the same record would have shown the inconsistent plea and verdict. We think that under the circumstances the trial ought to be regarded in substance as joint, and that the plea of guilty ought not to be followed by judgment. There is an authority to this effect which, although it has not the effect of a decision, we cannot disregard. The very case is put in *Robinson v. Robinson*, (1859) 1 Sw. & Tr., at p. 392, where Cockburn, C.J. says: "The case of an indictment against two persons for conspiracy suggested an apparent analogy; and as in such a case a plea of guilty by the one, if followed by the acquittal of the other, would not have supported a judgment of guilty against the defendant confessing and pleading guilty, so it may be said," &c. This passage is indeed treated by one of the judges in *Reg. v. Manning* as a "mere dictum," but in truth it was this very analogy that the court in *Robinson v. Robinson* had to consider and reject or adopt, and it forms part of a considered judgment of Cockburn, C.J., Wightman, J., and Sir C. Creswell—no mean authorities on the criminal law. It seems also to be supported by the language of Lee, C.J. in *R. v. Nichols* (*sup.*), who said: "On being acquitted on record, the conviction of his companions on the same record must be directly repugnant and contradictory to the other"; and there is nothing in the context to exclude the application of this language to a conviction on a plea of guilty. Even apart from the conclusion of strict law at which we have arrived, we think that the unfettered power the statute 11 & 12 Vict. c. 78 confers upon this court to make such order as justice may require might in this case be exercised in favour of the appellant who has been acquitted of the more serious charges alleged in the indictment, and who, in pleading guilty to the minor charge, may have done so under misapprehensions of various kinds, and who certainly did not plead guilty to any separate offence. And so before the statute, in *B. v. Waddington*, (1800) 1 East, at pp. 146 and 159, it was said that even where a convicted prisoner waived his motion in arrest of judgment, the court would not pass sentence if they could see that no crime was shown. Another point is raised in the case—namely, whether the court had power to allow the appellant to withdraw his plea

of guilty. There cannot be any doubt that the court had such power at any time before, though not after judgment: (see, e.g., *Reg. v. Cloutier and Heath*, (1859) 8 Cox C. C. 237, *Reg. v. Sell*, (1840) 9 C. & P. 346.) And as we infer that, but for the erroneous opinion that there was no such power, the withdrawal would have been allowed, this might of itself be a ground for a *venire de novo* (*Reg. v. Yeaton* (5 L. T. Rep. 329; 9 Cox C. C. 91; 1 L. & C. 81), the indictment being for a misdemeanor. Lastly, it is necessary to observe that, in entertaining this case, notwithstanding that the appellant pleaded guilty, we adopt the construction of the Act which commended itself to the court in *Reg. v. Brown* (61 L. T. Rep. 594; 24 Q. B. Div. 357) in preference to the decision in *Reg. v. Clark* (15 L. T. Rep. 190; L. Rep. 1 C. C. R. 54), where it was held that a question arising upon a plea of guilty was not a question arising upon a trial.

BRUCE, J.—I agree with the judgment of Wright, J. and with the reasons he has given. I do not propose to go through the authorities cited by him, but I wish to make a few observations of my own tending to the same conclusion on somewhat different grounds. I think that the statement in Chitty on Criminal Law, vol. 3, p. 1141, is correct, and is fully supported by the authorities. The statement in Chitty is as follows: "And it is holden that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him." That passage seems to me to apply exactly to the present case. The point of the passage turns upon the circumstance that the defendants are included in the same indictment, and I think it logically follows from the nature of the offence of conspiracy that where two or more persons are charged in the same indictment of conspiracy with one another, and the indictment contains no charge of their conspiracy with other persons not named in the indictment, then, if all but one of the persons named in the indictment are acquitted, no valid judgment can be passed upon the one remaining person, whether he has been convicted by the verdict of a jury or upon his own confession, because, as the record of conviction can only be made up in the terms of the indictment, it would be inconvenient and contradictory, and so bad on its face. The gist of the crime of conspiracy is that two or more persons did combine, confederate, and agree together to carry out the object of the conspiracy. To quote from Sir William Erle (the Law Relating to Trade Unions, p. 31) "with respect to the crimes classed under the term conspiracy, the external act of the crime in concert by which mutual consent to a common purpose is exchanged." Where the indictment charges that A., B., and C., combined, confederated, and agreed together to do a certain thing, and A. and B. are acquitted by the verdict of a jury from the charge, it is inconsistent with that finding that there could have been any combination, confederation, and agreement between them and C., and unless they combined, confederated, and agreed together with C., C. cannot be found guilty of the charge. It seems to me it matters not whether the trial of A., B., and C. took place at the same time or not, so long as they are charged

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upon one indictment. Only one record can be drawn up based upon that indictment; if the proceedings have taken such a course as to negative mutual consent to a common purpose by all but one of the parties who are alleged to have conspired together, no valid record of a conviction against that one can be drawn up. If the record finds that A. and B. are acquitted of a charge of agreeing together with C., the same record cannot without inconsistency find that C. agreed together with A. and B. As to the note by Mr. Greaves in Russell on Crimes, vol. 3, p. 146, 4th edit.; p. 276, 6th edit., referred to in the judgment of Wright, J., where it is suggested that a verdict of "not guilty" is not to be taken as establishing the innocence of the person acquitted, because the verdict may have been arrived at simply in consequence of the absence of evidence to prove his guilt, I think it is a very dangerous principle to regard a verdict of "not guilty" as not fully establishing the innocence of the person to whom it relates. If it is to be applied at all it would apply to persons tried at the same time, and yet it is perfectly clear upon the authorities that if two persons are tried together upon a charge of conspiracy with one another, and one is acquitted by the jury and the other convicted, the conviction cannot stand, although it is perfectly clear that the verdict of acquittal may have been obtained simply upon the ground that there was a failure of evidence to establish the charge against the person who was acquitted. There is another point in the case. It is clear that the court had power to allow the appellant to withdraw his plea of "guilty." The court no doubt had a discretion in the matter, and if the court had exercised its discretion, it may be that that would be final and we should have no power to interfere with the exercise of its discretion. But the court, acting upon the erroneous opinion that it had no power to allow the withdrawal of the plea, never did exercise its discretion. If it had exercised its discretion, it is quite possible that it might have allowed the withdrawal of the plea, and if had allowed the withdrawal of the plea of "guilty" and allowed the appellant to plead "not guilty," and he had been tried by the same jury who acquitted the other defendants or by another jury, it is quite possible that he would have been acquitted. The appellant has been deprived of this chance of acquittal by reason of a mistake of the court. I think every intendment should be made in favour of an accused person, and as the court, by reason of a mistake as to the extent of its powers, did not exercise a discretion which it might have exercised in favour of the appellant, the appellant is, I think, entitled on that ground alone to have the conviction set aside.

DARLING, J.—I agree with the judgments which have been delivered.

LORD ALVERSTONE, C.J.—Jelf, J. and I concur in the judgment which has been delivered by our brother Wright. But we have not come to this conclusion without much hesitation as to the first point in the case, for we feel that the course which we cannot hold to be illegal might be used to defeat the ends of justice. We concur, because we can find no reason for dissenting. We place great reliance on the fact that this was

a joint indictment, and a failure of justice can be guarded against in drawing the indictment. On the second point, the question of the withdrawal of the plea, we entirely agree.

Conviction quashed.

Solicitors: *Booke and Sons*, for Brain and Brain, Reading; *Bunting*.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Feb. 26, 1902.

(Before COLLINS, M.R., ROMER and MATHEW, L.JJ.)

NEAVEYSON v. PETERBOROUGH RURAL DISTRICT COUNCIL (a)

APPEAL FROM THE CHANCERY DIVISION.

Inclosure—Roads—Pasturage of roads—Pasturage limited to sheep—More extensive user long continued—Presumption of lost grant—Inclosure Act for purpose of drainage and inclosure—Act for public benefit.

An Inclosure Act, passed in 1812, provided for the inclosure of certain commons, and also for their drainage as part of a much larger district, and contained provisions for the subsequent appointment of drainage commissioners to preserve the system of drainage. The herbage on the roads to be set out by the award was to belong to the persons to whom the award should award the same; and the award was to contain orders and regulations for maintaining the inclosure and the system of drainage. The award, which was made in 1822, provided that the herbage on a certain road thereby set out, adjoining a water-course which was part of the system of drainage, should belong to the surveyor of highways, and be let for depasturing sound and healthy sheep only, but no other cattle or stock.

The surveyor of highways, ever since 1846, had habitually let the herbage for depasturing cattle and horses as well as sheep. The owner of an inclosure adjoining the road brought this action to restrain the defendants from pasturing cattle and horses on the road.

Held (reversing the judgment of Cozens-Hardy, J.), that the restriction on the use of the herbage of the road was intended to be a permanent provision for the protection of the system of drainage for the public benefit, and that it was therefore impossible to presume any lost grant by which that restriction had been released.

THIS was an appeal by the plaintiff from the judgment of Cozens-Hardy, J. at the trial of the action.

The plaintiff brought this action for damages, and for an injunction to restrain the defendants from depasturing horses, cattle, or stock, other than healthy sheep, in or upon a private road called Moor-road.

The plaintiff was the occupier of a farm abutting on Moor-road.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

The defendants were the rural district council, sued in their capacity of surveyor of highways, and T. H. Vergette, their tenant of the pasturage of Moor-road.

In 1812 "An Act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton; and for forming the same into a parish to be called Newborough; and for building and endowing a church for the said parish," was passed (52 Geo. 3. c. cxliii.).

By that Act commissioners were appointed for draining, and for dividing and allotting, the commons, which were situate in a fen country.

The Act provided that the commissioners should, until the execution of their award, drain the lands and protect them from floods, and for that purpose maintain and provide drains, &c., over a much larger district than the said commons.

Sect. 21 of the Act provided that the commissioners should set out public carriage, bridle, and drift roads and footpaths, and that "the herbage of the public and private roads shall belong to and be the property of the person or persons to whom the commissioners shall allot and award the same."

By sect. 57 it was provided that, after the commissioners had completed the divisions and allotments and completed all the works of drainage, they should make their award, which should contain

Such other orders, regulations, and determinations to be observed and followed by the several proprietors as shall be necessary or proper to be inserted in the said award, conformably with the tenor and purport of this Act and the said recited Act, or for the completing and maintaining the said divisions, drainage, and inclosure.

The Act further provided for the appointment of commissioners for the future drainage and preservation of the said lands; and these drainage commissioners were directed to preserve, repair, and make all drains, &c., in the larger district used or necessary for the drainage and preservation of the said lands.

Penalties were imposed by the Act upon any person who should maliciously injure any of the mills, banks, and hedges made for the purposes of the Act, or should wilfully stop, dam up, or damage any drains, watercourses, dams, or other works made for the purposes of the Act.

The award under the Act was made in 1822, and provided that the herbage on Moor-road, which was a private road thereby set out, should belong to and be the property of the surveyor of highways for the time being to be appointed for the common and waste lands, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever.

One of the watercourses, which formed part of the system of drainage which was established by the commissioners, ran along the side of Moor-road.

Ever since the year 1846 the surveyor of highways for the time being had habitually let the herbage on Moor-road for grazing a limited number of cattle and horses, as well as sheep; and the defendant council, when they became the highway authority for the district, let the herbage in the same way to the defendant Vergette.

The action was tried before Cozens-Hardy, J. The learned judge held that a lost grant ought to be presumed by which the right of pasturage on the road was enlarged, and accordingly gave judgment in favour of the defendants (83 L. T. Rep. 496).

The plaintiff appealed.

Bawlin, K.C. and *Percival* for the appellant. — The judgment of the learned judge was wrong because it was impossible to presume a lost grant in the circumstances of this case. A lost grant can only be presumed if it can be presumed to have been made by parties who could legally have made it. In the present case no one could legally have made a grant which would remove the restrictions placed by statute upon the user of this road. Upon a consideration of the whole of the provisions of the Inclosure Act and of the award, it is clear that the user of this road for pasturage was restricted to sheep, with the object of preventing any damage to the drainage of the district, and that the restriction was intended to be permanent, inasmuch as the system of drainage was intended to be permanent. It was probably thought that, if cattle and horses were allowed to pasture on the road, they would tread down the banks of the drains and ditches and cause the flow of water to be obstructed, whereas sheep were not likely to do damage of that kind. There was no person who could legally make any grant which would release that restriction. The allottees of the land could not do so, for it was not imposed for their benefit alone; the parishioners could do so, for the system of drainage was for the benefit of a much larger district, and the restriction was imposed for the public benefit. Again, there was no person who could be the grantee of the suggested lost grant. The surveyor of highways was not a corporation to whom the grant could be made; and the grant could not be made to the parishioners generally. They cited

Hendy v. Stephenson, 10 East, 55;

Halliday v. Phillips, 28 Q. B. Div. 48;

Johnson v. Hodgson, 8 East, 38;

Goodtitle v. Baldwin, 11 East, 488; 11 R. R. 249;

Rochdale Canal Company v. Radcliffe, 18 Q. B. 287.

Eve, K.C. and *Schiller* for the respondents. — It was not impossible for the learned judge to presume a lost grant in this case. The proper inference is that the provisions restricting the pasturage on this road were intended to be temporary only, and not permanent. Provisions of that kind are ordinary and usual provisions in Inclosure Acts and awards. This being fen land, the boundaries between the allotments and roads were ditches and not hedges, and this restriction was imposed for the protection of those ditches as boundaries, and to prevent horses and cattle, which would be likely to go through ditches, from damaging the adjoining allotments and from damaging the ditches themselves when they were new. Therefore this restriction was intended to be temporary only, and a grant could be made which would release the restriction:

Haigh v. West, 69 L. T. Rep. 165; (1893); 2 Q. B. 19.

This restriction being for the benefit of the owners of the adjoining land, for the protection of their land and the preventing of an increase in the burden

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of maintaining the ditches, they could legally make a grant which would release the restriction. They could together join in a grant to the surveyor of highways, and such a grant ought to be presumed from the long-continued user; or the grant could have been made to trustees for the surveyor of highways for the time being. They cited

Campbell v. Wilson, 3 East, 294; 7 B. E. 463;
Great Eastern Railway Company v. Goldsmid, 52
 L. T. Rep. 270; 9 App. Cas. 927.

Rawlins, K.C. replied.

COLLINS, M.R.—This is an appeal from the decision of Cozens-Hardy, J., who gave judgment in favour of the defendants in an action brought by the plaintiff for damages and an injunction. The defendants are the rural district council, who are the successors of the surveyor of highways named in the Inclosure Act and award. The plaintiff is the occupier of an allotment adjoining the road called Moor-road. The defence set up by the defendants, which was accepted by the learned judge, was that Moor-road was a private road, and that the herbage thereon by virtue of the Inclosure Act and award became the property of the surveyor of highways for the time being, and that the defendants, as successors to the surveyor of highways, have by themselves or their tenants enjoyed the right to depasture on the said herbage sheep, horses, and cattle of all kinds for a period of sixty years, or alternatively for a period of over twenty years. That has been explained as meaning that there had been a grant by someone to the surveyor of highways, and that under and by virtue of that grant the pasturage of the road could be let without any restriction to sheep only. The question whether there could be any such grant must be determined by a consideration of the Inclosure Act and award. The nature of the provisions of the Inclosure Act is shortly as follows: It provides for the drainage of a particular district, and contains provisions which prohibit the pasturing of any stock, except sheep, on roads set out in a particular part of the district called the Foreland, adjoining a dyke called Carr Dyke. There was also a provision in the Act that the property in the herbage of all the other roads should be given to the person or persons to whom the inclosure commissioners should award and allot the same; and the award provided that the herbage upon all private roads should be the property of the surveyor of highways, to be by him let annually for depasturing sound and healthy sheep, but no other stock or cattle whatever. The question then arises whether, in view of the provisions of the Act and of the award, it could be possible for anyone to grant to the surveyor of highways the right to do that which is forbidden by the award, and to let the herbage for pasturing horses and cattle. There was evidence of a long user by the surveyor of highways of letting the herbage not for the purpose of depasturing sheep exclusively. The question is whether the proof of that fact is evidence of a grant, which could have a legal origin, of the right to let the herbage for the more extended purpose. If such a grant could not have a legal origin, we cannot presume that there was a grant. If a legal origin were possible, we ought to presume the grant. It may be more easy to presume a grant in some circum-

stances than in others. If the alleged grant would affect the rights of a large number of persons, and would be one of which it would be natural to suppose that there would be some public record, if it really existed, and the period of user was comparatively short, it would be more difficult to presume the grant than in the case of an alleged grant by an individual who was competent to make it, in which case a short period of user would be sufficient. In this case an Act was passed, intitled "An Act for draining, inclosing, and improving the lands called Borough Fen Common and the Four Hundred Acre Common, in the county of Northampton; and for forming the same into a parish to be called Newborough; and for building a church for such parish." The recitals of that Act show that it was not, like an ordinary Inclosure Act, providing only for private interests. It provided for a much larger scheme—that is, for the drainage of this fen district, which was to be inclosed, and also for the drainage of a much larger area of a similar character. There is a recital in the Act that by an Act of 27 Geo. 2 the fen lands, called the North Level, and other lands near thereto, were divided into five districts, within the boundaries of which Borough Fen Common and the Four Hundred Acre Common were included and were declared to be part of the First District of the North Level, and that the commissioners under that Act had power to assess and rate the lands in the First District, except certain lands which included Borough Fen Common and the Four Hundred Acre Common, to certain general rates and district rates, and were required to expend the same in cleansing, widening, and deepening certain drains, rivers, and other works of drainage which were essentially necessary to the drainage and protection of Borough Fen Common and the Four Hundred Acre Common. Then there is a recital that, notwithstanding that exemption from rates, the proprietors interested in Borough Fen Common and the Four Hundred Acre Common were entitled to have the same protected from upland floods and to have the waters thereof drained to the sea in like manner as the lands chargeable with those rates, and that therefore it was reasonable and expedient that Borough Fen Common and the Four Hundred Acre Common should contribute towards the general works and district works provided and required to be made for the protection and drainage of the North Level, in manner and proportion and on the conditions thereafter contained. There is a further recital that the said common and waste lands were in their then state incapable of much improvement, and, for want of proper and effectual drainage and protection from land floods, were of little benefit to the persons having a right of common thereon or interested therein, and that it would be of great benefit and advantage to the persons interested in the said common and waste lands and of public utility if the same were drained, inclosed, and allotted among the persons interested therein according to and in proportion to their respective rights and interests. The Act then proceeds to appoint commissioners for draining Borough Fen Common and the Four Hundred Acre Common, and for dividing and allotting the same among the persons interested therein. The Act provided that the commissioners should from time to time,

until the making of their award, effectually protect from upland water and drain and preserve the said commons, and for that purpose repair and widen all such ditches, drains, watercourses, &c., and other requisites in, over, and upon the lands within the said First District as were then used for those purposes, as they might think necessary, and make such new and other mills, ditches, drains, watercourses, &c., as wall upon, through, in, and over the said lands as upon, in, through, and over any ancient inclosures or other lands within the said First District, as they should think fit. Then sect. 17 provides that the commissioners shall, within two years after the passing of the Act, scour out an ancient drain or watercourse called Carr Dyke, and heighten and strengthen its banks for the purpose of receiving the waters running from the high lands into the same, and conveying them to the river Welland, and preventing them from overflowing or injuring the said common and waste lands and other lands in the said North Level. Sect. 18 provided that the commissioners should allot, out of the Borough Fen Common, a foreland on the whole of the east side of Carr Dyke, and set out all such roads and ways across and along that foreland as should be requisite for the necessary occupation of the old inclosures adjoining Carr Dyke and the allotments in respect thereof; but that it should not be lawful for any person to permit any stock, except sheep, to pasture thereon, and that all cattle, except sheep, found pasturing thereon should be deemed to be trespassing. Sect. 20 provided that the banks of Carr Dyke and the said foreland should be preserved by the said commissioners or by the drainage commissioners thereafter mentioned as pasture land, and that the grass and herbage of the said banks and foreland should be let by the commissioners in every year, for the best rent obtainable, under such regulations and subject to such restrictions as they might think necessary, and apply the rents for the general purposes of the Act. After providing for the setting out of public and private roads and paths and of allotments to the surveyors of highways for gravel pits, the Act, by sect. 21, provided that the herbage of the public and private roads should belong to and be the property of the person or persons to whom the commissioners should allot and award the same. Then sect. 57 provided that, as soon as the commissioners should have completed the allotments and executed all the works of drainage provided for, and done all the other things they were empowered by the Act to do, they should make an award which should describe all the public roads and ways, and all mills, drains, ditches, watercourses, &c., and other works which had been made or repaired by them pursuant to the Act, or might be deemed necessary by them for the preservation and drainage of the said common and waste lands, and contain all such regulations to be observed and kept by the proprietors as should be necessary and proper for completing and maintaining the divisions, drainage, and inclosures. Sect. 61 provided for the appointment of a body of persons as commissioners for the future drainage and preservation of the said lands and grounds. By sect. 74 the drainage commissioners were required from time to time to repair and work all such mills and engines as were then erected or should be erected

by the inclosure commissioners, and to scour out, widen, strengthen, and repair all such drains, ditches, watercourses, &c., as might be used for the drainage and preservation of the said lands, and also to make such new and other mills, drains, ditches, watercourses, &c., within the said First District as might in their discretion be necessary and proper for the drainage and preservation of the said lands. Sect. 79 provided that the drainage commissioners should from time to time, when necessary, assess all the lands and grounds directed to be inclosed and drained with such an annual tax as might be necessary to defray the expenses of the works necessary for the future drainage and preservation of the said lands. Sect. 89 provided that any person maliciously cutting, breaking down, burning, or destroying any mills, banks, or hedges made, or to be made, for the purposes of the Act, should be liable to punishment as a felon, and that any person wilfully stopping, damming up, or damaging any rivers, drains, watercourses, dams, or other works made or to be made for the purposes of the Act, should be liable to a penalty. Those sections show that this Act of Parliament did not provide for a mere temporary scheme, but did provide for a permanent scheme for the drainage of this area as part of a much larger area, which was to be not merely for the benefit of the owners and occupiers on this particular fen. To return to the provisions of sect. 21, that section directs that the herbage of the public and private roads should belong to and be the property of the person or persons to whom the commissioners should allot and award the same. The Act was passed in 1812, and the award was made in 1822. The award set out a large number of public and private roads, and provided that all the herbage which should from time to time grow and arise upon all the private roads set out and thereinbefore awarded should belong to and be the property of the surveyor for the time being of the highways, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at and for the best rent or rents that could be reasonably obtained for the same. The road now in question, called Moor-road, was set out by the award, and the allotment of the plaintiff was set out adjoining that road. The obligation was imposed upon the owners of allotments to keep up the fences which had already been made. Therefore on the face of the Act of Parliament it appears that the systematic and essential object of the Act was not merely the benefit of the allottees. Parts of the land were to be depastured by sheep only, and it was provided that the herbage of the roads should be the property of the persons to whom the commissioners should allot the same. Then, in the award, which had the same effect as the Act of Parliament, there was the provision vesting the herbage of the private roads in the surveyor of highways with the limitation that it was to be depastured by sheep only. Why was that provision introduced? The obvious reason was that cattle and horses might trespass on to the dykes and be a serious nuisance to the maintenance of the drains, and cause public mischief by interfering with the free working of the drains. In my opinion that was not a mere temporary provision, but was a permanent object of the Act. It was not a temporary provision for the interval

between the passing of the Act and the making of the award. The fences had been made before the award, and the declaration of the award as to the depasturing of the herbage of the roads was made after the fences had been made. I think that that provision was made as ancillary to the main purpose of the Act with respect to drainage. If the right could be given to the surveyor of highways to allow horses and cattle to be put to pasture upon the roads, that would be contrary to the main purpose of the Act of Parliament. The owners of the allotments could not have agreed that the roads should be so used and have granted the right to use them in that way; a grant of that kind would not have been a good grant, because the Act and the award made it unlawful to depasture horses and cattle upon the roads, which would have the probable effect of injuriously affecting the drainage. It has been contended for the respondents that, looking at the provisions of the Act and the award, they were really intended to be either only for the benefit of the adjoining owners in respect of their obligation to keep the fences in repair, or else mere temporary provisions for the period during which the allotments were being got into working order and the fences were growing and for no longer time, and that therefore there was nothing in the Act and the award to prevent horses and cattle being depastured on the roads afterwards. It seems to me that it cannot be said that the provision which prohibits the depasturing of horses and cattle on the roads was made for the benefit of the allottees only; that provision was a part of a complete scheme of drainage which was to continue permanently. The drain along this road is an important drain in that scheme. It has been argued that this provision was for temporary purposes only, chiefly upon the authority of *Haigh v. West* (69 L. T. Rep. 165; (1893) 2 Q. B. 19). In that case the Act of Parliament and the award were of a very special character, and were passed and made quite *ad hoc* from the Act and award in the present case. The land in that case was not in the fens at all, and the provisions of the Act and award there in question were construed by the court as being limited to the period before the main provisions of the Act came into force—that is, while the fences were growing. In the present case the provision in question came into force after all the preliminary arrangements had been made, ten years after the Act was passed. It is impossible to infer that the maintenance of the drains in proper working order, and the exclusion of cattle and horses from the roads, was only a temporary purpose. Who could be the grantor and who the grantee in a presumed grant? It was difficult for the respondents to answer that question. We cannot infer an illegal origin when we are seeking for a legal origin to justify a long-continued practice. A grant cannot be presumed which would permit a thing to be done contrary to statutory duties or prohibitions: (*Manchester Ship Canal Company v. Rochdale Canal Company*, 81 L. T. Rep. 472; 85 L. T. Rep. 585). If the scheme of this Act of Parliament and award is that which I have stated, the suggested grant would be contrary to the Act of Parliament. A grant must be from some person to some other person. It is said that the suggested grant could have been made to the surveyor of highways; but

he was not a corporation. That difficulty, however, might perhaps be got over. Then it is said that the grant might have been made by the owners of the soil releasing the surveyor of highways from the restriction upon his power of letting the pasturage of the roads. If the object of the Act and award was that which I have stated it to be, the owners could not waive that restriction and grant to the surveyor of highways an enlarged right of pasturage, contrary to the provisions of the Act and award. It was suggested that the grant might have been made by all the inhabitants of the parish; but the general scheme was not for their benefit alone, and therefore they could not release the surveyor of highways from the restriction. This was, indeed, a public Act passed for public purposes, the public being larger than the inhabitants of this particular area. It seems to me that, if we are to presume anything, we must presume an Act of Parliament. It is, however, impossible to presume that a public Act of Parliament has been passed since 1822, considering the way in which Acts of Parliament are now recorded. Therefore that presumption is impossible. It is said that the plaintiff is under a personal incapacity to bring this action because he himself had been a party to letting the herbage of this road for the purpose of depasturing horses and cattle, and had also hired it himself for that purpose. When he so acted, however, he did not know of the provisions of the Act and the award; and he did not take any part in the letting which is now complained of. I think that these facts do not affect the question. They are not within any of the conditions laid down by Fry, L.J. in *Russell v. Watts* (50 L. T. Rep. 673; 25 Ch. Div. 559, 586) as being necessary to bar a man from asserting his legal rights; there has been no misleading or alteration of the position of anyone. The plaintiff is not suing in respect of anything done during the time when he concurred in the extended user of the pasturage, but complains of acts done afterwards, and after he had objected and protested. For these reasons I am of opinion that we cannot agree with the decision of Cozens-Hardy, J., and that this appeal must be allowed.

ROMER, L.J.—I have come to the same conclusion. In the first place, on consideration of the Act of Parliament in question, I think that it is clear that the duties of the inclosure commissioners and drainage commissioners were not limited to merely draining and dividing up this fen and common. In my opinion more than that was to be done—that is, the making and preserving of a permanent system of drainage, not merely such drainage as might be required for the separate allotments, but a general scheme of drainage, so that the water might flow freely away to the sea. The owners of the allotments to be made under the Act of Parliament were not the sole persons interested. There were other rights. I think that the inclosure commissioners in their award had in view rights of a public character as to drainage, and therefore when their award was made they made permanent provisions for drainage. I think that those provisions were of a public character so that, even if all the allottees agreed together, they could not abrogate those provisions. They had no right to destroy the watercourses and ditches provided

for by the award as an important part of the drainage. If they could deal with any of those watercourses as being unnecessary they might proceed by degrees and gradually do away with the whole system of drainage and cause the land to revert to the same condition as that in which it was before. In my opinion the allottees, if they all agreed together, could not take up that position in face of the Act of Parliament and the award. Still less could some only of the allottees interfere with the watercourses and drainage adjoining their own allotments. In my opinion all the provisions of the Act of Parliament and the award of a permanent character for the drainage of the district are such that the allottees cannot disregard, or release, or grant away the right to enforce them. That brings us to the consideration of the Act of Parliament and the award. It is conceded that the provisions of the award as to pasturage were valid. Why were those provisions inserted? I think that they were inserted for the purpose of assisting in the carrying out of the general purpose of the Act of Parliament, including the preservation of the drainage, and not merely for the protection of the adjoining owners, and that the restriction as to pasturing with sheep only was therefore intended to be permanent. This case is quite distinct from the case of *Haigh v. West* (*ubi sup.*), which turned upon the particular circumstances and the provisions of the particular Act of Parliament there in question. The pasturing of heavy cattle and horses on roads with drains, ditches, and banks by the sides would tend to destroy those drains, ditches, and banks. We can see, therefore, why the inclosure commissioners would take care to limit the pasturage as they did. As to the provision for depasturing "sound and healthy sheep," I think that that was provided not solely for the benefit of the adjoining owners; the waters from these watercourses would flow on towards the sea, and if the water was infected by unhealthy sheep that might tend to the public injury. That particular provision, I think, was inserted in the general interests. In certain cases the inclosure commissioners did grant unlimited rights of pasturage to the allottees of the land adjacent to the roads, but that was in cases where the land did not adjoin any through drain and it would be safe to allow unlimited pasturage. It follows, in my opinion, that these provisions were for the public purpose of preserving the drainage, and therefore could not be disregarded or made the subject of a grant or release by the adjoining owners, or by the inhabitants, or even by the drainage commissioners themselves. Certainly, in these circumstances, I do not see how the court can presume a lawful lost grant which would permanently free the surveyor of highways from regarding the careful limitation of the right of pasturage which was provided by the award. The defendants' case, therefore, clearly fails. The plaintiff cannot be said to have lost his rights. Acquiescence cannot deprive him of the right to say that this was an illegal act. The plaintiff's right is a legal right, which cannot be taken away unless he has so acted that it would be fraudulent conduct on his part to seek to enforce the right. There is no case of that kind made out here. Therefore the plaintiff is entitled to sue and to recover damages because it is

admitted that, failing a lost grant, or the loss by the plaintiff of his right to sue, the plaintiff has been specially injured and has a cause of action. The plaintiff therefore is entitled to damages, but an injunction is not required. This appeal must, therefore, be allowed.

MATHEW, L.J.—I think that it is necessary to add but little to the reasons which have been given for allowing this appeal. I could have understood the argument of the respondents if the allotments had been made by agreement between the persons interested. This, however, was a totally different transaction. It is impossible to read the provisions of the Act of Parliament and the award without seeing that the particular object was to convert a fen into dry land. The general scheme and the main purpose of the Act was to carry out that object. The Act of Parliament provides for commissioners being appointed to drain the land and to execute all works necessary for that purpose and, when the works were executed, to make an award. Then the functions of the inclosure commissioners were to cease, and they were to be succeeded by drainage commissioners, whose paramount duty it would be to protect the drainage system which had been established. It has been contended that this Act of Parliament and award can be got rid of by presuming a lost grant by the persons to whom this Act of Parliament applied. The Act was not, however, passed in their interests only, but in the interests of the public. The provisions of the Act and of the award were not intended to be temporary. Everything in them shows that it was intended that the drainage commissioners were to maintain the system of drainage permanently. It was argued that the presumed lost grant could be a grant by the owners of the adjoining allotments to the surveyor of highways. But the drainage commissioners could not be bound by a grant of that kind. The drainage commissioners could not be bound by it, because it would violate the provisions of the Act of Parliament and award. No lawful origin for such a grant is possible, and therefore it cannot be presumed. The conduct of the plaintiff cannot deprive him of his legal rights. What would be the extent of the suggested lost grant? Would it permit the surveyor of highways to allow persons to depasture as many cattle and horses upon the roads as they chose? That could not be. I agree, therefore, that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Clarke, Bawkins, and Co.*, for *Percival and Son*, Peterborough.

Solicitor for the respondents, *J. Matthew Voss*, for *J. W. Buckle*, Peterborough.

Monday, June 23, 1902.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

REX v. FARNHAM JUSTICES; *Ex parte* SMITH. (a)
APPEAL FROM THE KING'S BENCH DIVISION.

Licensing—Renewal of licence—Notice of objection given by justices—Disqualification of justices—Bias—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 42.

In consequence of a suggestion that the number of licensed houses in a certain district was needlessly large, the licensing justices appointed a committee out of their number to inquire into the condition, position, and circumstances of each licensed house in the district. The committee, as the result of their inquiries, drew up a report in which certain recommendations were made. The licensing justices then, by their clerk, served on all the licence-holders in the district notices of objection to the renewal of their licences.

At the hearing of the applications for renewals the justices, upon the evidence which was given on oath before them, refused to renew nine of the applications.

Held, that the giving of the notices of objection by the licensing justices did not of necessity debar them from afterwards hearing and determining the applications for the renewal of licences.

Held also, that as what was done by the justices in connection with the inquiry and the report by the committee was honestly done to enable them to secure a full investigation of the facts with no other motive than the desire of discharging properly their duties as licensing justices, and as all the formalities of sect. 42 of the Licensing Act 1872 had been complied with, there was nothing to invalidate their decisions.

THERE were nine appeals from a decision of the King's Bench Division (Lord Alverstone, C.J., Darling and Channell, JJ.) discharging rules nisi for a mandamus which had been obtained by nine licence-holders at Farnham against the Farnham licensing justices.

The licensing justices had refused applications for renewals of their licences made by the nine appellants.

The appellants thereupon obtained rules nisi for a mandamus to the justices to hold an adjourned licensing meeting to deal with the applications for renewals.

The circumstances of the case were as follows:

In May 1901 a special meeting of the justices of the Farnham division was held to consider a letter from the clerk of the peace of the county of Surrey, addressed to the clerk of the justices of the Farnham division, stating that the attention of the county licensing committee had been called to the large number of licences in the parishes of Farnham Urban and Farnham Rural; that there appeared to be one licensed house for every 155 of the population, which was largely in excess of any other parish in the county; and that the committee were of opinion that some steps should be taken whereby the licences of a substantial number of such houses should be discontinued.

At this special meeting of justices a committee of five justices, including the chairman, Mr. Howard, was appointed to consider the letter and report upon the subject referred to in it.

The committee met from time to time and considered certain comparative statistics as to population, number of licences, and other information of a general character tending to show how the Farnham division compared with other divisions in the county, and how the county compared with neighbouring counties in the matter of ratio of population to licences.

On the 13th July 1901, at a meeting of the justices, the committee made a report, which was adopted, and the committee were empowered to obtain further information as to the condition, position, and other circumstances of each licensed house in the Farnham urban district.

The committee then directed the clerk to the justices to send to the owners of licensed houses and the licence-holders in the division the following letter:

The attention of the justices of the Farnham Petty Sessional Division having been called by the county licensing committee to the excessive number of licences in the division, a fact which cannot, in the opinion of the justices, be disputed, and the justices having appointed a committee to make inquiries in connection with the matter with a view to a reduction, in the first place, of licences in the Farnham urban district where such excess is most pronounced, I am directed by the justices to so inform you, and to suggest that anything you may desire to say upon the subject addressed to me will receive their best consideration.

The committee held further meetings, and unanimously decided to inspect the fully licensed houses in the Farnham urban district. Members of the committee did inspect all the licensed houses accordingly.

Except in one instance the inquiries were made and information was obtained only from the licensee or the person actually in charge of the licensed premises at the time of the inspection, which person was in every case the wife or daughter of the licensee.

The committee made a report to the justices in which the information obtained in the inspection of the houses was included.

On the 6th Feb. 1902 the report was presented to the justices and adopted by them. Certain recommendations by the committee upon the proposed procedure at the then forthcoming general annual licensing meeting were also adopted with some modifications.

On the 1st March 1902 the general annual licensing meeting was held. The justices present included certain members of the committee above mentioned.

Before the meeting no notice of objection to the renewal of any of the licences in the division had been given.

When the first application for a renewal was reached, a Mr. Hayes rose in court and stated that he objected to the renewal of all the licences in Farnham Urban.

The chairman of the justices thereupon directed Mr. Hayes to give the requisite seven days' notice of his objection for the adjourned meeting on the 12th March. The chairman then, on behalf of the majority of the justices, made objection to the renewal of the forty-five alehouse licences in the Farnham urban district, and the applications

(a) Reported by E. MANLEY SMITH and W. W. ORR, Esqrs.,
Barristers-at-Law.

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for renewals of such licences were directed to stand adjourned to the adjourned meeting.

The chairman stated publicly that the reason why the majority of the justices thus raised objection to the houses was in order that every one of the licensees might have equal opportunities of bringing evidence before the justices, and that the justices might be thus enabled to decide such cases with perfect justness and fairness.

At the conclusion of the meeting the justices instructed their deputy clerk to serve formal notice in each case, requiring the licensee to attend in person at the adjourned licensing meeting, and to state the grounds of objection, which were based on the report of the committee, and such notices were served accordingly.

In the case of ten of the licensed alehouses notices of objection were also given by Mr. Hayes.

At the commencement of the adjourned licensing meeting on the 14th March, counsel on behalf of the holders of licences who had been served with notice of objection objected that the justices themselves, sitting at the general annual licensing meeting, could not, under sect. 42 of the Licensing Act 1872, be objectors to the renewal of licences. It was further objected that all and every the justices who had been parties to the service of notices of objections to renewals were disqualified from sitting and adjudicating upon the grounds: (1) That such justices were in fact the prosecutors or complainants, and could not adjudicate in their own cause; (2) upon the general ground of "bias" in the legal sense, arising from their resolution, which was either a resolution not to renew a particular licence or a resolution not to renew any of the licences in the district; (3) upon the ground of bias in consequence of having received and acted upon the report of the majority of the committee as to the proposed reduction of licences in the division, and having been thereby influenced by statements not upon oath.

There was a further objection in respect of Mr. Bentall, one of the justices, on the ground that he was present at a meeting of the Surrey Congregational Union at which certain resolutions as to the renewal of licences had been passed. It appeared that Mr. Bentall did not speak or vote upon the resolutions, and that, when objection was taken to his presence on the bench, he at once retired.

The justices, after consideration, overruled the objections, and proceeded to hear the cases.

In his affidavit the chairman of the justices stated that the reasons which actuated him, and which he knew also influenced his colleagues, were that the justices had arrived at no previous decision whether to renew or not to renew any of the licences in the district, and that in causing notices requiring the personal attendance of licensees to be served they were not in any way taking sides or committing themselves to any particular view as to the propriety or otherwise of renewing any licence, but had merely taken the steps which the statute had imposed upon them of putting matters in proper trim for fully considering, after due notice to the applicants, each case upon its merits, and upon sworn evidence, which alone they intended to have regard to.

The justices proceeded to hear the evidence on oath in the several cases.

Mr. Hayes was represented by counsel, who conducted the case for the opposition in the cases with respect to which Mr. Hayes had given notice of objection.

In the cases in which notice of objection had been given only by the justices the affidavits in support of the rules stated that the chairman of the justices conducted the case for the opposition and called and examined witnesses in support of the objections. This was denied by the chairman in an affidavit in reply, according to which what actually took place was that, when the cases were called on, the superintendent of police, following the course of procedure adopted in the preceding cases, stepped into the witness-box and gave the bench testimony upon oath within the grounds stated in the notice of objection served upon the applicant. The chairman, on behalf of the bench, put some supplementary questions to him, and he was then cross-examined by the advocate for the applicant, who, at the close of the superintendent's evidence, conducted the case of and called evidence on behalf of the applicant.

In the result the justices refused to renew nine licences.

The chairman of the justices stated in his affidavit that, in arriving at his decision to refuse the renewal of the licences in question, he did not entertain or take into consideration, nor was his decision based upon or affected by any evidence, matter, or thing save the evidence given upon oath and the admissions made in open court during the hearing of the applications.

The Licensing Act 1872 (35 & 36 Vict. c. 94) provides as follows:

Sect. 42. Where a licensed person applies for the renewal of a licence the following provisions shall have effect: (1) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices to attend. (2) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holders not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. (3) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. Subject as aforesaid licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore.

The Licensing Act 1874 (37 & 38 Vict. c. 49) provides as follows:

Sect. 26. Whereas by section forty-two of the principal Act it is enacted that a licensed person applying for the renewal of his licence need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend: Be it enacted that such requisition shall not be made, save for some special cause personal to the licensed person to whom such requisition is sent. It shall not be necessary to serve copies of notices of any adjournment of a general annual licensing meeting on holders of licences or applicants for licences who are not required to attend at such adjourned annual general licensing meeting. A notice of an intention to oppose the renewal of a licence served under section forty-two of the principal Act shall

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not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed.

May 1 and 2.—*F. Low*, K.C. (*Hohler* with him) for the justices (except Mr. Gould) showed cause.—The two important questions of law raised in the case are whether, under the circumstances disclosed by the affidavits, the justices were entitled to be objectors to the renewal of the licences, and whether, if they were so entitled and if they did in fact object, they were entitled to sit and adjudicate on the applications. There is this preliminary point: The general rule in all cases of *mandamus*, even in licensing cases, has always been that a *mandamus* is not available where there is another effective remedy. This present case goes further than that, because, not only is there the effective remedy of an appeal to quarter sessions under sect. 27 of the Licensing Act 1823 (9 Geo. 4, c. 61), but the parties are actually pursuing it. The decision of the justices was given on the 27th March; by the 1st April all the necessary steps had been taken to bring an appeal to the next quarter sessions, and after that, on the 15th April, these rules were obtained. Under these circumstances appeal is the proper remedy, and *mandamus* is not applicable:

Reg. v. Bristol Justices, 68 L. T. Rep. 225;

Reg. v. Smith, L. Rep. 8 Q. B. 146.

The appeal to quarter sessions is a rehearing, and if the quarter sessions came to the conclusion that the parties had not a proper hearing below, the case could have been tried. The parties have got the two remedies; they have elected their remedy of appeal, and by bringing their appeal they have waived their right to come for a *mandamus*:

Reg. v. Kent Justices, 44 J. P. 298.

They might have applied for a writ of prohibition or *certiorari*. So much for the question of form. As to the question of substance, it comes to this—whether sect. 42 of the Act of 1872, as amended by sect. 26 of the Act of 1874, has so cut down the discretion of justices with regard to refusing renewals that they are unable to exercise their discretion unless they are set in motion by some outside objector. Under the proviso in sect. 42, sub-sect. 2, upon which this case really turns, the justices themselves can take the objection. The construction of the statutes, the case of *Sharp v. Wakefield* (64 L. T. Rep. 180; (1891) A. C. 173), especially the judgment of Lord Hannen therein, and the other cases show that, but for sect. 42, the justices have as absolute a discretion in granting or refusing a renewal as in granting or refusing a new licence. It was clearly the opinion of Lord Hannen that sect. 42 was only a matter of procedure, and that it was not intended to cut down the discretion of the justices so as to prevent them from exercising the powers they previously had unless they were put in motion by somebody else. It is said that the words in sub-sect. 2 “on an objection being made” must mean an objection made by some other person to the justices, and that an objection to be good could not be made by the persons to whom it was to be made. The judgment of Hawkins, J. in *Reg. v. Anglesea Justices* (65 L. J. 12, M. C.) does not really support that view. The words “on objection made” do not cut down their general powers. The applicants cannot say that, because the justices have given them notice, and have put in

the notice the grounds of objection, therefore the justices have made themselves litigants and cannot adjudicate. It cannot be said that because the justices have obtained these reports and have inspected the houses they had so prejudged the matter that they are disqualified from acting. The matters in these reports were all matters proper for the justices to inquire into and to have before them, and they were before the justices not as sworn evidence, but as matters with respect to which they ought to make inquiry before acting. Objections can be taken by the justices themselves. That has been expressly decided in *Baxter v. Leche* (79 L. T. Rep. 138), and there are dicta to the same effect in *Reg. v. Farquhar* (L. Rep. 9 Q. B. 258), *Reg. v. Merthyr Tydvil Justices* (14 Q. B. Div. 584), *Reg. v. Eales* (42 L. T. Rep. 735), and in the opinion of Sir Edward Fry, sitting as chairman of licensing sessions: (see 64 J. P. at p. 642). Assuming that the justices could take the objections, and that the persons were properly before them by notices duly given, there was nothing to disqualify the justices from adjudicating in the cases. With regard to Mr. Bentall, he did not sit and he did not adjudicate in any of the cases. He also referred to

Boulter v. Kent Justices, 77 L. T. Rep. 288; (1897) A. C. 556, at p. 569;

Reg. v. Sharman, 78 L. T. Rep. 320; (1898) 1 Q. B. 578;

Reg. v. Sunderland Justices, 85 L. T. Rep. 183; (1901) 2 K. B. 357;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. London County Council; Ex parte Akkredyk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190; and sect. 28 of 9 Geo. 4, c. 61.

Cyril Dodd, K.C., for one of the justices (Mr. Gould).—Mr. Gould has only one object in appearing—namely, that the proper procedure in these licensing cases should be laid down and followed. He therefore neither supports nor shows cause against these rules.

Avory, K.C. and *Stimson* for the applicants in support of the rules.—With regard to the preliminary objection that the applicants have lost their remedy by *mandamus* by giving notice of appeal, the giving of that notice was a matter of precaution, because if they had waited for this application before giving notice of appeal they would have been out of time for appealing and would have lost their remedy. They are entitled to a *mandamus* unless their remedy by appeal is as full as the one they now seek. It is not so, as one of the grounds on which the *mandamus* is asked for is that the court was improperly constituted. That objection would not be open on the appeal, as the appeal would be a rehearing. There are several cases which show that there may be a *mandamus* although notice of appeal has been given:

Reg. v. Farquhar (*ubi sup.*);

Reg. v. Howard, 60 L. T. Rep. 960; 23 Q. B. Div. 502;

Reg. v. West Riding Justices, 21 L. T. Rep. 490; L. Rep. 5 Q. B. 83.

Notice of appeal was given in this case not for the purpose of prosecuting the appeal, but because it was the only means of keeping the houses open. There is no provision in the Licensing Acts for getting permission of the excise or for keeping the houses open pending an application for a

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mandamus. It can only be done by giving notice of appeal, and that is also an answer to any suggested remedy by prohibition or *certiorari*. [Lord ALVERSTONE, C.J.—We do not think that the giving notice of appeal is any bar to this application for a *mandamus*, or that the applicants by giving notices of appeal have lost their remedy here. It is only a question which would affect our discretion if we thought there ought to be a *mandamus* on other grounds.] The substantial question in the case is, whether justices who have themselves given notice of opposition to the renewal of a licence and have collected information and have identified themselves with the opposition to such renewal, can after doing all that adjudicate upon the case. It is submitted that they cannot do so. It is immaterial whether in fact they were biased. The question is, whether the circumstances are such as to give rise to a reasonable suspicion that they might have been biased, and the more absolute the discretion of the justices the more necessary is it to be careful that they shall not be biased beforehand or identified with either side. Until the decision of Hawkins, J. in *Reg. v. Anglessa Justices* (*ubi sup.*) this question had never been discussed in any of the cases as to the right or power of the justices, who have themselves given notice of opposition, to sit and adjudicate. It is proposed to cite only the cases which apply to justices who are not sitting in a strictly judicial capacity in a court, but are exercising administrative functions though discharging a quasi judicial duty. The case which lays down those principles most clearly is the case of *Leeson v. General Council of Medical Education and Registration* (61 L. T. Rep. 849; 43 Ch. Div. 366), where the General Council held an inquiry as to the conduct of the plaintiff on a charge preferred by the Medical Defence Union. Twenty-nine members of the council were present, two of whom were members of the Defence Union which had preferred the charge, but neither had anything to do with making the complaint against the plaintiff. Cotton and Bowen, L.J.J. held that those two members were not disqualified from acting; whereas Fry, L.J. held that they were. The decision of Sir Edward Fry sitting at licensing sessions, which has been referred to, apparently only goes to the extent that the mere fact of justices having given notice of objection does not disqualify them, and he had not in his mind any such case as the present. There is all the difference between a justice getting up in court and saying: "I object to the licence, let the case be adjourned," and his doing what was done in this case. If he does more than object, as, for instance, if he collects the evidence, or follows up that notice of objection in open court by serving the document, which the section clearly contemplates is to be served by some third party, then he is disqualified. Even if the statute contemplates that the justice may object in open court, it also contemplates that the notice of objection should be served by a third party: (see sect. 42). Since *Sharp v. Wakefield* (*ubi sup.*) it has been held that the burden of proof is on the opposition to the renewal (*Evans v. Conway Justices*, 82 L. T. Rep. 704; (1900) 2 Q. B. 224), and unless an objection is made the licence must be renewed. A notice for some cause personal to the man himself (see *Sharp v. Wakefield* (*ubi sup.*))

must be served, and the justices can only adjourn on an objection being made:

Res v. Kingston Justices; Ex parte Davey, 86 L. T. Rep. 589.

The justices in this case made themselves parties to the litigation. They not merely gave notice of objection, they went very much further; they instructed their clerk to give the notice of opposition contemplated by sub-sect. 2 of sect. 42 and the ground of the opposition, and they both collected evidence themselves, and after they gave the notice they instructed their clerk to collect the necessary evidence to support it. They were therefore disqualified:

Allinson v. General Council of Medical Education and Registration, 70 L. T. Rep. 471; (1894) 1 Q. B. 750;

Reg. v. Antrim Justices, (1901) 2 Ir. R. 133;

Reg. v. London County Council; Ex parte Akkerdijk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. Ferguson, 54 J. P. 101.

Lord ALVERSTONE, C.J.—The points raised in this case are undoubtedly of very general importance. They have been most admirably argued before us on both sides, and for myself I do not think I should gain anything by further considering the matter, and I am prepared to express the opinion at which I have arrived. The rules were moved upon four grounds. First—a very important ground—that the justices who are members of the tribunal cannot raise the objections contemplated by sect. 42, sub-sect. 2, of the Licensing Act 1872; secondly, that, if they do so, they must not adjudicate upon the cases in respect of which they have given notices; thirdly, that in this particular case the justices had obtained information upon which they acted contrary to the provisions of sect. 42 of the Act; lastly, a special objection to a justice named Mr. Bentall, on the ground that he had taken part in the proceedings, which would undoubtedly, it was said, invalidate his action or any judgment to which he was a party. The first and most important thing is, I think, to lay down certain general principles which are derived or can be deduced from the cases, and then consider what are the rights of the justices and of the parties in regard to this matter, having regard to these general principles. I think it is quite clear that the justices can only act upon sworn evidence given before them, and if in any case it appeared to the court that the justices had acted upon information obtained otherwise than through the evidence, their proceedings would be, and ought to be, set aside. I think it is further equally clear, not so much from the decisions as from the legislation and the general principles applicable to the state of circumstances with which the legislation is dealing, that it would not invalidate the proceedings if the justices had become acquainted with what I may call the general circumstances of the case, and made use of that information to bring to the minds of persons who were before them the points that they had to deal with. There is only one other point which I wish to mention, because it seems to me an important one—namely, that, if in any particular case a justice has private information in regard to that particular case, he ought not, in my opinion, to sit upon that case, nor

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ought he to do anything except go into the witness-box and give evidence; or, in other words, if a case ever arises of a justice having particular knowledge in regard to a particular individual or against a particular individual, or with regard to a particular house, that knowledge can only be made available or can only be utilised for the purpose of the case by means of his giving evidence as a witness, subject to cross-examination in the ordinary way. I mention these broad principles first, because I think it right to make it clear that I bear them in view when I express the opinion that I have formed as regards what the justices did in this case. I will state as briefly as I can, but sufficiently fully, what I really understand the justices to have done in this case. A year before the attention of the Farnham Bench had been called to the fact that there was a large number, or that there was considered to be, or might be, too large a number of licensed houses for the population in their district, and preparatory to the proceedings which gave rise to this question, information was collected by the committee which, in my opinion, would be of value for the purpose of directing the minds of any tribunal that had to deal with it to the question or the incidents in regard to various houses, which would be of importance when the matter came to be considered, and the justices have not shrunk from stating that they did, before they sat, go round and make themselves acquainted with what may be called the surrounding circumstances of each of these particular houses. I think it is going a great deal too far to say that applying their general knowledge of the district to the cases that they were going to sit upon, or applying the information so obtained, would invalidate the proceedings, provided that everything on which they wish to act or intend to act, is brought to the minds of the persons against whom it can possibly be used. That being so, the justices took a course to which at present, subject to the legal objection with which I will deal in a moment, I think no reasonable objection can be taken. They thought it right, when they were dealing with the question of there being too many licensed houses in the district, that the case of every house should be investigated, and certainly the justices in this case, if their affidavits are taken as representing the facts—and the contrary is not suggested—did investigate individually each case, and gave no decision until after the cases had been investigated. Therefore that they acted upon the principle of fairly considering the requirements of the district, and the suitability of each particular house, I think nobody can question. In that state of circumstances, Mr. Avory's first objection arises. It is a very important objection, and one which I should have taken time to consider if I did not think it was covered by authority, but it is a question upon which I myself have no real doubt. He says justices cannot either themselves give, or cause any person to give on their behalf, the notice of an intention to oppose the renewal contemplated by sub-sect. 2 of sect. 42. He does not dispute that they can adjourn the case on objection being made, and that they can hear the case ultimately when the holder has been called to attend, without the previous prescribed notice having been given; but he says "on an objection being made" must mean made by somebody to

the justices, and not made by the justices themselves. That undoubtedly raises a very important point, which was considered by Hawkins, J. in *Reg. v. Anglesea Justices* (*ubi sup.*). There has for a long time been a view, whether judicially decided or not, that justices could raise objections to licences being renewed. That they ought to be able to do so, having regard to their functions and duties under the Licensing Act, I myself have no doubt at all. That there may be many cases in which the liquor traffic cannot be properly controlled unless justices can raise such objections I think there is no doubt, but, as I have said, I do not found it upon general principles. I refer to the decisions or opinions as they have been expressed from time to time. In the year 1874, in the case of *Reg. v. Farquhar* (L. Rep. 9 Q. B. at p. 261), Blackburn, J. said: "Assuming that the justices might of their own knowledge make the objection themselves, and I do not say that it is not impossible that they might, yet it is clear that they ought not to have decided at once, because no notice had been given to the applicant, and he was entitled to be heard." It is obvious, whatever the actual language used, that Blackburn, J. thought that the justices might be able to give a notice, and when the matter arose in the case of *Reg. v. Merthyr Tydvil Justices* (*ubi sup.*) Smith, J. put the construction upon the case of *Reg. v. Farquhar* (*ubi sup.*) which I have referred to. He said: "The case of *Reg. v. Farquhar* (*ubi sup.*) would seem to show that the objection mentioned in the proviso may be made by the justices themselves"; and in the case of *Reg. v. Bales* (*ubi sup.*) Cockburn, C.J. took the same view. Therefore there was during a series of years a considerable amount of opinion—though I agree no actual decision—to the effect that the justices could raise the objections. When the matter came before Hawkins, J. in the case of *Reg. v. Anglesea Justices* (*ubi sup.*) he certainly did use expressions which amply supported Mr. Avory in urging before us that the opinion of that learned judge was that the objection must be raised by a third person. He used the expression (65 L. J., at p. 15, M. C.): "The language of the proviso, 'on an objection being made,' can only mean made to the justices." It is true that that does not cover the case of an individual justice making an objection, and then ceasing, so to speak, to act as a justice. But I think it is only fair to say that the argument of Mr. Avory was well founded in this, that the opinion of Hawkins, J. in that case certainly did seem to come to this, that the justices could not raise an objection. Then came the last case, the case of *Baxter v. Leche* (*ubi sup.*), in which there is an express decision of Wills and Kennedy, J.J. to the effect that the justices may raise the objection, and, having raised it, may adjourn and give notice. It would be perfectly true to say that in that case the justices did not give the grounds on which they were going to entertain the objection; but it certainly seems to me to be very much fairer to those whose licences were going to be questioned that they should be told what objections were going to be raised rather than that they should not. Therefore that particular argument seems to me not to affect the weight of that authority of *Baxter v. Leche* (*ubi sup.*), in which I entirely concur, and which is binding upon this

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court. Then there is, I agree, only a matter of opinion, but it seems to me an opinion which contains very weighty reasoning indeed, and that is the reasoning of Sir Edward Fry in the case cited from the justice of the peace (see 64 J. P., p. 642), where he was only giving his opinion after consideration as chairman of quarter sessions; and it is all the more weighty because of the strong line which he had taken, when Fry, L.J., in the case of *Lesson v. General Council of Medical Education and Registration* (*ubi sup.*). Therefore I come to the conclusion that justices can raise these objections under sect. 42, and that it does not invalidate the proceedings that a notice has been subsequently given by them. But it is said by Mr. Avory that, that being so, even then they must not sit and adjudicate. That contention seems to me to raise the fundamental question, What is the position of a person who objects? Certainly, if we take the language of Lord Herschell in *Boulter v. Kent Justices* (*ubi sup.*), in its natural sense, the objector is not in the position of a party, and it seems to me that, looking to the duty which the justices have to perform, and the considerations that ought to affect them, it is not right to regard a person who objects on the grounds which have been raised in this objection as what I may call a personal opponent of the person whose licence is in question, or as a party to any litigation. It is in that respect that I think that the fact that the justices had given notice of objection does not bar them from subsequently acting upon the proceedings, assuming that they acted without any suggestion of improper bias, or of having acted on improper materials. Therefore I now answer the question which I left open in the case of *Rex v. Kingston Justices; Ex parte Davey* (86 L. T. Rep. 589), where I merely indicated my opinion that the question would at some time or other have to be decided as to whether or not the justices could give the notices of objection. Certainly in a case where the justices were of opinion that there were too many licensed houses in the district, and where the real question to be considered by them was how those houses were to be reduced, it would be very unfortunate if the mere fact that notices of objection were given by the justices in order that the whole question might be fairly and impartially considered should prevent these justices from sitting and acting in the case. Mr. Avory has contended in support of these rules that if the justices have prejudged the question from the point of view of having previously made up their minds that there ought to be a reduction in the number of licences, their judgment would be affected. I am not prepared either to agree with, or to dissent from, that argument. It certainly is not this case. But where it is seen that the justices have approached the question of whether there should be any reduction, and, if so, what reduction, by raising the question with regard to every licence in the district, it seems to me to be an entirely different consideration altogether. I will deal shortly with the third objection, that the justices have acted upon information obtained beforehand and not given in evidence. I asked to see the notes in the only case which was really argued in detail before us, and which is agreed to be typical of the whole, and I find that all the points on which the objec-

tions to the house could be founded were proved in evidence in the case of the Queen-street Tavern, of which Mrs. Smith is licensee. The justices have all said that every substantive matter was proved in evidence, and that they have not acted in any single case except upon the evidence. I think, if I remember rightly, one of the justices says that they heard each case separately, that notes were taken separately, and in each case where necessary the notes of the evidence were read over to them before they came to their decision. Therefore it seems to me impossible to say in fact that there is any foundation on which we ought to come to the conclusion that the justices acted, in coming to their decision, upon information which they obtained elsewhere. It must be distinctly understood that I express my opinion without any hesitation that if they had so acted in getting information they would not be entitled to use any information, or act upon anything, which was not evidence given on oath before them. Lastly, there is the objection that is taken with regard to Mr. Bentall, and I think that ought to be stated so that the facts may be understood. The affidavit on which the rule was moved has stated a resolution in the chapel: "That this meeting of the Surrey Congregational Union notes with satisfaction the efforts of the Farnham magistrates to reduce the number of licensed houses in this ancient town, which are in excess as to number of population with most other towns in Surrey." I agree that this seems a very harmless resolution and one which in itself would not indicate bias. But it is said in the same affidavit that a formal objection was taken to any justices sitting who had attended the meeting of the Surrey Congregational Union on the 5th March 1902. Mr. Bentall says in his affidavit that he was not a member of the Congregational Union, that this being a public meeting and the resolution not having any direct reference to any particular action or any particular house, when the objection was first taken by Mr. Avory it did not occur to his mind that it applied to him; but upon the second day, when counsel expanded this particular objection, he understood it, and he at once got up and retired and took no further part in the proceedings. Then the applicants for renewals went on. It seems to me that it would be going far beyond any case that has ever been decided to hold that in the case where the magistrate retires, and the parties go on with the case, they can afterwards raise the objection. I entirely agree with what has been put forward by counsel in support of these rules, that if this had not been known, if no objection had been taken, but it had afterwards been discovered that a magistrate who had taken an active part or a part in promoting a particular side, had sat, the fact that he had so sat would or might have vitiated the proceedings. With regard to the authorities that counsel for the applicants referred to—namely, *Reg. v. London County Council; Ex parte Akkersdyk* (*ubi sup.*), *Reg. v. Fraser* (*ubi sup.*), and *Reg. v. Ferguson* (*ubi sup.*), they are all, in my opinion, illustrations of the principle that if a person has taken sides in the matter in which he is called upon or purports to act judicially, he cannot be allowed to act. In my opinion they do not assist the applicants in this case in the view I have taken of the facts. I have therefore come to the conclusion that none of the four grounds on which these rules were

moved prevail, and that the rules *nisi* should be discharged.

DARLING, J.—I am of the same opinion. In regard to the point that the magistrates had made up their minds to reduce these licences, because they had come to the conclusion, with many other people in the neighbourhood, that there were too many public-houses within their district, I cannot see that there is any objection whatever in that. They must have had some opinion in the matter. They must have had one of three opinions. They must have thought that there was exactly the right number of houses, in which case if any person asked for a new licence it might be said that the magistrates were biased against that, because they thought there were already the right number, or they must have thought there were too many, or they must have thought there were too few. In either case it might be said, if it were proposed to renew a licence or to grant a new licence, that because the magistrates had got an opinion on the matter that there were just enough licences, that there were too many, or that there were too few, they had made up their minds and could not consider the question. To my mind the Legislature has confided this licensing to the magistrates because they are persons in a position to bring to bear upon the question of granting licences their experience of the neighbourhood and of the necessities of the neighbourhood. They are not to decide, if evidence is brought before them, regardless of the evidence; but when it is provided that licences should be renewed, as I say, the justices must come to the licensing committee with some sort of opinion on the question such as I have indicated. Coming there with the opinion which they held, that there were really too many licensed houses in this neighbourhood, and that it would be a good thing if there were fewer, and contemplating, as they must have done, that if a person asked for a renewal of a licence it might very well be that they would grant it, or it might very well be that they would refuse it, it is said that they could not exercise any kind of judgment on the matter unless somebody, who might be a person who knew nothing whatever about it, got up and came before them and said: "I object." The sort of person who gets up and objects is very easily obtained if he is wanted. It is perfectly clear, I think, that the magistrates at licensing sessions have a discretion. If I wanted any authority for that—and it is to be found in many places—I should take it from no place more readily than from what was said by Sir Edward Fry quite lately at the Long Ashton Licensing Sessions for the county of Somerset, where he said: "The duty vested in licensing justices is a discretionary one," and then he went on to say that it had been objected that the discretion was contingent upon an objection taken by a third person, and that the justices could not take an objection for the purpose of giving themselves an opportunity of exercising that discretion. He said: "It seems an unreasonable construction of sect. 42 of the Licensing Act 1872 to suppose that the magistrates were absolutely deprived of any opportunity of exercising that discretion unless some third person gave them that opportunity. They thought they might take an objection for the purpose of giving themselves that

opportunity, and by so doing they did not express any conclusion or any bias beyond thinking it a question that ought to be inquired into." This was said as to what the justices did in the particular case with which he was then dealing. That, I think, states the law accurately, and better than I can state it myself, and for that reason I desire to adopt those words. To my mind it also carries the other point that the justices, who take the objection, may sit and hear the application for the licence, because that is what happened in that case, and that was how the question arose. When the justices came to hear applications for licences, they were objected to on the ground that the objectors were the justices who were trying the case, and Sir Edward Fry having said what I have quoted, the justices went on to hear the applications for licences. Therefore, to my mind, it is really not necessary to dwell any more upon that point; in fact, the two points are only one, because there is nothing in the point that the justices may not object unless it is coupled with this: "and proceed to hear the application for the licence," as the proposition that the justices may not object could not be sustained. It would not be a good answer to say you cannot object because you are a justice. Therefore it is one point, and not two: Can a justice formally object for the purpose of allowing himself to exercise his discretion, and then proceed to hear the application for a licence and exercise his discretion? I think what I have read from Sir Edward Fry's opinion is enough to show that he can. It follows upon the distinct authority of *Baxter v. Leche* (*ubi sup.*), which has decided this point, and for *Baxter v. Leche* (*ubi sup.*) there is authority which has been alluded to by my Lord in the various cases that he has mentioned. The only thing that I know of to the contrary effect is the judgment of Hawkins, J. in the case of *Reg. v. Anglesea Justices* (*ubi sup.*). That decision cannot, to my mind, be reconciled with these other cases. It was not a judgment of the Divisional Court; it was only the considered judgment of a single judge, and therefore I am at liberty to say what I think about it, which is, that it was wrong.

CHANNELL, J.—I entirely agree. I think the difficulty here arises almost entirely from the fact that the licensing justices have both administrative functions and judicial functions, and that, as so often happens when men are put into that position, it is extremely difficult to divide exactly what are their judicial functions from those which are their administrative functions. I think that the licensing justices are clearly entitled to go in their own way to make themselves acquainted with the character of their district, with the amount of public-house accommodation that there is existing in it, and all matters of that sort. A large number of the justices—local gentlemen—would probably have the information. Justices who have only recently come into the district are fully entitled to inquire, and not judicially to inquire, into the general circumstances of the neighbourhood to fit them for performing their licensing duties, to give them a knowledge of the place and the wants of it, and whether the public-house accommodation is too much or too little, and things of that sort. When it gets to the rights or quasi rights of individuals about renewals—whether a particular

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individual should or should not have his licence renewed—then it is a different matter; it then becomes a judicial matter. In that matter it seems to me the justices must act judicially. The proceeding is at any rate *quasi* judicial, and the justices must not act upon information acquired behind the backs of the parties without giving the parties the fullest information to enable them to understand what it is the justices are acting upon, and without giving them an opportunity of inquiring about it and seeing whether they agree with it, or what answer they have got to make, or what they say about those facts. There is nothing to my mind, therefore, objectionable in the general character of the inquiries which these magistrates made for the purpose of ascertaining whether or not the suggestions made to them by the other magistrates in the county, that in their district there were a great deal too many public houses, were correct. The way in which they entered into that inquiry shows what a full and careful report it must have been. In the course of that report incidentally the persons who made it furnished information not merely on the general question, upon which I think the inquiry was not a judicial one, but they also furnished information which would be useful when they come to the judicial inquiry, and it became a matter of considerable difficulty how that information so acquired could be properly used. So long as the information was only supplied to the magistrates for the purpose of their not acting upon it, but for the purpose of their using it to make inquiries when the different cases of these applicants for renewals came on, I think it was unobjectionable. It is a little doubtful, no doubt, and a little dangerous, because it was so very likely to be misused; but in this case, as far as I can see, the information really was used merely for the purpose of making full inquiries into each of the cases when it came on, and deciding each of those cases judicially and according to the evidence before the court. That disposes of a certain portion of the objections to these proceedings. There remains only the question about the right of the justices themselves to be the objecting parties, and their right, if they are the objecting parties, to sit. I think the difficulty upon that point arises partly from the different view that Mr. Avory apparently takes, and which questions I asked him in the course of the argument showed that he does take, as to what an objection means in this section. I take the view, about which I intended to have said something more fully, which has been put quite clearly by my brother Darling, in what he has said in reference to Sir Edward Fry's opinion of the matter, and I do not think I can improve upon that. Substantially it is that the objection taken by the justices is not to make the justices themselves parties to an opposition in the sense that they are opposing parties to the person who is requiring his licence, but is simply in the nature of a notice that they propose to exercise their discretion in that matter, and that it is done for the purpose of enabling them to exercise their discretion in that matter. Those, I think, are the substantial points in this case, and I do not think it is necessary to add anything further to the matter.

Rules discharged with costs.

From this decision the licence-holders appealed.

June 14, 16, and 17.—*Danckwerts*, K.C. and *Horace Avory*, K.C. (*Stimson* and *W. O. Willis* with them) for Jane Smith, the licence-holder in the first appeal.—The justices cannot be themselves objectors as well as judges in the case of an application for a renewal of a licence. The question depends on sect. 42 of the Licensing Act 1872. It could not have been in the contemplation of the Legislature that justices might be objectors under that section, for the justices are the only persons to whom an objection can be made; they are the only persons required to take action upon it, and they are the only persons who are to hear and determine it. If justices were allowed to adjudicate upon their own objections made to themselves, it would be a departure from the first principles of justice. See the judgment of *Hawkins, J.* in

Reg. v. Anglessea Justices, 65 L. J. 12, M. C.

The point has been discussed in other cases, but it became unnecessary then for the court to decide it:

Reg. v. Farquhar, L. Rep. 9 Q. B. 258;

Baxter v. Leche, 79 L. T. Rep. 138.

The opinions that may have been expressed in those two cases are therefore not to be relied on. The power confided to the justices in these matters is to be exercised by them "judicially." That has been laid down by Lord Halsbury in the House of Lords:

Sharp v. Wakfield, 64 L. T. Rep. 180; (1891) A. C. 173.

If it was possible for justices to be objectors, then those justices who make objections ought not to remain on the bench when their objections were being heard. In the case of an application for a renewal of a licence, the application must be granted unless an objection has been made, and the burden of proof is on the objector:

Evans v. Conway Justices, 82 L. T. Rep. 704; (1900) 2 Q. B. 224.

A justice who has made an objection ought to go into the witness-box, instead of remaining on the bench:

Rez v. Antrim Justices, (1901) 2 Ir. R. 133, 162.

Here all the justices were biased. They came to the bench with a determination in their minds, before they had heard any evidence, to refuse some of the applications for a renewal. They had also previously collected evidence against some of the licensed houses, and in this way they were prejudiced against them. They referred also to

Reg. v. Eales, 42 L. T. Rep. 735;

Reg. v. Merthyr Tydvil Justices, 14 Q. B. Div. 584;

Boulter v. Kent Justices, 77 L. T. Rep. 288; (1897) A. C. 556;

Reg. v. London County Council; Ex parte Akkerydyk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190;

Royal Aquarium and Summer and Winter Garden Society Limited v. Parkinson, 66 L. T. Rep. 513 (1892) 1 Q. B. 431;

Leeson v. General Medical Council, 61 L. T. Rep. 849; 43 Ch. Div. 366;

Allinson v. General Medical Council, 70 L. T. Rep. 471; (1894) 1 Q. B. 750;

Reg. v. Sunderland Justices, 85 L. T. Rep. 183; (1901) 2 K. B. 357;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. Walsall Justices, 24 L. T. Rep. O. S. 111;

Reg. v. Sylvester, 5 L. T. Rep. 794.

between the passing of the Act and the making of the award. The fences had been made before the award, and the declaration of the award as to the depasturing of the herbage of the roads was made after the fences had been made. I think that that provision was made as ancillary to the main purpose of the Act with respect to drainage. If the right could be given to the surveyor of highways to allow horses and cattle to be put to pasture upon the roads, that would be contrary to the main purpose of the Act of Parliament. The owners of the allotments could not have agreed that the roads should be so used and have granted the right to use them in that way; a grant of that kind would not have been a good grant, because the Act and the award made it unlawful to depasture horses and cattle upon the roads, which would have the probable effect of injuriously affecting the drainage. It has been contended for the respondents that, looking at the provisions of the Act and the award, they were really intended to be either only for the benefit of the adjoining owners in respect of their obligation to keep the fences in repair, or else mere temporary provisions for the period during which the allotments were being got into working order and the fences were growing and for no longer time, and that therefore there was nothing in the Act and the award to prevent horses and cattle being depastured on the roads afterwards. It seems to me that it cannot be said that the provision which prohibits the depasturing of horses and cattle on the roads was made for the benefit of the allottees only; that provision was a part of a complete scheme of drainage which was to continue permanently. The drain along this road is an important drain in that scheme. It has been argued that this provision was for temporary purposes only, chiefly upon the authority of *Haigh v. West* (69 L. T. Rep. 165; (1893) 2 Q. B. 19). In that case the Act of Parliament and the award were of a very special character, and were passed and made quite *ad hoc* from the Act and award in the present case. The land in that case was not in the fens at all, and the provisions of the Act and award there in question were construed by the court as being limited to the period before the main provisions of the Act came into force—that is, while the fences were growing. In the present case the provision in question came into force after all the preliminary arrangements had been made, ten years after the Act was passed. It is impossible to infer that the maintenance of the drains in proper working order, and the exclusion of cattle and horses from the roads, was only a temporary purpose. Who could be the grantor and who the grantee in a presumed grant? It was difficult for the respondents to answer that question. We cannot infer an illegal origin when we are seeking for a legal origin to justify a long-continued practice. A grant cannot be presumed which would permit a thing to be done contrary to statutory duties or prohibitions: (*Manchester Ship Canal Company v. Rochdale Canal Company*, 81 L. T. Rep. 472; 85 L. T. Rep. 585). If the scheme of this Act of Parliament and award is that which I have stated, the suggested grant would be contrary to the Act of Parliament. A grant must be from some person to some other person. It is said that the suggested grant could have been made to the surveyor of highways; but

he was not a corporation. That difficulty, however, might perhaps be got over. Then it is said that the grant might have been made by the owners of the soil releasing the surveyor of highways from the restriction upon his power of letting the pasturage of the roads. If the object of the Act and award was that which I have stated it to be, the owners could not waive that restriction and grant to the surveyor of highways an enlarged right of pasturage, contrary to the provisions of the Act and award. It was suggested that the grant might have been made by all the inhabitants of the parish; but the general scheme was not for their benefit alone, and therefore they could not release the surveyor of highways from the restriction. This was, indeed, a public Act passed for public purposes, the public being larger than the inhabitants of this particular area. It seems to me that, if we are to presume anything, we must presume an Act of Parliament. It is, however, impossible to presume that a public Act of Parliament has been passed since 1822, considering the way in which Acts of Parliament are now recorded. Therefore that presumption is impossible. It is said that the plaintiff is under a personal incapacity to bring this action because he himself had been a party to letting the herbage of this road for the purpose of depasturing horses and cattle, and had also hired it himself for that purpose. When he so acted, however, he did not know of the provisions of the Act and the award; and he did not take any part in the letting which is now complained of. I think that these facts do not affect the question. They are not within any of the conditions laid down by Fry, L.J. in *Russell v. Watts* (50 L. T. Rep. 673; 25 Ch. Div. 559, 586) as being necessary to bar a man from asserting his legal rights; there has been no misleading or alteration of the position of anyone. The plaintiff is not suing in respect of anything done during the time when he concurred in the extended user of the pasturage, but complains of acts done afterwards, and after he had objected and protested. For these reasons I am of opinion that we cannot agree with the decision of Cozens-Hardy, J., and that this appeal must be allowed.

ROMER, L.J.—I have come to the same conclusion. In the first place, on consideration of the Act of Parliament in question, I think that it is clear that the duties of the inclosure commissioners and drainage commissioners were not limited to merely draining and dividing up this fen and common. In my opinion more than that was to be done—that is, the making and preserving of a permanent system of drainage, not merely such drainage as might be required for the separate allotments, but a general scheme of drainage, so that the water might flow freely away to the sea. The owners of the allotments to be made under the Act of Parliament were not the sole persons interested. There were other rights. I think that the inclosure commissioners in their award had in view rights of a public character as to drainage, and therefore when their award was made they made permanent provisions for drainage. I think that those provisions were of a public character so that, even if all the allottees agreed together, they could not abrogate those provisions. They had no right to destroy the watercourses and ditches provided

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for by the award as an important part of the drainage. If they could deal with any of those watercourses as being unnecessary they might proceed by degrees and gradually do away with the whole system of drainage and cause the land to revert to the same condition as that in which it was before. In my opinion the allottees, if they all agreed together, could not take up that position in face of the Act of Parliament and the award. Still less could some only of the allottees interfere with the watercourses and drainage adjoining their own allotments. In my opinion all the provisions of the Act of Parliament and the award of a permanent character for the drainage of the district are such that the allottees cannot disregard, or release, or grant away the right to enforce them. That brings us to the consideration of the Act of Parliament and the award. It is conceded that the provisions of the award as to pasturage were valid. Why were those provisions inserted? I think that they were inserted for the purpose of assisting in the carrying out of the general purpose of the Act of Parliament, including the preservation of the drainage, and not merely for the protection of the adjoining owners, and that the restriction as to pasturing with sheep only was therefore intended to be permanent. This case is quite distinct from the case of *Haigh v. West* (*ubi sup.*), which turned upon the particular circumstances and the provisions of the particular Act of Parliament there in question. The pasturing of heavy cattle and horses on roads with drains, ditches, and banks by the sides would tend to destroy those drains, ditches, and banks. We can see, therefore, why the inclosure commissioners would take care to limit the pasturage as they did. As to the provision for depasturing "sound and healthy sheep," I think that that was provided not solely for the benefit of the adjoining owners; the waters from these watercourses would flow on towards the sea, and if the water was infected by unhealthy sheep that might tend to the public injury. That particular provision, I think, was inserted in the general interests. In certain cases the inclosure commissioners did grant unlimited rights of pasturage to the allottees of the land adjacent to the roads, but that was in cases where the land did not adjoin any through drain and it would be safe to allow unlimited pasturage. It follows, in my opinion, that these provisions were for the public purpose of preserving the drainage, and therefore could not be disregarded or made the subject of a grant or release by the adjoining owners, or by the inhabitants, or even by the drainage commissioners themselves. Certainly, in these circumstances, I do not see how the court can presume a lawful lost grant which would permanently free the surveyor of highways from regarding the careful limitation of the right of pasturage which was provided by the award. The defendants' case, therefore, clearly fails. The plaintiff cannot be said to have lost his rights. Acquiescence cannot deprive him of the right to say that this was an illegal act. The plaintiff's right is a legal right, which cannot be taken away unless he has so acted that it would be fraudulent conduct on his part to seek to enforce the right. There is no case of that kind made out here. Therefore the plaintiff is entitled to sue and to recover damages because it is

admitted that, failing a lost grant, or the loss by the plaintiff of his right to sue, the plaintiff has been specially injured and has a cause of action. The plaintiff therefore is entitled to damages, but an injunction is not required. This appeal must, therefore, be allowed.

MATHEW, L.J.—I think that it is necessary to add but little to the reasons which have been given for allowing this appeal. I could have understood the argument of the respondents if the allotments had been made by agreement between the persons interested. This, however, was a totally different transaction. It is impossible to read the provisions of the Act of Parliament and the award without seeing that the particular object was to convert a fen into dry land. The general scheme and the main purpose of the Act was to carry out that object. The Act of Parliament provides for commissioners being appointed to drain the land and to execute all works necessary for that purpose and, when the works were executed, to make an award. Then the functions of the inclosure commissioners were to cease, and they were to be succeeded by drainage commissioners, whose paramount duty it would be to protect the drainage system which had been established. It has been contended that this Act of Parliament and award can be got rid of by presuming a lost grant by the persons to whom this Act of Parliament applied. The Act was not, however, passed in their interests only, but in the interests of the public. The provisions of the Act and of the award were not intended to be temporary. Everything in them shows that it was intended that the drainage commissioners were to maintain the system of drainage permanently. It was argued that the presumed lost grant could be a grant by the owners of the adjoining allotments to the surveyor of highways. But the drainage commissioners could not be bound by a grant of that kind. The drainage commissioners could not be bound by it, because it would violate the provisions of the Act of Parliament and award. No lawful origin for such a grant is possible, and therefore it cannot be presumed. The conduct of the plaintiff cannot deprive him of his legal rights. What would be the extent of the suggested lost grant? Would it permit the surveyor of highways to allow persons to depasture as many cattle and horses upon the roads as they chose? That could not be. I agree, therefore, that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Clarke, Rawlins, and Co.*, for *Percival and Son*, Peterborough.

Solicitor for the respondents, *J. Matthew Voss*, for *J. W. Buckle*, Peterborough.

Monday, June 23, 1902.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

REX v. FARNHAM JUSTICES; *Ex parte* SMITH. (a)
APPEAL FROM THE KING'S BENCH DIVISION.

Licensing—Renewal of licence—Notice of objection given by justices—Disqualification of justices—Bias—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 42.

In consequence of a suggestion that the number of licensed houses in a certain district was needlessly large, the licensing justices appointed a committee out of their number to inquire into the condition, position, and circumstances of each licensed house in the district. The committee, as the result of their inquiries, drew up a report in which certain recommendations were made. The licensing justices then, by their clerk, served on all the licence-holders in the district notices of objection to the renewal of their licences.

At the hearing of the applications for renewals the justices, upon the evidence which was given on oath before them, refused to renew nine of the applications.

Held, that the giving of the notices of objection by the licensing justices did not of necessity debar them from afterwards hearing and determining the applications for the renewal of licences.

Held also, that as what was done by the justices in connection with the inquiry and the report by the committee was honestly done to enable them to secure a full investigation of the facts with no other motive than the desire of discharging properly their duties as licensing justices, and as all the formalities of sect. 42 of the Licensing Act 1872 had been complied with, there was nothing to invalidate their decisions.

THERE were nine appeals from a decision of the King's Bench Division (Lord Alverstone, C.J., Darling and Channell, JJ.) discharging rules nisi for a mandamus which had been obtained by nine licence-holders at Farnham against the Farnham licensing justices.

The licensing justices had refused applications for renewals of their licences made by the nine appellants.

The appellants thereupon obtained rules nisi for a mandamus to the justices to hold an adjourned licensing meeting to deal with the applications for renewals.

The circumstances of the case were as follows:

In May 1901 a special meeting of the justices of the Farnham division was held to consider a letter from the clerk of the peace of the county of Surrey, addressed to the clerk of the justices of the Farnham division, stating that the attention of the county licensing committee had been called to the large number of licences in the parishes of Farnham Urban and Farnham Rural; that there appeared to be one licensed house for every 155 of the population, which was largely in excess of any other parish in the county; and that the committee were of opinion that some steps should be taken whereby the licences of a substantial number of such houses should be discontinued.

At this special meeting of justices a committee of five justices, including the chairman, Mr. Howard, was appointed to consider the letter and report upon the subject referred to in it.

The committee met from time to time and considered certain comparative statistics as to population, number of licences, and other information of a general character tending to show how the Farnham division compared with other divisions in the county, and how the county compared with neighbouring counties in the matter of ratio of population to licences.

On the 13th July 1901, at a meeting of the justices, the committee made a report, which was adopted, and the committee were empowered to obtain further information as to the condition, position, and other circumstances of each licensed house in the Farnham urban district.

The committee then directed the clerk to the justices to send to the owners of licensed houses and the licence-holders in the division the following letter:

The attention of the justices of the Farnham Petty Sessional Division having been called by the county licensing committee to the excessive number of licences in the division, a fact which cannot, in the opinion of the justices, be disputed, and the justices having appointed a committee to make inquiries in connection with the matter with a view to a reduction, in the first place, of licences in the Farnham urban district where such excess is most pronounced, I am directed by the justices to so inform you, and to suggest that anything you may desire to say upon the subject addressed to me will receive their best consideration.

The committee held further meetings, and unanimously decided to inspect the fully licensed houses in the Farnham urban district. Members of the committee did inspect all the licensed houses accordingly.

Except in one instance the inquiries were made and information was obtained only from the licensee or the person actually in charge of the licensed premises at the time of the inspection, which person was in every case the wife or daughter of the licensee.

The committee made a report to the justices in which the information obtained in the inspection of the houses was included.

On the 6th Feb. 1902 the report was presented to the justices and adopted by them. Certain recommendations by the committee upon the proposed procedure at the then forthcoming general annual licensing meeting were also adopted with some modifications.

On the 1st March 1902 the general annual licensing meeting was held. The justices present included certain members of the committee above mentioned.

Before the meeting no notice of objection to the renewal of any of the licences in the division had been given.

When the first application for a renewal was reached, a Mr. Hayes rose in court and stated that he objected to the renewal of all the licences in Farnham Urban.

The chairman of the justices thereupon directed Mr. Hayes to give the requisite seven days' notice of his objection for the adjourned meeting on the 12th March. The chairman then, on behalf of the majority of the justices, made objection to the renewal of the forty-five alehouse licences in the Farnham urban district, and the applications

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for renewals of such licences were directed to stand adjourned to the adjourned meeting.

The chairman stated publicly that the reason why the majority of the justices thus raised objection to the houses was in order that every one of the licensees might have equal opportunities of bringing evidence before the justices, and that the justices might be thus enabled to decide such cases with perfect justness and fairness.

At the conclusion of the meeting the justices instructed their deputy clerk to serve formal notice in each case, requiring the licensee to attend in person at the adjourned licensing meeting, and to state the grounds of objection, which were based on the report of the committee, and such notices were served accordingly.

In the case of ten of the licensed alehouses notices of objection were also given by Mr. Hayes.

At the commencement of the adjourned licensing meeting on the 14th March, counsel on behalf of the holders of licences who had been served with notice of objection objected that the justices themselves, sitting at the general annual licensing meeting, could not, under sect. 42 of the Licensing Act 1872, be objectors to the renewal of licences. It was further objected that all and every the justices who had been parties to the service of notices of objections to renewals were disqualified from sitting and adjudicating upon the grounds:

(1) That such justices were in fact the prosecutors or complainants, and could not adjudicate in their own cause; (2) upon the general ground of "bias" in the legal sense, arising from their resolution, which was either a resolution not to renew a particular licence or a resolution not to renew any of the licences in the district; (3) upon the ground of bias in consequence of having received and acted upon the report of the majority of the committee as to the proposed reduction of licences in the division, and having been thereby influenced by statements not upon oath.

There was a further objection in respect of Mr. Bentall, one of the justices, on the ground that he was present at a meeting of the Surrey Congregational Union at which certain resolutions as to the renewal of licences had been passed. It appeared that Mr. Bentall did not speak or vote upon the resolutions, and that, when objection was taken to his presence on the bench, he at once retired.

The justices, after consideration, overruled the objections, and proceeded to hear the cases.

In his affidavit the chairman of the justices stated that the reasons which actuated him, and which he knew also influenced his colleagues, were that the justices had arrived at no previous decision whether to renew or not to renew any of the licences in the district, and that in causing notices requiring the personal attendance of licensees to be served they were not in any way taking sides or committing themselves to any particular view as to the propriety or otherwise of renewing any licence, but had merely taken the steps which the statute had imposed upon them of putting matters in proper trim for fully considering, after due notice to the applicants, each case upon its merits, and upon sworn evidence, which alone they intended to have regard to.

The justices proceeded to hear the evidence on oath in the several cases.

Mr. Hayes was represented by counsel, who conducted the case for the opposition in the cases with respect to which Mr. Hayes had given notice of objection.

In the cases in which notice of objection had been given only by the justices the affidavits in support of the rules stated that the chairman of the justices conducted the case for the opposition and called and examined witnesses in support of the objections. This was denied by the chairman in an affidavit in reply, according to which what actually took place was that, when the cases were called on, the superintendent of police, following the course of procedure adopted in the preceding cases, stepped into the witness-box and gave the bench testimony upon oath within the grounds stated in the notice of objection served upon the applicant. The chairman, on behalf of the bench, put some supplementary questions to him, and he was then cross-examined by the advocate for the applicant, who, at the close of the superintendent's evidence, conducted the case of and called evidence on behalf of the applicant.

In the result the justices refused to renew nine licences.

The chairman of the justices stated in his affidavit that, in arriving at his decision to refuse the renewal of the licences in question, he did not entertain or take into consideration, nor was his decision based upon or affected by any evidence, matter, or thing save the evidence given upon oath and the admissions made in open court during the hearing of the applications.

The Licensing Act 1872 (35 & 36 Vict. c. 94) provides as follows:

Sect. 42. Where a licensed person applies for the renewal of a licence the following provisions shall have effect: (1) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices to attend. (2) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holders not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given. (3) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath. Subject as aforesaid licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore.

The Licensing Act 1874 (37 & 38 Vict. c. 49) provides as follows:

Sect. 26. Whereas by section forty-two of the principal Act it is enacted that a licensed person applying for the renewal of his licence need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend: Be it enacted that such requisition shall not be made, save for some special cause personal to the licensed person to whom such requisition is sent. It shall not be necessary to serve copies of notices of any adjournment of a general annual licensing meeting on holders of licences or applicants for licences who are not required to attend at such adjourned annual general licensing meeting. A notice of an intention to oppose the renewal of a licence served under section forty-two of the principal Act shall

not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed.

May 1 and 2.—*F. Low*, K.C. (*Hohler* with him) for the justices (except Mr. Gould) showed cause.—The two important questions of law raised in the case are whether, under the circumstances disclosed by the affidavits, the justices were entitled to be objectors to the renewal of the licences, and whether, if they were so entitled and if they did in fact object, they were entitled to sit and adjudicate on the applications. There is this preliminary point: The general rule in all cases of *mandamus*, even in licensing cases, has always been that a *mandamus* is not available where there is another effective remedy. This present case goes further than that, because, not only is there the effective remedy of an appeal to quarter sessions under sect. 27 of the Licensing Act 1823 (9 Geo. 4, c. 61), but the parties are actually pursuing it. The decision of the justices was given on the 27th March; by the 1st April all the necessary steps had been taken to bring an appeal to the next quarter sessions, and after that, on the 15th April, these rules were obtained. Under these circumstances appeal is the proper remedy, and *mandamus* is not applicable:

Reg. v. Bristol Justices, 68 L. T. Rep. 225;

Reg. v. Smith, L. Rep. 8 Q. B. 146.

The appeal to quarter sessions is a rehearing, and if the quarter sessions came to the conclusion that the parties had not a proper hearing below, the case could have been tried. The parties have got the two remedies; they have elected their remedy of appeal, and by bringing their appeal they have waived their right to come for a *mandamus*:

Reg. v. Kent Justices, 44 J. P. 298.

They might have applied for a writ of prohibition or *certiorari*. So much for the question of form. As to the question of substance, it comes to this—whether sect. 42 of the Act of 1872, as amended by sect. 26 of the Act of 1874, has so cut down the discretion of justices with regard to refusing renewals that they are unable to exercise their discretion unless they are set in motion by some outside objector. Under the proviso in sect. 42, sub-sect. 2, upon which this case really turns, the justices themselves can take the objection. The construction of the statutes, the case of *Sharp v. Wakefield* (64 L. T. Rep. 180; (1891) A. C. 173), especially the judgment of Lord Hannen therein, and the other cases show that, but for sect. 42, the justices have as absolute a discretion in granting or refusing a renewal as in granting or refusing a new licence. It was clearly the opinion of Lord Hannen that sect. 42 was only a matter of procedure, and that it was not intended to cut down the discretion of the justices so as to prevent them from exercising the powers they previously had unless they were put in motion by somebody else. It is said that the words in sub-sect. 2 “on an objection being made” must mean an objection made by some other person to the justices, and that an objection to be good could not be made by the persons to whom it was to be made. The judgment of Hawkins, J. in *Reg. v. Anglesea Justices* (65 L. J. 12, M. C.) does not really support that view. The words “on objection made” do not cut down their general powers. The applicants cannot say that, because the justices have given them notice, and have put in

the notice the grounds of objection, therefore the justices have made themselves litigants and cannot adjudicate. It cannot be said that because the justices have obtained these reports and have inspected the houses they had so prejudged the matter that they are disqualified from acting. The matters in these reports were all matters proper for the justices to inquire into and to have before them, and they were before the justices not as sworn evidence, but as matters with respect to which they ought to make inquiry before acting. Objections can be taken by the justices themselves. That has been expressly decided in *Baxter v. Leche* (79 L. T. Rep. 138), and there are dicta to the same effect in *Reg. v. Farquhar* (L. Rep. 9 Q. B. 258), *Reg. v. Merthyr Tydvil Justices* (14 Q. B. Div. 584), *Reg. v. Bales* (42 L. T. Rep. 735), and in the opinion of Sir Edward Fry, sitting as chairman of licensing sessions: (see 64 J. P. at p. 642). Assuming that the justices could take the objections, and that the persons were properly before them by notices duly given, there was nothing to disqualify the justices from adjudicating in the cases. With regard to Mr. Bental, he did not sit and he did not adjudicate in any of the cases. He also referred to

Boulter v. Kent Justices, 77 L. T. Rep. 288; (1897) A. C. 556, at p. 569;

Reg. v. Sharman, 78 L. T. Rep. 320; (1898) 1 Q. B. 578;

Rea v. Sunderland Justices, 85 L. T. Rep. 183; (1901) 2 K. B. 357;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. London County Council; Ex parte Akkordyk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190; and sect. 28 of 9 Geo. 4, c. 61.

Cyril Dodd, K.C., for one of the justices (Mr. Gould).—Mr. Gould has only one object in appearing—namely, that the proper procedure in these licensing cases should be laid down and followed. He therefore neither supports nor shows cause against these rules.

Avory, K.C. and *Stimson* for the applicants in support of the rules.—With regard to the preliminary objection that the applicants have lost their remedy by *mandamus* by giving notice of appeal, the giving of that notice was a matter of precaution, because if they had waited for this application before giving notice of appeal they would have been out of time for appealing and would have lost their remedy. They are entitled to a *mandamus* unless their remedy by appeal is as full as the one they now seek. It is not so, as one of the grounds on which the *mandamus* is asked for is that the court was improperly constituted. That objection would not be open on the appeal, as the appeal would be a rehearing. There are several cases which show that there may be a *mandamus* although notice of appeal has been given:

Reg. v. Farquhar (*ubi sup.*);

Reg. v. Howard, 60 L. T. Rep. 960; 23 Q. B. Div. 502;

Reg. v. West Riding Justices, 21 L. T. Rep. 490; L. Rep. 5 Q. B. 33.

Notice of appeal was given in this case not for the purpose of prosecuting the appeal, but because it was the only means of keeping the houses open. There is no provision in the Licensing Acts for getting permission of the excise or for keeping the houses open pending an application for a

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mandamus. It can only be done by giving notice of appeal, and that is also an answer to any suggested remedy by prohibition or *certiorari*. [Lord ALVERSTONE, C.J.—We do not think that the giving notice of appeal is any bar to this application for a *mandamus*, or that the applicants by giving notices of appeal have lost their remedy here. It is only a question which would affect our discretion if we thought there ought to be a *mandamus* on other grounds.] The substantial question in the case is, whether justices who have themselves given notice of opposition to the renewal of a licence and have collected information and have identified themselves with the opposition to such renewal, can after doing all that adjudicate upon the case. It is submitted that they cannot do so. It is immaterial whether in fact they were biased. The question is, whether the circumstances are such as to give rise to a reasonable suspicion that they might have been biased, and the more absolute the discretion of the justices the more necessary is it to be careful that they shall not be biased beforehand or identified with either side. Until the decision of Hawkins, J. in *Reg. v. Anglesea Justices* (*ubi sup.*) this question had never been discussed in any of the cases as to the right or power of the justices, who have themselves given notice of opposition, to sit and adjudicate. It is proposed to cite only the cases which apply to justices who are not sitting in a strictly judicial capacity in a court, but are exercising administrative functions though discharging a *quasi* judicial duty. The case which lays down those principles most clearly is the case of *Leeson v. General Council of Medical Education and Registration* (61 L. T. Rep. 849; 43 Ch. Div. 366), where the General Council held an inquiry as to the conduct of the plaintiff on a charge preferred by the Medical Defence Union. Twenty-nine members of the council were present, two of whom were members of the Defence Union which had preferred the charge, but neither had anything to do with making the complaint against the plaintiff. Cotton and Bowen, L.J.J. held that those two members were not disqualified from acting; whereas Fry, L.J. held that they were. The decision of Sir Edward Fry sitting at licensing sessions, which has been referred to, apparently only goes to the extent that the mere fact of justices having given notice of objection does not disqualify them, and he had not in his mind any such case as the present. There is all the difference between a justice getting up in court and saying: "I object to the licence, let the case be adjourned," and his doing what was done in this case. If he does more than object, as, for instance, if he collects the evidence, or follows up that notice of objection in open court by serving the document, which the section clearly contemplates is to be served by some third party, then he is disqualified. Even if the statute contemplates that the justice may object in open court, it also contemplates that the notice of objection should be served by a third party: (see sect. 42). Since *Sharp v. Wakefield* (*ubi sup.*) it has been held that the burden of proof is on the opposition to the renewal (*Evans v. Conway Justices*, 82 L. T. Rep. 704; (1900) 2 Q. B. 224), and unless an objection is made the licence must be renewed. A notice for some cause personal to the man himself (see *Sharp v. Wakefield* (*ubi sup.*))

must be served, and the justices can only adjourn on an objection being made:

Res v. Kingston Justices; Ex parte Davey, 86 L. T. Rep. 589.

The justices in this case made themselves parties to the litigation. They not merely gave notice of objection, they went very much further; they instructed their clerk to give the notice of opposition contemplated by sub-sect. 2 of sect. 42 and the ground of the opposition, and they both collected evidence themselves, and after they gave the notice they instructed their clerk to collect the necessary evidence to support it. They were therefore disqualified:

Allinson v. General Council of Medical Education and Registration, 70 L. T. Rep. 471; (1894) 1 Q. B. 750;

Reg. v. Antrim Justices, (1901) 2 Ir. R. 133;

Reg. v. London County Council; Ex parte Akkerdijk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. Ferguson, 54 J. P. 101.

LORD ALVERSTONE, C.J.—The points raised in this case are undoubtedly of very general importance. They have been most admirably argued before us on both sides, and for myself I do not think I should gain anything by further considering the matter, and I am prepared to express the opinion at which I have arrived. The rules were moved upon four grounds. First—a very important ground—that the justices who are members of the tribunal cannot raise the objections contemplated by sect. 42, sub-sect. 2, of the Licensing Act 1872; secondly, that, if they do so, they must not adjudicate upon the cases in respect of which they have given notices; thirdly, that in this particular case the justices had obtained information upon which they acted contrary to the provisions of sect. 42 of the Act; lastly, a special objection to a justice named Mr. Bentall, on the ground that he had taken part in the proceedings, which would undoubtedly, it was said, invalidate his action or any judgment to which he was a party. The first and most important thing is, I think, to lay down certain general principles which are derived or can be deduced from the cases, and then consider what are the rights of the justices and of the parties in regard to this matter, having regard to these general principles. I think it is quite clear that the justices can only act upon sworn evidence given before them, and if in any case it appeared to the court that the justices had acted upon information obtained otherwise than through the evidence, their proceedings would be, and ought to be, set aside. I think it is further equally clear, not so much from the decisions as from the legislation and the general principles applicable to the state of circumstances with which the legislation is dealing, that it would not invalidate the proceedings if the justices had become acquainted with what I may call the general circumstances of the case, and made use of that information to bring to the minds of persons who were before them the points that they had to deal with. There is only one other point which I wish to mention, because it seems to me an important one—namely, that, if in any particular case a justice has private information in regard to that particular case, he ought not, in my opinion, to sit upon that case, nor

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ought he to do anything except go into the witness-box and give evidence; or, in other words, if a case ever arises of a justice having particular knowledge in regard to a particular individual or against a particular individual, or with regard to a particular house, that knowledge can only be made available or can only be utilised for the purpose of the case by means of his giving evidence as a witness, subject to cross-examination in the ordinary way. I mention these broad principles first, because I think it right to make it clear that I bear them in view when I express the opinion that I have formed as regards what the justices did in this case. I will state as briefly as I can, but sufficiently fully, what I really understand the justices to have done in this case. A year before the attention of the Farnham Bench had been called to the fact that there was a large number, or that there was considered to be, or might be, too large a number of licensed houses for the population in their district, and preparatory to the proceedings which gave rise to this question, information was collected by the committee which, in my opinion, would be of value for the purpose of directing the minds of any tribunal that had to deal with it to the question or the incidents in regard to various houses, which would be of importance when the matter came to be considered, and the justices have not shrunk from stating that they did, before they sat, go round and make themselves acquainted with what may be called the surrounding circumstances of each of these particular houses. I think it is going a great deal too far to say that applying their general knowledge of the district to the cases that they were going to sit upon, or applying the information so obtained, would invalidate the proceedings, provided that everything on which they wish to act or intend to act, is brought to the minds of the persons against whom it can possibly be used. That being so, the justices took a course to which at present, subject to the legal objection with which I will deal in a moment, I think no reasonable objection can be taken. They thought it right, when they were dealing with the question of there being too many licensed houses in the district, that the case of every house should be investigated, and certainly the justices in this case, if their affidavits are taken as representing the facts—and the contrary is not suggested—did investigate individually each case, and gave no decision until after the cases had been investigated. Therefore that they acted upon the principle of fairly considering the requirements of the district, and the suitability of each particular house, I think nobody can question. In that state of circumstances, Mr. Avory's first objection arises. It is a very important objection, and one which I should have taken time to consider if I did not think it was covered by authority, but it is a question upon which I myself have no real doubt. He says justices cannot either themselves give, or cause any person to give on their behalf, the notice of an intention to oppose the renewal contemplated by sub-sect. 2 of sect. 42. He does not dispute that they can adjourn the case on objection being made, and that they can hear the case ultimately when the holder has been called to attend, without the previous prescribed notice having been given; but he says "on an objection being made" must mean made by somebody to

the justices, and not made by the justices themselves. That undoubtedly raises a very important point, which was considered by Hawkins, J. in *Reg. v. Anglessea Justices (ubi sup.)*. There has for a long time been a view, whether judicially decided or not, that justices could raise objections to licences being renewed. That they ought to be able to do so, having regard to their functions and duties under the Licensing Acts, I myself have no doubt at all. That there may be many cases in which the liquor traffic cannot be properly controlled unless justices can raise such objections I think there is no doubt, but, as I have said, I do not find it upon general principles. I refer to the decisions or opinions as they have been expressed from time to time. In the year 1874, in the case of *Reg. v. Farquhar (L. Rep. 9 Q. B. at p. 261)*, Blackburn, J. said: "Assuming that the justices might of their own knowledge make the objection themselves, and I do not say that it is not impossible that they might, yet it is clear that they ought not to have decided at once, because no notice had been given to the applicant, and he was entitled to be heard." It is obvious, whatever the actual language used, that Blackburn, J. thought that the justices might be able to give a notice, and when the matter arose in the case of *Reg. v. Morthyr Tydvil Justices (ubi sup.)* Smith, J. put the construction upon the case of *Reg. v. Farquhar (ubi sup.)* which I have referred to. He said: "The case of *Reg. v. Farquhar (ubi sup.)* would seem to show that the objection mentioned in the proviso may be made by the justices themselves"; and in the case of *Reg. v. Bales (ubi sup.)* Cockburn, C.J. took the same view. Therefore there was during a series of years a considerable amount of opinion—though I agree no actual decision—to the effect that the justices could raise the objections. When the matter came before Hawkins, J. in the case of *Reg. v. Anglessea Justices (ubi sup.)* he certainly did use expressions which amply supported Mr. Avory in urging before us that the opinion of that learned judge was that the objection must be raised by a third person. He used the expression (65 L. J., at p. 15, M. C.): "The language of the proviso, 'on an objection being made,' can only mean made to the justices." It is true that that does not cover the case of an individual justice making an objection, and then ceasing, so to speak, to act as a justice. But I think it is only fair to say that the argument of Mr. Avory was well founded in this, that the opinion of Hawkins, J. in that case certainly did seem to come to this, that the justices could not raise an objection. Then came the last case, the case of *Baxter v. Leche (ubi sup.)*, in which there is an express decision of Wills and Kennedy, J.J. to the effect that the justices may raise the objection, and, having raised it, may adjourn and give notice. It would be perfectly true to say that in that case the justices did not give the grounds on which they were going to entertain the objection; but it certainly seems to me to be very much fairer to those whose licences were going to be questioned that they should be told what objections were going to be raised rather than that they should not. Therefore that particular argument seems to me not to affect the weight of that authority of *Baxter v. Leche (ubi sup.)*, in which I entirely concur, and which is binding upon this

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court. Then there is, I agree, only a matter of opinion, but it seems to me an opinion which contains very weighty reasoning indeed, and that is the reasoning of Sir Edward Fry in the case cited from the justice of the peace (see 64 J. P., p. 642), where he was only giving his opinion after consideration as chairman of quarter sessions; and it is all the more weighty because of the strong line which he had taken, when Fry, L.J., in the case of *Leeson v. General Council of Medical Education and Registration* (*ubi sup.*). Therefore I come to the conclusion that justices can raise these objections under sect. 42, and that it does not invalidate the proceedings that a notice has been subsequently given by them. But it is said by Mr. Avory that, that being so, even then they must not sit and adjudicate. That contention seems to me to raise the fundamental question, What is the position of a person who objects? Certainly, if we take the language of Lord Herschell in *Boulter v. Kent Justices* (*ubi sup.*), in its natural sense, the objector is not in the position of a party, and it seems to me that, looking to the duty which the justices have to perform, and the considerations that ought to affect them, it is not right to regard a person who objects on the grounds which have been raised in this objection as what I may call a personal opponent of the person whose licence is in question, or as a party to any litigation. It is in that respect that I think that the fact that the justices had given notice of objection does not bar them from subsequently acting upon the proceedings, assuming that they acted without any suggestion of improper bias, or of having acted on improper materials. Therefore I now answer the question which I left open in the case of *Rex v. Kingston Justices; Ex parte Davey* (86 L. T. Rep. 589), where I merely indicated my opinion that the question would at some time or other have to be decided as to whether or not the justices could give the notices of objection. Certainly in a case where the justices were of opinion that there were too many licensed houses in the district, and where the real question to be considered by them was how those houses were to be reduced, it would be very unfortunate if the mere fact that notices of objection were given by the justices in order that the whole question might be fairly and impartially considered should prevent these justices from sitting and acting in the case. Mr. Avory has contended in support of these rules that if the justices have prejudged the question from the point of view of having previously made up their minds that there ought to be a reduction in the number of licences, their judgment would be affected. I am not prepared either to agree with, or to dissent from, that argument. It certainly is not this case. But where it is seen that the justices have approached the question of whether there should be any reduction, and, if so, what reduction, by raising the question with regard to every licence in the district, it seems to me to be an entirely different consideration altogether. I will deal shortly with the third objection, that the justices have acted upon information obtained beforehand and not given in evidence. I asked to see the notes in the only case which was really argued in detail before us, and which is agreed to be typical of the whole, and I find that all the points on which the objec-

tions to the house could be founded were proved in evidence in the case of the Queen-street Tavern, of which Mrs. Smith is licensee. The justices have all said that every substantive matter was proved in evidence, and that they have not acted in any single case except upon the evidence. I think, if I remember rightly, one of the justices says that they heard each case separately, that notes were taken separately, and in each case where necessary the notes of the evidence were read over to them before they came to their decision. Therefore it seems to me impossible to say in fact that there is any foundation on which we ought to come to the conclusion that the justices acted, in coming to their decision, upon information which they obtained elsewhere. It must be distinctly understood that I express my opinion without any hesitation that if they had so acted in getting information they would not be entitled to use any information, or act upon anything, which was not evidence given on oath before them. Lastly, there is the objection that is taken with regard to Mr. Bentall, and I think that ought to be stated so that the facts may be understood. The affidavit on which the rule was moved has stated a resolution in the chapel: "That this meeting of the Surrey Congregational Union notes with satisfaction the efforts of the Farnham magistrates to reduce the number of licensed houses in this ancient town, which are in excess as to number of population with most other towns in Surrey." I agree that this seems a very harmless resolution and one which in itself would not indicate bias. But it is said in the same affidavit that a formal objection was taken to any justices sitting who had attended the meeting of the Surrey Congregational Union on the 5th March 1902. Mr. Bentall says in his affidavit that he was not a member of the Congregational Union, that this being a public meeting and the resolution not having any direct reference to any particular action or any particular house, when the objection was first taken by Mr. Avory it did not occur to his mind that it applied to him; but upon the second day, when counsel expanded this particular objection, he understood it, and he at once got up and retired and took no further part in the proceedings. Then the applicants for renewals went on. It seems to me that it would be going far beyond any case that has ever been decided to hold that in the case where the magistrate retires, and the parties go on with the case, they can afterwards raise the objection. I entirely agree with what has been put forward by counsel in support of these rules, that if this had not been known, if no objection had been taken, but it had afterwards been discovered that a magistrate who had taken an active part or a part in promoting a particular side, had sat, the fact that he had so sat would or might have vitiated the proceedings. With regard to the authorities that counsel for the applicants referred to—namely, *Reg. v. London County Council; Ex parte Akkerydyk* (*ubi sup.*), *Reg. v. Fraser* (*ubi sup.*), and *Reg. v. Ferguson* (*ubi sup.*), they are all, in my opinion, illustrations of the principle that if a person has taken sides in the matter in which he is called upon or purports to act judicially, he cannot be allowed to act. In my opinion they do not assist the applicants in this case in the view I have taken of the facts. I have therefore come to the conclusion that none of the four grounds on which these rules were

moved prevail, and that the rules *nisi* should be discharged.

DABLING, J.—I am of the same opinion. In regard to the point that the magistrates had made up their minds to reduce these licences, because they had come to the conclusion, with many other people in the neighbourhood, that there were too many public-houses within their district, I cannot see that there is any objection whatever in that. They must have had some opinion in the matter. They must have had one of three opinions. They must have thought that there was exactly the right number of houses, in which case if any person asked for a new licence it might be said that the magistrates were biassed against that, because they thought there were already the right number, or they must have thought there were too many, or they must have thought there were too few. In either case it might be said, if it were proposed to renew a licence or to grant a new licence, that because the magistrates had got an opinion on the matter that there were just enough licences, that there were too many, or that there were too few, they had made up their minds and could not consider the question. To my mind the Legislature has confided this licensing to the magistrates because they are persons in a position to bring to bear upon the question of granting licences their experience of the neighbourhood and of the necessities of the neighbourhood. They are not to decide, if evidence is brought before them, regardless of the evidence; but when it is provided that licences should be renewed, as I say, the justices must come to the licensing committee with some sort of opinion on the question such as I have indicated. Coming there with the opinion which they held, that there were really too many licensed houses in this neighbourhood, and that it would be a good thing if there were fewer, and contemplating, as they must have done, that if a person asked for a renewal of a licence it might very well be that they would grant it, or it might very well be that they would refuse it, it is said that they could not exercise any kind of judgment on the matter unless somebody, who might be a person who knew nothing whatever about it, got up and came before them and said: "I object." The sort of person who gets up and objects is very easily obtained if he is wanted. It is perfectly clear, I think, that the magistrates at licensing sessions have a discretion. If I wanted any authority for that—and it is to be found in many places—I should take it from no place more readily than from what was said by Sir Edward Fry quite lately at the Long Ashton Licensing Sessions for the county of Somerset, where he said: "The duty vested in licensing justices is a discretionary one," and then he went on to say that it had been objected that the discretion was contingent upon an objection taken by a third person, and that the justices could not take an objection for the purpose of giving themselves an opportunity of exercising that discretion. He said: "It seems an unreasonable construction of sect. 42 of the Licensing Act 1872 to suppose that the magistrates were absolutely deprived of any opportunity of exercising that discretion unless some third person gave them that opportunity. They thought they might take an objection for the purpose of giving themselves that

opportunity, and by so doing they did not express any conclusion or any bias beyond thinking it a question that ought to be inquired into." This was said as to what the justices did in the particular case with which he was then dealing. That, I think, states the law accurately, and better than I can state it myself, and for that reason I desire to adopt those words. To my mind it also carries the other point that the justices, who take the objection, may sit and hear the application for the licence, because that is what happened in that case, and that was how the question arose. When the justices came to hear applications for licences, they were objected to on the ground that the objectors were the justices who were trying the case, and Sir Edward Fry having said what I have quoted, the justices went on to hear the applications for licences. Therefore, to my mind, it is really not necessary to dwell any more upon that point; in fact, the two points are only one, because there is nothing in the point that the justices may not object unless it is coupled with this: "and proceed to hear the application for the licence," as the proposition that the justices may not object could not be sustained. It would not be a good answer to say you cannot object because you are a justice. Therefore it is one point, and not two: Can a justice formally object for the purpose of allowing himself to exercise his discretion, and then proceed to hear the application for a licence and exercise his discretion? I think what I have read from Sir Edward Fry's opinion is enough to show that he can. It follows upon the distinct authority of *Baxter v. Leche* (*ubi sup.*), which has decided this point, and for *Baxter v. Leche* (*ubi sup.*) there is authority which has been alluded to by my Lord in the various cases that he has mentioned. The only thing that I know of to the contrary effect is the judgment of Hawkins, J. in the case of *Reg. v. Anglesea Justices* (*ubi sup.*). That decision cannot, to my mind, be reconciled with these other cases. It was not a judgment of the Divisional Court; it was only the considered judgment of a single judge, and therefore I am at liberty to say what I think about it, which is, that it was wrong.

CHANNELL, J.—I entirely agree. I think the difficulty here arises almost entirely from the fact that the licensing justices have both administrative functions and judicial functions, and that, as so often happens when men are put into that position, it is extremely difficult to divide exactly what are their judicial functions from those which are their administrative functions. I think that the licensing justices are clearly entitled to go in their own way to make themselves acquainted with the character of their district, with the amount of public-house accommodation that there is existing in it, and all matters of that sort. A large number of the justices—local gentlemen—would probably have the information. Justices who have only recently come into the district are fully entitled to inquire, and not judicially to inquire, into the general circumstances of the neighbourhood to fit them for performing their licensing duties, to give them a knowledge of the place and the wants of it, and whether the public-house accommodation is too much or too little, and things of that sort. When it gets to the rights or quasi rights of individuals about renewals—whether a particular

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individual should or should not have his licence renewed—then it is a different matter; it then becomes a judicial matter. In that matter it seems to me the justices must act judicially. The proceeding is at any rate *quasi* judicial, and the justices must not act upon information acquired behind the backs of the parties without giving the parties the fullest information to enable them to understand what it is the justices are acting upon, and without giving them an opportunity of inquiring about it and seeing whether they agree with it, or what answer they have got to make, or what they say about those facts. There is nothing to my mind, therefore, objectionable in the general character of the inquiries which these magistrates made for the purpose of ascertaining whether or not the suggestions made to them by the other magistrates in the county, that in their district there were a great deal too many public houses, were correct. The way in which they entered into that inquiry shows what a full and careful report it must have been. In the course of that report incidentally the persons who made it furnished information not merely on the general question, upon which I think the inquiry was not a judicial one, but they also furnished information which would be useful when they come to the judicial inquiry, and it became a matter of considerable difficulty how that information so acquired could be properly used. So long as the information was only supplied to the magistrates for the purpose of their not acting upon it, but for the purpose of their using it to make inquiries when the different cases of these applicants for renewals came on, I think it was unobjectionable. It is a little doubtful, no doubt, and a little dangerous, because it was so very likely to be misused; but in this case, as far as I can see, the information really was used merely for the purpose of making full inquiries into each of the cases when it came on, and deciding each of those cases judicially and according to the evidence before the court. That disposes of a certain portion of the objections to these proceedings. There remains only the question about the right of the justices themselves to be the objecting parties, and their right, if they are the objecting parties, to sit. I think the difficulty upon that point arises partly from the different view that Mr. Ivory apparently takes, and which questions I asked him in the course of the argument showed that he does take, as to what an objection means in this section. I take the view, about which I intended to have said something more fully, which has been put quite clearly by my brother Darling, in what he has said in reference to Sir Edward Fry's opinion of the matter, and I do not think I can improve upon that. Substantially it is that the objection taken by the justices is not to make the justices themselves parties to an opposition in the sense that they are opposing parties to the person who is requiring his licence, but is simply in the nature of a notice that they propose to exercise their discretion in that matter, and that it is done for the purpose of enabling them to exercise their discretion in that matter. Those, I think, are the substantial points in this case, and I do not think it is necessary to add anything further to the matter.

Rules discharged with costs.

From this decision the licence-holders appealed.

June 14, 16, and 17.—*Danckwerts*, K.O. and *Horace Ivory*, K.O. (*Stimson* and *W. O. Willis* with them) for Jane Smith, the licence-holder in the first appeal.—The justices cannot be themselves objectors as well as judges in the case of an application for a renewal of a licence. The question depends on sect. 42 of the Licensing Act 1872. It could not have been in the contemplation of the Legislature that justices might be objectors under that section, for the justices are the only persons to whom an objection can be made; they are the only persons required to take action upon it, and they are the only persons who are to hear and determine it. If justices were allowed to adjudicate upon their own objections made to themselves, it would be a departure from the first principles of justice. See the judgment of *Hawkins*, J. in

Reg. v. Anglessea Justices, 65 L. J. 12, M. C.

The point has been discussed in other cases, but it became unnecessary then for the court to decide it:

Reg. v. Farquhar, L. Rep. 9 Q. B. 258;

Baxter v. Leche, 79 L. T. Rep. 138.

The opinions that may have been expressed in those two cases are therefore not to be relied on. The power confided to the justices in these matters is to be exercised by them "judicially." That has been laid down by Lord Halsbury in the House of Lords:

Sharp v. Wakefield, 64 L. T. Rep. 180; (1891) A. C. 178.

If it was possible for justices to be objectors, then those justices who make objections ought not to remain on the bench when their objections were being heard. In the case of an application for a renewal of a licence, the application must be granted unless an objection has been made, and the burden of proof is on the objector:

Evans v. Conway Justices, 82 L. T. Rep. 704; (1900) 2 Q. B. 224.

A justice who has made an objection ought to go into the witness-box, instead of remaining on the bench:

Ree v. Antrim Justices, (1901) 2 Ir. R. 133, 162.

Here all the justices were biassed. They came to the bench with a determination in their minds, before they had heard any evidence, to refuse some of the applications for a renewal. They had also previously collected evidence against some of the licensed houses, and in this way they were prejudiced against them. They referred also to

Reg. v. Eales, 42 L. T. Rep. 735;

Reg. v. Merthyr Tydvil Justices, 14 Q. B. Div. 584;

Boulter v. Kent Justices, 77 L. T. Rep. 288; (1897) A. C. 556;

Reg. v. London County Council; Ex parte Akkerydyk, 66 L. T. Rep. 168; (1892) 1 Q. B. 190;

Royal Aquarium and Summer and Winter Garden Society Limited v. Parkinson, 66 L. T. Rep. 513 (1892) 1 Q. B. 431;

Leeson v. General Medical Council, 61 L. T. Rep. 849; 43 Ch. Div. 366;

Allinson v. General Medical Council, 70 L. T. Rep. 471; (1894) 1 Q. B. 750;

Reg. v. Sunderland Justices, 85 L. T. Rep. 183; (1901) 2 K. B. 357;

Reg. v. Fraser, 57 J. P. 500;

Reg. v. Walsall Justices, 24 L. T. Rep. O. S. 111;

Reg. v. Sylvester, 5 L. T. Rep. 794.

Disturnal for the licence-holders in the eight other appeals.

F. Low, K.C. and *G. F. Hohler* for the justices. —The question here does not depend entirely on the meaning of sect. 42 of the Licensing Act 1872. There might be cases in which the circumstances under which justices appeared as objectors might disqualify them from also acting as justices in deciding whether a licence should be renewed or not. But there is no reason why this court should lay it down as a hard and fast rule that under no circumstances can justices be also objectors. Justices in these matters are not required to act judicially in the strict sense of the word. As to the expression used by Lord Halsbury in *Sharp v. Wakefield* (*ubi sup.*), which has been cited by the appellants, it appears from the shorthand notes of *Boulter v. Kent Justices* (*ubi sup.*) that Lord Halsbury said in that case that in *Sharp v. Wakefield* he had used the word "judicially" simply as opposed to "capriciously." One of the duties of justices in hearing applications for the renewal of licences is to protect the public:

Boulter v. Kent Justices (*ubi sup.*).

Here the notice of objection given by the justices was based upon a public ground—viz., the superfluity of public-houses in the district. It might well be the duty of the justices in certain cases to take objection to the renewal of a licence if no one else was willing to come forward for that purpose. There can be no injustice in the justices pointing out to the licence-holders the case which will be made against them. There are decisions which show that justices may themselves be objectors:

Reg. v. Howard and others, Licensing Justices of Congleton, 60 L. T. Rep. 960; 23 Q. B. Div. 502;

Whiffen v. Malling Justices, 66 L. T. Rep. 333; (1892) 1 Q. B. 362;

Dakin v. Parker, 71 L. T. Rep. 379; (1894) 2 Q. B. 556.

As to the other points taken by the appellants it is clear from the affidavits that the evidence on which the justices acted was all given on oath. There is no ground for saying that the justices acted on the report of their committee. That report did not refer to any particular licence, but dealt solely with the question of the advisability of reducing the number of licensed houses in the district. Upon the question whether *mandamus* was the proper remedy or whether the appellants ought not to have appealed to quarter sessions, they referred to

Reg. v. Bishop of Chester, 2 Stra. 797;

Reg. v. Justices of Southport, 28 L. T. Rep. 129; *nom.*

Reg. v. Smith and others, L. Rep. 8 Q. B. 146.

Avory, K.C. in reply.

Curr. adv. vult.

June 23.—COLLINS, M.R. read the following judgment:—This is an appeal from the decision of the Divisional Court discharging a rule for a *mandamus* addressed to the licensing justices of the Farnham Petty Sessional Division of the county of Surrey, calling upon them to show cause why a writ of *mandamus* should not issue commanding them to hold a further adjournment of the annual licensing meeting and to hear and determine according to law certain applications for the renewal of licences. The case is one of

importance, as the question raised goes to the root of the law and practice in the matter of the renewal of licences. The circumstances are shortly these: In Feb. 1891 a letter was addressed by the clerk of the peace of the county to the clerk of the Farnham justices informing him that the attention of the county licensing committee had been called to the large number of licences existing in the parish of Farnham and Farnham Rural, pointing out that the proportion was largely in excess of any other parish in the county, and stating that it was the opinion of the committee—that is, the confirming committee—that steps should be taken whereby the licences of a substantial number of such houses should be discontinued, and inviting the justices to consider this question at their next annual licensing meeting. The justices, as appears by the affidavit of their chairman, addressed themselves to the consideration of the question raised by this letter, and appointed a committee to consider the statistics referred to in the letter. Upon the report of this committee, which was unanimously adopted, the committee were authorised to inquire into the condition, position, and circumstance of each licensed house in the Farnham district, which they accordingly proceeded to do—first, by framing questions addressed to the owners of the houses, and afterwards by personal inspection, the results of which were duly reported to the licensing justices, with recommendations which were adopted by them with one dissentient. It is clear from their report that they were of opinion that the only fair and satisfactory way of dealing with the question was to cause objections to be served on all the owners of licensed houses, so that the case of each of them might be formally inquired into, and for this purpose authority was given to the justices' clerk to object to such renewals on the general ground that the houses were not required, and also on special grounds set out in the notice. These objections were signed by the clerk stating that he was acting under the instructions of the justices present at the annual licensing meeting. At the general annual licensing meeting held on the 1st March a certain Mr. Hayes objected to the renewal of all the licences in urban Farnham and the chairman of the justices, on behalf of the justices, made objection to the renewal of the forty-five licences in the Farnham urban district, stating that the reason why the justices thus raised objections was "in order that every one of the licensees might have equal opportunities of giving evidence before them, and the justices might thus be enabled to decide with justice and fairness," and the meeting was accordingly adjourned until the 14th March following, and instructions were given to Mr. Mason, the deputy clerk, to serve formal notice in each case, requiring the licensees to attend in person and stating the grounds of objection. When the cases came on for hearing, evidence on oath was given in support of the objections, and questions were put by the chairman based on the facts collected by the committee. A copy of the report itself had been placed by the justices in the hands of counsel for the applicants. The rule *nisi* was obtained on the ground that the justices were incapacitated from dealing with the question of the renewal of licences, inasmuch as they were at once parties and judges, that they had acted

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upon evidence not taken upon oath as provided by sub-sect. 3 of sect. 42 of the Licensing Act 1872, and that they must be deemed in law to be biased on the ground that they had predetermined to refuse the renewal of some of the licences and had already inquired into the cases. There was also a particular objection to one of the magistrates, which I will deal with, if necessary, later on. In considering how far these points are material it is necessary to understand precisely what is the character in which the justices are required by law to deal with questions of renewal. Whatever views may have been held as to their position before *Boulter v. Kent Justices* (*ubi sup.*) was decided in the House of Lords, it is now clear that in the granting or refusing of renewals the justices do not sit as a court, and that the transaction itself is in no sense a *lis* to which there are parties. The objector is not a "party"; his function is merely to inform the mind of the tribunal to enable it rightly to exercise its discretion whether to grant the privilege of a licence or not. This point is so material to the true appreciation of the cardinal consideration in these cases that I propose to read one or two passages from the judgment of Lord Halsbury, L.C., and Lord Herschell, in the case I have just referred to. Lord Halsbury said: "The difference between the procedure of a court and of the licensing meeting is not only one of nomenclature. Where justices are acting as a court of any sort they must proceed according to the regular rules which are applicable to all courts of justice; but in respect of an application for a licence or its refusal they may and constantly do receive representations not on oath." He then quotes Lord Kenyon, who in 1790, in the case of *Rex v. Downes* (3 T. R. 560), when holding a licence bad because it was granted at a private meeting, did not rely upon the general principle that all courts of justice must be open, but upon the ground that the statute directed it, and added that the construction of the then statute law was advantageous to the public because it was "of importance to the public that licences of this sort should be granted openly and not by stealth, in order that they may have an opportunity of objecting to the granting of these licences to particular persons on the ground of unfitness." Lord Halsbury adds: "The Acts referred to by the learned judge were repealed by the Act of 1828. But a careful distinction appears to me always to have been observed between the same bodies acting as a court and deciding questions of licensing at a licensing meeting of the justices." Further on he says: "But if I am right in the distinction I have drawn between a magistrates' meeting for licensing purposes and courts, although consisting of the same persons, it would be the height of absurdity to suppose that the Legislature intended to include in the definition and to make applicable to that definition persons who were in fact justices of the peace, but who in the particular matter here referred to—namely, 'licensing'—were not occupying the position of judges at all, but were exercising the discretionary jurisdiction as to how many public-houses they would permit in a district, or what persons should carry them on." Lord Herschell (77 L. T. Rep. at p. 292; (1897) A. C. at p. 569) said as follows: "Persons objecting to the grant of a licence are not, I think, parties to the proceedings on

the application in any proper sense of the term. The question is not one *inter partes* at all. The justices have an absolute discretion to determine, in the interest of the public, whether a licence ought to be granted, and every member of the public may object to the grant on public grounds, apart from any individual right or interest of his own. The applicant seeks a privilege. A member of the public who objects merely informs the mind of the court to enable it rightly to exercise its discretion whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour. It is, I think, a fallacy to treat the refusal as necessarily induced by a particular objector. Every member of the local community might object. Would they all, then, become "the other party"? There is, in truth, no *lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party, for if a licence be refused on the ground that it was not needed to supply the legitimate wants of the neighbourhood, the decision is really in favour of the public at large. The provision contained in sect. 2 seems, then, to me, an additional reason for holding that an appeal from the act of the justices in refusing a licence is not an appeal from a 'conviction or order' of a court of summary jurisdiction." The standard, therefore, to be applied in determining whether justices have incapacitated themselves from dealing with the renewal of licences is not in any sense that applicable to judges dealing with litigation. Moreover, their position in relation to the right of objecting is not *res integra*. Since *Reg. v. Farquhar* (*ubi sup.*), at all events, decided in 1874, the practice has been that they might, when circumstances required it, themselves make or cause to be made an objection, at all events provided they adjourned for the purpose of hearing it and caused the necessary notice to be served requiring attendance upon a future day. I think this practice was founded on a true view of the law for reasons which I will state hereafter, but, whether it is or not, I think it has been treated as law for nearly thirty years, and ought not to be now disturbed. In *Reg. v. Eales* (*ubi sup.*), decided in 1880, it is thus referred to by Cockburn, C.J. He says: "And although by a practice founded upon a dictum in the case of *Reg. v. Farquhar* an objection may be made by the justices themselves, it must be upon one of those four grounds" (it was a case under the Act of 1869) "and the particular ground of such objection should be notified to the appellants in order that an opportunity may be given to meet it." He there treats the practice as established and in no way dissents from it. It has been treated as law in more than one case referred to in argument, and was formally decided to be so in 1898 in *Baxter v. Leche* (*ubi sup.*). It is true that a different view was taken by Hawkins, J. in *Reg. v. Anglesea Justices* (*ubi sup.*). But in the same case that learned judge upheld a decision based upon a notice given by the chief constable apparently at the instance of the licensing justices themselves.

And on the general question whether there is such incompatibility between the position of the justices who adjudicate and that of an objector that the two cannot be combined, it seems to me to be immaterial whether the objection is made personally by the justices or by somebody else at their instance, and from the reported cases it seems to be a very common practice, and one that has never been questioned, for the objection to be made at the instance of the justices, if not in their name. The observations of Hawkins, J. in the case referred to are very valuable as to the discretion of justices, and their right to discuss among themselves matters affecting the expediency of renewals, and their right to take steps to have a full investigation of them. On the same point Lord Halsbury, in *Sharp v. Wakefield* (*ubi sup.*) says: "By the express language of the statute, which is still the governing statute, the grant of a licence is expressly within the discretion of the magistrates. For the reasons to be stated presently, I am of opinion that no legislation has ever altered that provision; but, if one were to argue *à priori*, what possible reason could there be for limiting the discretion of the justices to the first grant of the licence? It is not denied that for the purpose of the original grant it is within the power and even the duty of the magistrates to consider the wants of the neighbourhood with reference both to its population, means of inspection by proper authorities, and so forth." The key to the position appears to be that the justices in dealing with licences are not a judicial body; that they are deliberately appointed because from their circumstances they are likely to have local knowledge; and it cannot have been the intention of the Legislature that they should divest themselves of all such knowledge in dealing with questions of licences. It would be a great public misfortune if they were bound to determine the question merely on materials provided by the individual who happened to object, and were constrained to sit by in silence although they had reason to suppose that there were very good grounds which ought to be inquired into before the matter was decided; and yet, if they were debarred from making an objection or causing one to be made, these facts never could be inquired into, and the licence would have to be disposed of without the necessary investigation. I think, therefore, that the practice is not only inveterate but is founded on a true view of the function of justices in relation to the matter. If that be so, the standard to be applied in considering the question of bias must be one which admits the right of the justices to be at one and the same time objectors and judges in the sense in which they are judges in such matters, and therefore the standard laid down in such cases as *Leeson v. General Medical Council* (*ubi sup.*) and *Allinson v. General Medical Council* (*ubi sup.*) is not applicable to them. They fall outside their principle for two reasons—first, that they are empowered by law to fill the two capacities; and secondly, that, rightly understood, the two capacities are not incompatible in the sense in which in those cases they were assumed to be incompatible, because, as has already been pointed out, in making the objection they do not in any sense become parties to the litigation or anything analogous thereto. They are simply taking the only or the best available course to enable matters vital to

the exercise of their discretion to be formally and fairly considered openly before them. Assuming, therefore, what I regard as clearly established by the evidence, that what was done by the justices in this case was honestly done to enable them to secure a full investigation of the facts for the purpose of avoiding the injustice which might arise if they had to deal with the question without such materials, and upon one or more isolated applications only, I think they were within their rights in doing what they did, and were not thereby debarred from sitting and deciding upon the question of renewals. Their original and fundamental discretion in the matter of granting or refusing applications for new licences remains when they are invited to deal with renewals, except so far, and only so far, as it is conditioned by sect. 42 of the Act of 1872, as amended by sect. 26 of the Act of 1874, which relates to procedure only: (see *Sharp v. Wakefield*, 64 L. T. Rep. at p. 182; (1891) A. C. at p. 182). In my opinion the course the justices took involved no predetermination of any point, but merely secured a full and informed discussion of the whole subject. It is not denied that on the hearing all the formalities of the 42nd section were complied with. The respondents indeed contend that the justices could have exercised their discretion without complying with these conditions, but I think the case of *Evans v. Conway Justices* (*ubi sup.*) debars them from advancing that contention in this court. I agree therefore, with the decision of the Divisional Court, and it is not necessary to discuss in detail the numerous cases which were referred to in argument before us. With regard to the special objection urged against Mr. Bentall on the ground that he was present at a meeting at which certain resolutions were passed upon which he did not vote, I think it cannot be sustained. It is not necessary to express an opinion upon the technical objections urged against the granting of a *mandamus* in the form prayed for. The appeal must be dismissed.

MATHEW, L.J. read the following judgment:—The grounds relied upon in support of the appeal were—(1) That the justices were prohibited from being themselves the objectors to the renewal of the licence; (2) that they were disabled from adjudicating upon the grounds of objection; and (3) that their decision was invalidated on the ground of personal interest in the result, or manifest bias against the applicant. As to the first point, if the jurisdiction of the justices depended upon the Act of 1828, there would seem to be no question that objections to a renewal might be made by the Bench sitting in open court, and that upon giving the applicant the opportunity of being heard, the justices had an absolute discretion to grant or refuse the renewal. But it was argued that the discretion of the justices could no longer be exercised freely, and that their jurisdiction was fettered by the provisions of the Act of 1872. Attention was called to the language of sect. 42, and it was contended that the jurisdiction of the magistrates depended upon the objection being made by some one who was not a member of the Bench. No reason was given for this supposed change of the law. It would matter nothing to the applicant from what quarter the objection came. A third person would be entitled to object without giving a reason, and might then

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withdraw and be no party to the subsequent proceedings. The grant of a renewal was for the magistrates only, and would seem to depend in every case upon the result of the subsequent inquiry upon sworn testimony. But it was said that the inference from the language of the section was clear, and that the object of the Act was to provide for a new method of procedure in all cases. Sect. 42, as modified by the later Act of 1874, is in the following terms: [His Lordship read the section.] Sub-sect. 1 would seem to assume that an objection might be made from the Bench, and that the applicant might be required to attend in person upon having proper notice given him in accordance with sub-sect. 2. He would thus learn the grounds upon which his attendance was considered by the justices to be necessary. The proviso in sub-sect. 2 leads to the same conclusion. It would appear, therefore, that the justices may entertain any objections to the renewal whether made previously or not and take evidence upon them. Further, even if, contrary to what would seem to be the true meaning of the statute, sub-sects. 1 and 2 must be taken to apply only when the Bench are not the objectors, the last clause in the section preserves their former powers and discretion. They continue to possess the authority conferred upon them by the Act of 1828. This is in accordance with the valuable judgment of Hawkins, J. in the case of *Reg. v. Anglesea Justices (ubi sup.)*. I see no reason to doubt the authority of the cases referred to by the Master of the Rolls, which sanction the conclusion that objections may be made from the Bench in open court, and may afterwards be investigated upon proper notice to the applicant to attend and answer the objections. The argument for the appellant would involve this consequence, that the magistrates, if there were no objector, would be bound to renew the licence, though they knew or had been furnished with reliable information that the application ought to be refused. But then it was said that, even though objections might be made from the Bench, the justices, who were parties to the notice to the applicant to attend, could not afterwards sit and adjudicate upon the application. The proceedings would have been regular under the Act of 1828, and it seems to me that there is no ground for saying it was impliedly forbidden by the Act of 1872. But it was urged that the inquiry was in the nature of the trial of an action between the justices and the applicant, and that those who had instigated the proceedings could not adjudicate upon what was described as their own cause. But, as has been laid down in the cases referred to by the Master of the Rolls, in licensing cases there is no *lis*, and nothing in the nature of a suit or a prosecution. The duty of the justices is to arbitrate impartially, not between themselves and the holder of the licence, but between that person and the public. The fact that the magistrates had obtained the report which was so much complained of by the counsel for the appellant was the ground upon which we are asked to say that the justices had made themselves parties to the opposition in each case, and were attempting to adjudicate on their own behalf. The form of the report, it was said, showed that the justices must have arrived at the conclusion that the appellant's premises were not required, and that the subsequent inquiry was only designed

to support a foregone decision. But I am wholly unable to adopt this reasoning. The report seems to me to contain no more than the information necessary to enable the magistrates to enter upon the consideration of the question whether there were too many licensed houses in the district. The document was neutral in its character, and contained no indication of an opinion as to the claim for renewal of the appellant or any other occupier of licensed premises. The justices seem to have acted with perfect fairness and to have been guided to the conclusions at which they arrived, not by anything contained in the report, but by the sworn evidence laid before them. The objection that the justices had what was described as an interest in the result of each inquiry took another shape in the suggestion that they were shown to have been influenced by bias. There is no ground for any such conclusion. The magistrates proceeded from first to last with commendable care, and seem to have had no other motive than the desire of honourable men to discharge their duties faithfully. With reference to Mr. Bentall, I agree that his temporary presence on the Bench did not invalidate the proceedings. He was not shown to have committed himself to any opinion on the subject of inquiry, or to have taken sides, as was suggested, against the appellants. It is not necessary to deal with the technical objections to the application for a *mandamus* which were raised by the learned counsel for the respondents.

COZENS-HARDY, L.J. read the following judgment:—In this case I should be content to say that, for the reasons assigned by the Master of the Rolls, I agree that the appeal must be dismissed. But, having regard to the great importance of the questions which have been raised as to the precise powers and duties of justices with respect to renewals of licences, it is right that I should state shortly, in my own words, the conclusions at which I have arrived. I do not propose to restate the facts. It cannot be disputed that, under the Act of 1828 the justices had an absolute discretion to grant or refuse applications for new licences and applications for the renewal of old licences. Their functions in this matter were administrative rather than judicial, and they were entitled to rely upon their general knowledge of the needs of the locality as well as upon any evidence which might be adduced. The Act of 1828 is still the governing statute, except so far as it has been modified by the Acts of 1872 and 1874. With respect to new licences, there are very material modifications to which it is not necessary to refer in detail. With respect to renewals, the material section—viz., sect. 42 of the Act of 1872, as amended by sect. 26 of the Act of 1874—need alone be considered. Now, in two cases the effect of this section has been discussed in the House of Lords. In *Sharp v. Wakefield (ubi sup.)* it was held that the old discretion of the justices under the Act of 1828 was not affected, and that sect. 42 only dealt with procedure. The attempt to establish a vested right to the renewal of a licence, except on some ground personal to the applicant, failed. In *Boulter v. Kent Justices (ubi sup.)* it was held that justices in granting or refusing to grant an application for renewal are not a court, and that the objector contemplated by sect. 42 is not a litigant, and

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that in short there is no *lis*. Now, in the face of those decisions, it has been strenuously argued before us that the effect of this section is to prevent the justices from exercising their discretion and discharging the duties imposed upon them in the public interest unless some outsider appears and objects to a renewal, or, in other words, that they are powerless themselves to require the attendance of the licence-holder with a view of considering whether his licence should be renewed. I cannot adopt this view. It seems to me that there is no reason why the justices should not on their own initiative direct the licence-holder to attend on a subsequent day, inform him of the grounds of objection, and then deal with the matter in due course at the adjourned meeting. The view has been repeatedly expressed and acted upon since 1874 that the justices may themselves start an objection. This conclusion seems to me necessary to enable the magistrates to perform their duty. The House of Lords held in *Boulter v. Kent Justices* (*ubi sup.*) that there is no *lis* between an objector and a licence-holder, and no right to recover the costs occasioned by an unsuccessful objection. In short, I regard the objection as merely a mode of informing the licence-holder that his case will be considered and that he must be prepared to deal with certain specified points. It is not necessary to consider whether the justices can act solely upon their own local knowledge—for example, as to the number of public-houses compared with the population, or whether they must in all cases act upon sworn evidence. In the present case the evidence was all taken upon oath. If I am right in the view that magistrates may themselves take, or direct their officer or agent to take, objection, all difficulty seems to be removed. It cannot be wrong to obtain careful and accurate information before taking, and with a view to taking such objection. No question of bias as against a particular licence-holder arises. In making the preliminary investigation and considering whether the number of licensed houses was in excess of the needs of the district the justices were simply preparing to discharge the important duties, mainly administrative, imposed upon them by the Act of 1828. In directing all the licence-holders to be served, and in taking sworn evidence upon each separate application, they seem to me to have acted with praiseworthy care. They were not adjudicating upon any rights. They were not prosecutors. In truth, there was no prosecution. They were only determining whether in the public interest a lucrative privilege should or should not be conferred. There is no ground for suggesting that they exercised their discretion capriciously or without regard to the circumstances of each individual case or without considering the requirements of the locality. The separate objection taken to Mr. Bentall may be disposed of very shortly. He was present at a meeting of the Surrey Congregational Union, at which a mild and harmless resolution was passed expressing satisfaction at the efforts of the Farnham magistrates to reduce the number of licensed houses. He took no part in the proceedings, and I think it idle to suggest that this in any way precluded him from acting as a licensing justice. I may add that in fact he retired directly it was brought to his mind that any objection could be taken to his presence. For these reasons I agree

with the Divisional Court that the rule for a *mandamus* must be discharged.

Appeal dismissed.

Solicitor for the licence-holders, *W. Montgomery White*, for *Edgar Kempe*, Farnham.

Solicitors for the justices, *Prior, Church, and Adams*, for *Hollett, Mason, and Nash*, Farnham.

Wednesday, May 14, 1902.

(Before WILLIAMS, BOMER, and MATHEW, L.JJ.).
HERTFORDSHIRE COUNTY COUNCIL v. BARNET
RURAL DISTRICT COUNCIL. (a)

APPEAL FROM THE KING'S BENCH DIVISION.

Local Government—Highways—Bridges—Surveyor of Highways—Agreement between surveyor of highways and county council for building bridge—Power to bind successors—District council becoming highway authority—Liability under agreement—Highways and Bridges Act 1891 (54 & 55 Vict. c. 63), s. 3.

The surveyor of highways for a parish was appointed on the 19th April 1898 for one year. On the 24th Sept. 1898 he made an agreement with the county council, under sect. 3 of the Highways and Bridges Act 1891, for the building of a bridge in the parish by the county council, and thereby agreed to contribute towards the expenses two sums of 100l., payable on the 31st Dec. 1898 and the 31st Dec. 1899 respectively.

On the 1st April 1899 the rural district council became the highway authority for the parish, under sect. 25 of the Local Government Act 1894, and they refused to pay the sum of 100l., which became due under the agreement on the 31st Dec. 1899, upon the ground that the surveyor of highways could not bind his successors.

Held (affirming the judgment of Lawrence, J.), that the surveyor of highways had power, under sect. 3 of the Highways and Bridges Act 1891, to make this contract so as to bind his successors, and that the liability thereunder passed to the rural district council.

THIS was an appeal by the defendants from the judgment of Lawrence, J., at the trial of the action without a jury.

The plaintiffs brought this action to recover the sum of 100l. due under an agreement made between the plaintiffs and one Henry Lovejoy.

On the 19th April 1898 Lovejoy was appointed surveyor of highways for the parish of Totteridge, in the rural district of Barnet, for the period of one year.

By a deed dated the 24th Sept. 1898, and made between the plaintiffs of the one part, and Henry Lovejoy, as such surveyor of highways for the said parish of Totteridge, on behalf of himself and his successors, as highway authority in and for the said parish (thereinafter called "the highway authority"), of the other part, after reciting that the parties thereto were desirous of constructing a bridge for the purpose of carrying the highway, leading from the town of Barnet to the Totteridge main road near the Totteridge church, over the stream or ford known as Totteridge Ford at the point situate within the parish

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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of Totteridge where the stream or ford crossed the highway, and that it had been arranged that the parties thereto should enter into the agreement thereafter contained for or in relation to the construction of such bridge, and for determining the proportions in which the expenses to be incurred for the purpose aforesaid should be defrayed by the parties respectively, and that it was estimated that the expenses would amount to the sum of 600*l.* or thereabouts, in exercise of the powers conferred on them respectively by sect. 3 of the Highways and Bridges Act 1891, and of all other powers (if any) enabling them in that behalf, the parties to the deed mutually agreed and declared as follows:

(1) That a bridge should be constructed for the purpose of carrying the said highway over the said stream or ford at the point aforesaid, and that all such works as the county surveyor for the time being of the said county of Hertford should deem necessary or proper for the purposes aforesaid should be executed by the plaintiffs as soon as might be under the directions of the said county surveyor.

(2) That the expenses to be incurred in the execution of the said works should be borne, as to the sum of 200*l.* part thereof, by the highway authority, and as to the residue thereof (not exceeding 400*l.*) by the plaintiffs.

(3) That the said sum of 200*l.* should be paid to the plaintiffs by the said highway authority out of such moneys as such authority should from time to time be authorised to apply for the purpose aforesaid, and that such authority should take all proper steps for raising the said sum and should pay the same to the plaintiffs by two equal instalments of 100*l.* each, of which the first should be so paid on the 31st Dec. 1898 and the second should be so paid on the 31st Dec. 1899.

(4) That all disbursements required to be made for the purposes of the said works should be made by the plaintiffs as occasion should require out of the moneys so received by the plaintiffs from the said highway authority or payable by the plaintiffs under the agreement, and that the said works and the superintendence thereof and the making of all contracts and the doing of all things in connection therewith should be under the sole control of the plaintiffs and the said county surveyor.

(5) That as soon as the said bridge should have been erected and completed to the satisfaction of the county surveyor, and all moneys payable to the plaintiffs by the said highway authority under the agreement should have been paid, the said bridge should be taken over by the county council as a county bridge and should thereafter be maintained and repaired by the county council.

(6) And that nothing in the agreement should be construed as imposing any liability on Henry Lovejoy to pay any sum out of any moneys other than moneys coming to his hands as highway authority for the said parish of Totteridge, and that his liability under the said agreement should be deemed to be and should enure as a liability of the highway authority for the time being having jurisdiction in and for the said parish.

On the 31st Oct. 1898 the works in connection with the bridge were commenced, and were thenceforth continued by the plaintiffs, and all the expenses of the works were paid by the plaintiffs from time to time.

On the 2nd Jan. 1899 the first instalment of 100*l.* provided for by the agreement was paid to the plaintiffs by Lovejoy, as such surveyor of highways.

On the 1st April 1899 the defendants, pursuant to the provisions of sect. 25 of the Local Govern-

ment Act 1894, became the highway authority for the parish of Totteridge.

The erection of the bridge was completed, and all the works in connection therewith were finished about the 25th Oct. 1899, and all the expenses thereof were paid by the plaintiffs.

On the 31st Dec. 1899 the second instalment of 100*l.* became due under the agreement, but the defendants refused to pay upon the ground that Lovejoy, as surveyor of highways, had no power to make any contract extending beyond his year of office.

The Highways and Bridges Act 1891 (54 & 55 Vict. c. 63) provides:

Sect. 3. The council of any administrative county, and any highway authority or authorities, and the council of any adjoining county, may from time to time make and carry into effect agreements with each other for or in relation to the construction, reconstruction, alteration, or improvement, or the freeing from tolls, of any main road or other highway, or of any bridge (including the approaches thereto), wholly or partly situate within the jurisdiction of any one or more of the party or parties to the agreement. All expenses incurred by any such county council or highway authority, in pursuance of this section, shall be defrayed as part of the expenses incurred in relation to the maintenance, repair, improvement or enlargement of bridges, main roads, or other highways by such council or highway authority, in such proportions as shall be determined by any such agreement as aforesaid, and any powers of borrowing, applicable to the raising of any fund for the payment of any such expenses as aforesaid, shall be applicable accordingly. Provided that if a highway board think it just that any parish or parishes specially benefited by any construction, reconstruction, alteration, or improvement under this section should bear the expense thereof, or any part of such expense, they may, with the approval of the county council of the county within which their highway district is situate, and with the assent of the inhabitants of such parish or parishes in vestry assembled, charge such expense, or such part thereof as they may think just, exclusively in such parish or parishes.

The Local Government Act 1894 (56 & 57 Vict. c. 73) provides:

Sect. 25 (1). As from the appointed day there shall be transferred to the district council of every rural district all the powers, duties, and liabilities of the rural sanitary authority in the district, and of any highway authority in the district, and highway boards shall cease to exist, and rural district councils shall be the successors of the rural sanitary authority and highway authority, and shall also have as respects highways all the powers, duties, and liabilities of an urban sanitary authority under sections one hundred and forty-four to one hundred and forty-eight of the Public Health Act 1875, and those sections shall apply in the case of a rural district and of the council thereof in like manner as in the case of an urban district and an urban authority. Provided that the council of any county may by order postpone within their county or any part thereof the operation of this section, as far as it relates to highways, for a term not exceeding three years from the appointed day, or such further period as the Local Government Board may on the application of such council allow.

The action was tried before Lawrance, J., without a jury, on the 17th May 1901.

Danckwerts, K.C. and *B. D. Muir*, for the plaintiffs.

Macmorran, K.C. and *Alexander Glen* for the defendants.

LAWRANCE, J.—In this action the question is whether in the circumstances of this case, and under the agreement which was made on the 24th Sept. 1898 between the Hertfordshire County Council and Mr. Lovejoy, the surveyor of highways at that time for the parish of Totteridge, for the building of a bridge, Mr. Lovejoy was in a position to impose upon his successors the liability for 100l., part of the expenses, which was not to be paid according to the agreement until after his term of office would have expired. The facts were as follows: Mr. Lovejoy was appointed the surveyor of highways for Totteridge on the 19th April 1898, and his year of office would expire on the 19th April 1899. The agreement between him and the county council was made on the 24th Sept. 1898. On the 1st April 1899, which in the circumstances of this case was "the appointed day" under sect. 25 of the Local Government Act 1894, the Barnet District Council became the highway authority for the district. The question is whether, under sect. 25 of the Act of 1894, the district council took over this liability as one of the liabilities which they were called upon to discharge. In my opinion, they did take over this liability. At that time Mr. Lovejoy was undoubtedly the highway authority, and in my judgment this was a liability of the highway authority which passed to the district council. I think that the district council are responsible for the carrying out of the agreement, and therefore there will be judgment for the plaintiffs.

Judgment for the plaintiffs.

The defendants appealed.

Macmorran, K.C. and Alexander Glen for the appellants.—The judgment of the learned judge was wrong, for this was a liability which the surveyor of highways had no power to impose upon his successors. The surveyor of highways is not a corporation, and has no power to make any contracts or to incur any liabilities which will extend beyond his term of office so as to bind his successors:

Frodingham Iron and Steel Company v. Bowser, 71 L. T. Rep. 433; (1894) 2 Q. B. 791.

He must defray all the expenses which he incurs out of the funds which are raised by him during his term of office. If he incurs liabilities which he cannot meet out of those funds, his successor may reimburse to him the deficiency, under sect. 5 of the Highway Act 1882 (45 & 46 Vict. c. 27). That section provides the only protection for a surveyor of highways who incurs liabilities which he cannot meet out of the rates levied by him and the other moneys which he may receive during his term of office; and it shows that he cannot impose any liabilities upon his successor. The only power under which a parish can contribute to highway expenses incurred by another authority is that contained in sect. 49 of the Highway Act 1864 (27 & 28 Vict. c. 101), which does not apply to a case of this kind. The effect and substance of this transaction was the same as the borrowing of money for a present capital expenditure upon improvements so as to throw the liability upon future ratepayers. Any highway authority or other local authority must obtain the sanction of the Local Government Board before it can borrow money, and the contention of the plaintiffs in effect is that a surveyor of highways, as highway authority, can do that which no other local authority can do

—that is, raise a loan and impose liability upon future ratepayers without obtaining that sanction which all other local authorities must obtain. This contract, so far as it sought to bind his successors, was *ultra vires* of the surveyor of highways and invalid. Sect. 3 of the Highways and Bridges Act 1891 does not confer upon a surveyor of highways any power to incur liabilities of a character which he could not otherwise incur; it relates only to the subject-matter of a contract which he may make.

Danckwerts, K.O., R. D. Muir, and T. B. Colquhoun Dill, for the respondents, were not called upon to argue.

WILLIAMS, L.J.—In my opinion this appeal must fail. The argument advanced on behalf of the appellants really amounts to this: While it cannot be denied that the words of sect. 3 of the Highways and Bridges Act 1891 are such that, if construed in their natural and plain sense, they do give to the surveyor of highways, as the highway authority, power to enter into such an agreement as this; yet it is said that, if we construe this section according to its plain meaning, we shall be imputing to the Legislature that by this section they passed a law which is not entirely consistent with previous legislation, and with the legal history of this matter. That is not, in my opinion, a sufficient reason for not giving to this section the plain meaning of the words used. It is not a sufficient reason to compel or justify us in refusing to give to this section that which appears to be the manifest meaning of the Legislature. It may be that the Legislature, when they passed this section, did not contemplate that they were giving to a surveyor of highways a larger authority than that which was given to what may be called the superior authorities. Even if that were so, it would not justify us in not giving its plain meaning to this section. That being so, and there being no dispute that, under sect. 25 of the Local Government Act 1894, the duties and liabilities of the surveyor of highways passed to the district council, I think that the decision of Lawrance, J. was right, and that this appeal must be dismissed.

ROMER, L.J.—I am of the same opinion. I think that we ought not to narrow the meaning of sect. 3 of the Highways and Bridges Act 1891 as contended by the appellants. The power of the surveyor of highways, as the highway authority, to make an agreement as to the construction of a bridge, under sect. 3, is clearly not limited to cases where the work of constructing the bridge will not last longer than his term of office, or to cases where he pays in advance if the work will continue beyond his term of office. I do not see why he should not agree that payment should be made in the ordinary way as the work proceeds. The opposite construction of sect. 3 would really often make it impossible for a surveyor of highways to make any proper contract for work of this kind. Sect. 3 gives the surveyor of highways power to make such an agreement at any time during his term of office, and not merely an agreement which will be fulfilled during his term of office. I agree that the power given by sect. 3 must be exercised reasonably, and that a surveyor of highways might enter into an agreement which upon the face of it would be an abuse of the power given by sect. 3. That is not so in the case

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of this agreement. This bridge took more than a year to build, and the agreement was to pay a part of the expenses by two yearly payments. That was a reasonable and proper agreement, and was within the powers conferred by sect. 3. I agree, therefore, that this appeal fails and must be dismissed.

MATHEW, L.J.—I am of the same opinion. With reference to certain particular charges and expenses, the surveyor of highways has only a limited power, and can only incur expenses which are defrayed during his year of office. It is contended that we ought to construe sect. 3 of the Highways and Bridges Act 1891 as subject to that limitation. This is an exceptional kind of contract—it is an agreement in relation to the construction of a bridge, the completion of which is likely to extend beyond the year. I do not think that it would be right to construe this Act of Parliament by reference to the ordinary limited powers of a surveyor of highways. Under sect. 3 a surveyor of highways can make any reasonable contract, and in relation to the building of a bridge it is reasonable to make a contract for payment extending over two years.

Appeal dismissed.

Solicitors for the appellants, *Byfield and Son*.
Solicitors for the respondents, *J. N. Mason and Co.*, for *C. E. Longmore*, Hertford.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 4 and 5, 1902.

(Before FARWELL, J.)

ATTORNEY-GENERAL AND THE RURAL DISTRICT COUNCIL OF SETTLE v. RURAL DISTRICT COUNCIL OF LUNESDALE. (a)

Inclosure Act—Action for breach of duty to repair roads—Canon of construction to be applied in construing Act.

By an *Inclosure Act* passed in the 7 Geo. 3 with reference to the inclosure of certain commons and waste grounds known as B. Moor, after reciting that the persons interested were owners and proprietors of messuages, &c., in the several townships therein mentioned, including, amongst others, the township of W., it was enacted that the commissioners should appoint and undertake the repair of (inter alia) two roads mentioned in the statement of claim.

The plaintiffs alleged that these roads were duly made in accordance with the award, and were for many years kept in repair by the surveyor of the township of Wennington, and that the said township was included in the defendant urban district, and that the defendants were liable to repair them.

There was no evidence, that the inhabitants of W., taken as a body, had ever in fact repaired or paid for the repair of the roads in question since 1767, although it was shown that since 1859 certain of the inhabitants of the township had contributed towards the repair of the roads for

their own convenience. It was contended by the plaintiffs that liability to repair the roads in question was imposed upon the defendants.

Held, in the circumstances, that the court was justified in reading in after the words "in such manner as other public highways are by law directed to be repaired by such of the said townships respectively" the words "within whose district such public highways are situated"; that the doctrine of contemporanea expositio did not apply; that the defendants were not liable to repair the roads in question as the same were outside their district; and that in construing an *Inclosure Act* it is right to take the whole of the document as one complete document. It is not sufficient to take out one section and disregard others which are germane to the same subject.

Rex v. Inhabitants of Cottingham (6 T. B. 20) followed.

ACTION for a declaration that the defendants, the Rural District Council of Lunesdale, were liable to repair two roads, coloured red upon a plan annexed to the statement of claim, situate in the township of Bentham, in the West Riding of the county of York, and for a mandatory injunction to compel the defendants to repair them.

According to the statement of claim it appeared that by an Act of Parliament of 7 Geo. 3 intituled "An Act for dividing, allotting, and inclosing such part of certain commons and waste grounds called Bentham Moor as lieth within the Manor of Ingleton, in the West Riding of the county of York," after reciting that the several persons therein mentioned were owners and proprietors of ancient messuages, lands, tenements, or hereditaments in the several townships therein mentioned including (*inter alios*) the township of Wennington, it was enacted (*inter alia*) that the commissioners therein named, or any three of them, should and might, and were thereby directed and required to set out and appoint such public highways and private roads or ways and also such hedges, ditches, bounds, walls, fences, drains, watercourses, tanks, bridges, gates, and stiles in, over, or upon the common and waste grounds intended to be inclosed by virtue of the Act, or any of them as they in their discretion should think requisite. And that all such public highways, roads, and ways should be made and at all times for ever thereafter repaired and kept in repair in such manner as other public highways were by law directed to be repaired by such of the townships respectively as the commissioners or their successors or any three or more of them should direct or appoint.

By their award dated the 28th Dec. 1767, and made in pursuance, as the plaintiffs alleged, of the authority given to them by the Act, the commissioners set out and appointed the two roads over Bentham Moor in dispute in this action, and directed that both roads should be made and for ever afterwards repaired and kept in repair by the inhabitants of the township of Wennington in manner as the public highways within the township of Wennington were maintained and kept in repair.

The plaintiffs further alleged that the roads in question were duly made in accordance with the award, and were for many years kept in repair by the surveyor of the township of Wennington; that the township was now included in the

(a) Reported by W. VALENTINE BALL, Esq., Barrister-at-Law.

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Lunesdale Urban District; and that repairs had not been effected since 1894.

The defendants by their defence contended that if the award in question imposed upon the inhabitants of Wennington any liability to keep the roads mentioned in the statement of claim in repair, the same was *ultra vires* of the commissioners and was not binding upon the defendants. They also denied that the roads in question were made in accordance with the award.

Upjohn, K.C. (*MacSwinney* with him), having opened the case for the plaintiffs, and witnesses having been called,

MacSwinney for the plaintiffs. — The actual width of the highways was in the discretion of the commissioners. It has been held that, affirmative words used in a statute are merely directory

Cole v. Green, 6 M. & G. 873; 7 Scott (N. R.) 682.

In that case it was provided by a private Act that contracts should be signed by the commissioners, or any three of them, or their clerk; it did not say that they should be void unless so signed. It appeared to the court therefore (see p. 890) that the part of the section containing these words was directory only. He also referred to

Maxwell on Interpretation of Statutes, 3rd edit., p. 528;

Reg. v. Ingall, 35 L. T. Rep. 552; L. Rep. 2 Q. B. Div. at p. 208.

In construing this Act it is necessary to strike a balance of convenience. It would seem extraordinary that if this direction were not complied with the whole Act should be void. No objection has ever been taken by anyone impeaching the conduct of the commissioners. Further, this is not a case where the result of not following the exact words of the statute imposes an increased burden upon the inhabitants. There is clear evidence that since 1854 this road has been kept in repair by the defendants; and within twelve months after the Local Government Act 1894 (i.e., on the 25th Nov. 1895) there is an entry made in the books of the district council to the effect that the surveyor should be directed to effect repairs of the Raven's Close Road, which is one of the roads referred to. Such a minute can be used in evidence:

Public Health Act 1875 (38 & 39 Vict. c. 55), sched. 1, pt. 1, s. 10.

There is also negative evidence to the effect that the Settle Rural District Council have not done the repairs.

Jenkins, K.C., *R. C. Glen*, and *Bethune* for the defendants. — It is submitted that the commissioners had no right under the Act to make the inhabitants of Wennington liable to repair the ways in question. It is said that repairs were done for thirty years; but they were only voluntary repairs effected by some of the inhabitants privately for their own convenience. The Act is loosely drawn. The words "ways" and "roads" are used interchangeably. All highways made under the Act should have been 60ft. wide:

R. v. Wright, 3 B. & A. 681.

It has been held that commissioners appointed by a local Act, which enacted that the private roads set out by them should be repaired by such person or persons as they should award, had no

power to impose on the parish at large the burden of repairs:

Res v. Inhabitants of Cottingham, 6 T. R. 20.

The Act creates a power in the commissioners and a corresponding liability upon those affected. It is submitted that this creates a position contemplated by Maxwell on the Interpretation of Statutes, 3rd edit., p. 521, where he says: "A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty, and where they relate to a privilege or power: (see per Denman, J. in *Caldow v. Pizell*, 36 L. T. Rep. 469; L. Rep. 2 C. P. Div. 562).

June 5. — *FARWELL, J.* — I have come to a conclusion in my own mind, although this case is very obscure. The point in question between the plaintiffs and the defendants is who is liable to pay for the repairs of a piece of road which is in the district of the plaintiffs, but which is said to be repairable by the defendants by virtue of an award under an Inclosure Act. The Act was passed in 1767. It was an Act for the inclosure of a large tract of common or waste ground in Bentham Moor, all or part of which is situated within the Manor of Ingleton. The persons interested appear in the second recital to the preamble. They are certain persons named, and they are described as "owners and proprietors respectively of ancient messuages, lands, tenements, or hereditaments in the several townships of Ingleton and Bentham within the said manor of Ingleton in the said West Riding of the said county of York and in the township of Wennington in the county of Lancaster." These "have severally for themselves and their respective leases and tenants for and in respect of the several estates within the same manor and townships right of common upon the said commons and waste grounds called Bentham Moor." The persons applying for the Act, and interested in it, are the owners of the soil, and certain persons including certain inhabitants of Wennington and of another county not within the manor at all in respect of tenements of theirs in Wennington. They have certain rights which include turbary, and there may have been others. I do not know. These persons come together and agree, and subsequently apply to the Legislature to get and succeed in getting one of the usual old-fashioned Inclosure Acts enabling the moor to be inclosed. I now come to a passage on p. 6 of the print of this Act upon which the argument in this case to a great measure turns, and I may say that, if the argument rested on this clause alone, I should have considerable difficulty in coming to the conclusion at which I have arrived. I think, however, that in construing an Act of this description, and indeed all Acts, it is only fair to take the whole of the document as one complete document. One must not take out one section and disregard others which are germane to the same subject. I have also to bear this in mind, that it is an Act passed, as was pointed out in the case of *Res v. Inhabitants of Cottingham* (*ubi sup.*), which has been referred to, for the private emolument of the persons who desire to divide up the common, and the only interest which Wennington has is first of all in respect of those inhabitants of Wennington who by reason of their tenements have rights of common

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over this moor, and also somewhat indirectly because under the award the owner of the soil chose to permit a certain quarry to be used for the making of roads and the repairing of roads, not only in the other townships, but also in Wennington. I cannot regard that as bringing Wennington in "as a party to the Act," but I regard it as the court did in the *Cottingham* case as something put forward by persons who are themselves interested. So far as I can see, all that Wennington had to do with it was limited to the individuals, who are stated to have rights of common over the moor in question. That being so, I find first of all at page 6 a clause for the setting out of the roads. It is followed a little later (after certain intervals) by a clause enabling the award to be made, which is expressed on the face of it to be for preventing all differences and disputes relating to the intended inclosure and division, and is followed by an express provision as to the costs and charges of certain specified matters in respect of these roads. On p. 6 the provision is as follows (reading it shortly): "The commissioners shall meet and they are hereby directed and required to set out and appoint such public highways and private roads or ways and also such hedges, ditches," and so on, "in, over, or upon the commons and waste grounds intended to be inclosed by this Act or any of them"—that is to say, the moor in question not being in Wennington—"as they in their discretion shall think requisite, so as all such public highways be 60ft. at least in width between the ditches, and that all such public highways, roads, and ways shall be made and at all times for ever thereafter repaired and kept in repair in such manner as other public highways are by law directed to be repaired by such of the said townships respectively as the said commissioners or their successors or any three or more of them shall direct or appoint." Then after certain provisions, which I need not refer to more particularly, because they only show that there is a certain want of care in the preciseness of the language used, the section goes on: "And that all private ways, hedges, ditches, walls, fences," and so on, "to be set out, erected, and appointed as aforesaid shall be made and provided, and at all times thereafter repaired, cleansed, maintained, and kept in repair by such person or persons, and in such manner as the said commissioners or their successors or any three or more of them, shall by their award or instrument hereinafter mentioned direct and appoint." That is followed up by the award section at p. 10: "And for preventing all differences and disputes relating to the said intended inclosure and division, it is hereby further enacted by the authority aforesaid that immediately after the said commissioners or their successors, or any three or more of them, shall have completed or finished the respective partitions, allotments and divisions of the said commons and waste grounds, pursuant to the purport and directions of this Act, they the said commissioners or their successors or any three or more of them, shall form and draw up, or cause to be formed and drawn up, an award or instrument in writing which shall express, specify, and contain the quantity in the measure hereinbefore mentioned, of acres, roods, and perches contained in the said commons and waste grounds, and the quantity of each and every parcel thereof

assigned and allotted to every of the parties entitled to and interested in the same respectively; and an exact description of the situation, abutments, and boundaries of the said parcels and allotments respectively, with orders and directions for and concerning the laying out and making the public roads, and the breadth thereof, and for and concerning laying out, making, maintaining, cleansing and keeping in repair, the private roads and the ways, hedges, ditches, walls, fences, banks, drains, watercourses, bridges, gates, and stiles, in, upon, and over the said commons and waste grounds intended to be closed by virtue of this Act; and also such other orders, regulations, and determinations as shall be necessary or proper to be inserted therein, according to the tenor and purport of this Act." Then there comes a provision on p. 12: "That the charges and expenses incident to, or attending the passing of this Act, and of the surveying and valuing the said messuages, tenements, and inlands within the said manor and townships respectively; and of the surveying, planning, measuring, dividing, allotting, and setting out the said commons and waste grounds so intended to be divided and inclosed as aforesaid, and of the preparing, making, and executing the said award and of setting out and making the said public and private ways and roads and of all charges and expenses incident to or attending the execution of this present Act shall be borne and defrayed by the several persons to and amongst whom the same commons and waste grounds shall be respectively allotted, in proportion to the real value of their respective allotments," &c. Now, under the first provision at p. 6, in my opinion, the generality of the statement "that all such public highways, roads, and ways shall be made and at all times for ever thereafter repaired and kept in repair in such manner as other public highways are by law directed to be repaired, by such of the said townships respectively as the said commissioners or their successors or any three or more of them shall direct or appoint," is really to be limited in the same manner or in an analogous manner to the mode in which the generality of the expression at the end of the section "by such person or persons as the commissioners shall direct" is to be limited in accordance with the authority of the case of *Rez v. Inhabitants of Cottingham (ubi sup.)*. I think the true rendering of the section is this, and it is one which avoids the difficulties suggested by Mr. Upjohn, which perhaps were applicable to the transposition which Mr. Jenkins suggested. The real way to solve the difficulty is to read in after the words "in such manner as other public highways are by law directed to be repaired, by such of the said townships respectively," the words "within whose district such public highways are situated." That seems to me to be what was really intended having regard to the subsequent provisions in the Act, and it is also in accordance with the principle of construction adopted by the court in the case of *Rez v. Inhabitants of Cottingham (ubi sup.)*. I have here to consider Wennington as a township, and it is to be distinguished from such of the inhabitants of Wennington as might by virtue of certain tenements therein have rights of common over the moor, who have no concern whatever with this matter; and to assume that the Legislature meant to give authority to the commis-

sioners to cast the burden of keeping in repair a public highway outside the district on the inhabitants of the district of Wennington seems to me to be a very strong thing, and one which is to be avoided if possible. Now, I have not only got the considerations which were present in the case of *Rez v. Inhabitants of Cottingham* (ubi sup.), but I have also the assistance of Grave, J.'s statement on that same section as to the meaning of the words "in such manner as other public highways are by law directed to be repaired." The words are exactly the same "in such manner as other public highways are by law directed to be repaired." He says: "With respect to the former, it directs that they shall be repaired in such manner as other public roads, that is, by the parish." The *primâ facie* meaning, therefore, of the words I have got here "in such manner as other public highways are by law directed to be repaired" is by the parish. In order to make that which I take to be the *primâ facie* meaning on Grave, J.'s authority consistent with the rest of the section, I must read in the words that I have suggested unless I adopt Mr. Jenkins' suggestion of transposing the sentences, I think I should be justified by *Key v. Key* (4 De G. M. & G. 73), and cases of that class, in making the transposition if necessary, but I prefer to put it in the way I have done because it avoids the difficulties which Mr. Upjohn suggests, although I confess I am not very much pressed by them, because one must assume that the commissioners would do what was sensible, and would not direct one township to make a road in another township's district for the mere pleasure of changing over the authority to do the work. In this particular Act of Parliament, which is certainly very ill drawn, I am assisted by the fact that when I come to the award, there is an express provision distinguishing between the public highways and the private ways. The orders are to be for and concerning the laying out and making of the public roads and the breadth thereof, and for and concerning the laying out, making, maintaining, cleansing, and keeping in repair of the private roads. On reading these two sections fairly together, I cannot help coming to the conclusion that there is no intention on the part of the Legislature to displace the common law liability to repair the roads, but to authorise the commissioners to make awards in accordance with such pre-existing common law liability. I think it would be unreasonable to construe the Act so as to enable the commissioners to throw upon the inhabitants of Wennington, who have no concern with the Act at all, the liability to repair the roads in another district. Then it is said that there is a *contemporanea expositio*. So far as regards the award, there is no doubt the commissioners took the view that they had power to direct the Wennington township to do these repairs. The award is explicit that public highways in the township of Wennington shall be made and for ever afterwards repaired and kept in repair by the inhabitants of the township of Wennington Manor. I think the true meaning of that is that the commissioners construe the Act of Parliament in a way different to the way I have construed it. Now if there had been evidence to convince me that, during the period of 150 years since the Act was passed, the inhabitants of Wennington had, in fact, repaired and paid for the repair of this road, I should then

consider I had a case of *contemporanea expositio*. The best statement of the law upon this subject is to be found in a speech of Lord Watson in the House of Lords in case of *Trustees of the Clyde Navigation v. Laird* (8 App. Cas. 673). He says: "I have only to add that, in my opinion, such usage as has in this case been termed *contemporanea expositio* is of no value whatever in construing a British statute of the year 1858." This was in 1883. "When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature at that remote period." Now, if I had found, in the present case, a long course of dealing evidencing the unanimous consent of all persons interested throughout the years since the Act and the award, I should undoubtedly have given effect to it; but so far from holding that, I do not think that the onus which is certainly on the plaintiffs of showing that Wennington has paid for these repairs has been discharged at all. The most material piece of evidence to my mind is supplied by those curious books put in evidence by Peter Bramwell from 1859 to 1865. There is no evidence whatever to show whether this road was ever repaired at all or by whom it was repaired down to 1859. I should infer that it was in fact repaired by somebody, but I had unmistakable evidence in 1859 that the road was then repaired, and had been repaired as I gather for some little time before, to what exact extent has not been shown, by a voluntary rate collected from the persons in Bentham who had occupied land adjoining the road. They found the road useful, and they repaired it for their own benefit. The book which proves this is perfectly explicit. It shows that a 6d. rate was levied on those particular persons and those only, and this levy went on down to the year 1865. As to what happened between 1865 and 1873 does not seem clear. I do not think the evidence really assists me, but from 1873 down to 1895 I think it is pretty plain that so far as the repairs were actually carried out they were carried out by this man Peter Bramwell. I also think it is plain, and I find as a fact so far as it is possible to come to an opinion on the evidence I have seen, that if and so far as they were paid out of the Wennington rates they were so paid by Peter Bramwell wrongfully, and without the knowledge of the persons who were really made liable for those payments. Peter Bramwell's evidence comes to this in effect. He was the surveyor; he lived in a house which abutted on the road in question; he used the road; he wanted it repaired, and he used money from the rates from time to time in order to repair it, but he says, "I never put down the expenses of repair of this road," which he called Bentham-road (I need not say anything about the dispute as to the name of the road), "in my highway account books. If I had the auditor would have disallowed it; from my books nobody could have told that I had been repairing the road. The reason I repaired the road was that I was the surveyor of Wennington. I repaired it before, and liked to do it before. I was not bound to repair that road; I did it from my own free will; I personally used the road a good deal." The evidence

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before me amounts to nothing down to 1859; there is no evidence at all one way or the other from 1859 onwards, but there is indisputable evidence that it was not repaired by Wennington, but repaired privately. There is evidence that repairs were done unwittingly by Wennington, not to their knowledge, but in fact in spite of them and to their detriment; but such evidence is comparatively modern, and to my mind does not come within the meaning of the words *contemporanea expositio*, as pointed out by Lord Watson. There is no unanimous consent over a long unbroken period; in fact, the earlier date is the most material for the *contemporanea expositio*, and although if I had evidence that in 1865 Wennington had been repairing, and that afterwards there had been a charge, I should attach little importance to the charge, and I might be able to throw back, by way of inference, the actual repairs to 150 years ago, as to which, of course, positive evidence would be difficult to obtain at this period. Still, when I find that the earliest record I have is of repairs not by Wennington, but by voluntary rate, it seems to me that what was done subsequently is of very little avail for the purpose of displacing that voluntary payment, or rather of overleaping that voluntary payment, so as to get back by way of inference to a contemporaneous payment, which is the only thing that would be useful as *contemporanea expositio*. The result is that to my mind the evidence is really not in favour of the plaintiffs so far as the facts go. There is only one other thing which I need refer to. It is that I do not think that public highways of at least 60ft. in width is a condition precedent, or essential to the setting out of the roads. I think it is only directory for the reasons which appeared in the various cases cited. I think the setting out of the various highways is a duty to the public within the definition given by the case of *Steele v. Ashwell*, and I might also adopt the view of Lord Tenterden—and it is a strong one—that in an Act of this sort you do require negative words if you want to make a provision of that kind something more than directory. The result is that in my opinion the plaintiffs have failed to show that there is such a liability as they contended for, and that the liability is really cast upon themselves. In fact I need not say that. It is enough to say that it is not cast upon the defendants. I shall dismiss the action with costs.

Solicitors: *Ridsdale and Son*, for William Hartley, Settle; *Gibson, Weldon, and Bilborough*, for Johnson and Tilly, Lancaster.

KING'S BENCH DIVISION.

Tuesday, June 24, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

WIMBLEDON URBAN DISTRICT COUNCIL (apps.) v. HASTINGS (resp.). (a)

Public health—Nuisance—Overcrowding—Order to inspect—Evidence as to reasonable grounds—Form of order—"House"—School without boarders—Public Health Act 1875 (38 & 39 Vict. c. 54), ss. 4, 91, 92, 102.

"House" in sect. 91 (5) of the Public Health Act 1875 includes a day school where there are no boarders and where none of the members of the staff reside.

Where by virtue of sect. 102 of that Act an application is made to a justice for an order to enter premises where a nuisance is alleged to exist, such justice, although he has not to decide whether a nuisance in fact exists, may consider whether there are reasonable grounds for suspecting there is a nuisance, and for that purpose may receive evidence as to the true state of the facts.

If a justice makes an order for the officer to enter to inspect, such order ought to be made in reference to a particular subject-matter.

CASE stated by quarter sessions.

The appellants, the Wimbledon Urban District Council, are the local authority under the Public Health Act 1875 in and for the urban district of Wimbledon.

The respondent, Edith Hastings, is the head mistress of the high school for girls in Mansel-road, Wimbledon (hereinafter referred to as the school).

The school is one of the thirty-four schools owned and carried on by the Girls' Public Day School Company Limited, and in respect of its science and art classes is under the inspection of the Board of Education and receives grants for the same. It is a day school for girls; there are no boarders nor do any of the members of the staff reside there, the only persons dwelling upon the premises being two maidservants. No evidence was given as to the hours of attendance of the scholars.

Sect. 92 of the Public Health Act 1875 provides that it shall be the duty of every local authority to cause to be made from time to time inspection of their district with a view to ascertain what nuisances exist calling for abatement under the powers of the Act, and to enforce the provisions of the Act in order to abate the same. By sect. 91 of the same Act, for the purpose of the Act any house or part of a house so overcrowded as to be dangerous or injurious to the health of the inmates, whether or not members of the same family, shall be deemed to be a nuisance; and by sect. 4 of the same Act:

In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them—that is to say, "house" includes schools, also factories and other buildings in which persons are employed.

By sect. 102 of the Act it is enacted that the local authority or any of their officers shall be admitted into any premises, for the purpose of examining as to the existence of any nuisance

(a) Reported by W. DE B. HERBERT Esq., Barrister-at-Law.

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thereon, at any time between the hours of nine in the forenoon and six in the afternoon, or, in a case of a nuisance arising in respect of any business, then at any hour when such business is in progress or is usually carried on.

By the same section it is further enacted that

If admission to premises for any of the purposes of this section is refused any justice on complaint thereof on oath by any officer of the local authority (made after reasonable notice in writing of the intention to make the same has been given to the person having custody of the premises) may by order under his hand require the person having custody of the premises to admit the local authority or their officer into the premises during the hours aforesaid, and if no person having custody of the premises can be found, the justice shall, on oath made before him of that fact, by order under his hand authorise the local authority or any of their officers to enter such premises during the hours aforesaid.

The medical officer of health for the district received the following complaint in writing dated the 10th Nov. 1901 and signed—namely:

I do not know if I am right in asking you the question or should have applied to the sanitary inspector. It is of the overcrowding of the junior class rooms of the girls' high school. I am not alone of that opinion. The school is deservedly popular, but we who send our girls there expect them to have the legal amount of space. There are now 400 pupils besides the teachers. There were thirty-two and mistress in the room my niece was in last term. There are thirty-two pupils also in the present one, and it is smaller.

This letter was given to the inspector of nuisances for the district for inquiry into the complaint. The inspector accordingly on the 18th Nov. 1901 visited the school and saw the respondent. He explained to her the nature of the complaint received, and applied for admission to examine the school for the purpose of seeing whether the alleged nuisance existed.

The respondent refused to grant the inspector admission to make the desired examination.

The inspector on the evening of the same day reported the matter to the sanitary committee of the appellant council, and they instructed the clerk of the council to forthwith take such proceedings as might be necessary to enforce compliance with the provisions of the Public Health Act 1875.

Accordingly the clerk on the day following (the 19th Nov. 1901) wrote the following letter to the respondent:

Complaint was made last evening to the sanitary committee of this council that you had refused to permit the sanitary inspector of the council to examine the premises occupied by you. I would point out to you that this is a direct violation of the provisions of the Public Health Act 1875, but I can hardly believe that you have wittingly offended against that Act. The sanitary inspector will attend at your premises at two o'clock this Tuesday afternoon for the purposes of making an examination required by him, and I am instructed to inform you that in the event of your again refusing him admission or obstructing him in the execution of his duties an application will be made to the magistrates to deal with the matter without delay—a course which I trust will be unnecessary.

The inspector, in accordance with the terms of such letter, attended at the school at the hour named and applied to be admitted for the purpose above mentioned, but was again refused admission, and on the same day the respondent

forwarded the following letter to the clerk of the council:

I must again decline to allow any inspector to examine the school without the authority of my council or their secretary.

An application was made to justices of the peace for an order under sect. 102 of the Public Health Act 1875 requiring the respondent to admit the inspector to the school for the purpose aforesaid, and in support of such application a complaint was made on oath by the inspector, and an order was made requiring the respondent to admit the officer of the Wimbledon District Council to the premises for the purposes aforesaid.

The respondent being dissatisfied with the decision appealed against the same to the Court of Quarter Sessions.

It was contended on behalf of the respondent:

(1) That the alleged nuisance was not within sect. 91 (5) at all (a) because that clause referred only to houses in the ordinary sense of the term, or at any rate only houses used as dwellings, and (b) because the scholars were not inmates, and accordingly that the justices had no jurisdiction to make, or at any rate had no sufficient materials before them on which to make, their order; (2) that under sect. 102 of the Public Health Act 1875 the justice before making such an order as aforesaid must be satisfied that there are reasonable grounds for such entry, and that in this present case there were no such reasonable grounds, and they referred to *Duncan v. Dowding* (1897) 1 Q. B. 575 and to *Vines v. Governors of the North London Collegiate School for Girls* (63 J. P. 244); (3) that the entry was not sought to be made during the hours at which the business of the school was being carried on; and (4) that the order was wrong in substance and form because it did not specify any particular nuisance, and therefore did not properly specify the purpose for which the entry was to be made and did not specify the hours during which the entry was to be allowed.

The respondent tendered evidence for the purpose of proving that the number of pupils at the school was 270, and not 400 as stated in the letter, and that the class rooms therein referred to were not used for thirty-two pupils and a mistress, and that the alleged nuisance did not at any time in fact exist, but the quarter sessions were of opinion that the question as to the existence of overcrowding in fact was not before them, and they decided not to hear any such evidence.

On behalf of the appellants it was contended:

(1) That by sect. 4 of the Public Health Act 1875 the word "house" includes schools, and therefore sect. 91 of the same Act, which for the purpose of the Act states what are to be deemed nuisances including (*inter alia*) "any house or part of a house so overcrowded as to be dangerous or injurious to the health of the inmates, whether or not members of the same family," applies to the school, and that therefore the justices were right and acting within their jurisdiction in making such order as aforesaid; (2) that sect. 92 of the Public Health Act 1875 imposes upon the local authority an imperative duty of causing to be made from time to time inspection of their district with a view to ascertaining what nuisances exist calling for abatement under the powers of

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the Act, and that sect. 102 of the Act gives to the local authority and to their officers an absolute right to enter the premises for the purpose of examining as to the existence thereon of any nuisance, and the section, in the event of admission being refused, empowers any justice, upon complaint thereof on oath by any officer of the local authority (made after reasonable notice in writing of the intention to make the same has been given to the person having custody of the premises), by order under his hand to require the person having custody of the premises to admit the local authority or their officer into the premises during the hours mentioned in the section; that therefore there is no obligation on the part of the local authority to show that they or their officer have reasonable grounds for believing that a nuisance exists upon the premises, but that, even if it should be necessary to show that there were such reasonable grounds, then in the present case it was shown that the inspector had such reasonable grounds for believing that the alleged nuisance did exist upon the premises of the school; and (3) that the order was not wrong in form, but that, even if it were wrong, the appellants are not and have never been averse to the same being amended so as to refer to the specific nuisance complained of only.

The quarter sessions were of opinion that the scholars attending at the school were not inmates within the meaning of sect. 91 (5) of the Public Health Act 1875, and accordingly that the appellants had not alleged the existence of any nuisance within the meaning of that Act or shown any reasonable grounds for suspecting the existence of such a nuisance, and they accordingly made an order allowing the appeal and quashing the order of the justices. They did not decide any of the other points raised by the respondent.

C. A. Russell, K.C. and Geo. Humphreys for the appellants.

Macmorran, K.C. and Daldy for the respondent.

LORD ALVERSTONE, C.J.—Under sect. 102 of the Public Health Act 1875, if a local authority desire to obtain admission to a house for the purpose of seeing as to whether or not there is a nuisance there, they may apply to a magistrate or justices on complaint on oath by an officer of the local authority, after reasonable notice in writing of intention to make the same to the person having custody of the premises, who may by order require the person having the custody to admit the local authority by their officer into the premises. It is quite plain that it is a very salutary provision to enable inspection of premises to be made in order to see if there is a nuisance or not. Now, in this case some representations had been made, we do not exactly know what, about the school and an order was made by the justices to allow the school to be inspected. The quarter sessions have decided that that was not a proper order, because it related to a school, and that school was not in their opinion a house or part of a house so overcrowded as to be dangerous or injurious to the health of the inmates. Now, the interpretation clause of the Act, sect. 4, says that "house" is to include school, and *prima facie*, when you are dealing with the matter of nuisances, there would not seem to be any reason

why there should not be the same power of inspection with regard to a school kept for the purpose of girls or boys being received and passing several hours of the day there for the purpose of their education, just in the same way as power is given to go into a private house under certain circumstances in a proper case where the magistrate might make the order for inspection in the private house. Mr. Macmorran contends that must mean dwelling-house in the ordinary sense of the word, where people sleep, and he fortifies his argument by referring to sect. 91 (6), dealing with factories and the overcrowding of a factory which would otherwise come within sect. 91 (5), and he says that that shows that, as overcrowding of a factory is mentioned in sect. 91 (6), "house" is limited to a dwelling-house in this sub-section (5). I think the answer to that is the one I ventured to indicate in the course of the argument. With regard to factories, they were desirous to bring in other things to give a wider scope of the power and authority, and they used the words "keep in a clean state" and "not ventilated" in a certain way so as to take off gas, vapour, dust, and then, to avoid it being said that being overcrowded was not a ground, they have to add those words again. Therefore, that is to my mind, that is not sufficient. Then I think we ought to look at sect. 5 and see the object with which it was passed. I must say, speaking for myself, I think it would be impossible in the face of *Reg. v. Mead*; *Ex parte Gates* (59 J. P. 150) to say that "house" must be limited to an ordinary dwelling. Lord Russell there decided that a shelter was within the purview of the section, and though the appeal there was as to the form of the order, still the substance of the matter was the same as in the previous case of *Reg. v. Mead*. Certainly there was no more ground for applying the Act to such a case than there is to a school. We think the particular point upon which the quarter sessions held the order was bad was wrong, and the case must be further dealt with. Then there are two subordinate points which we have to deal with. The first point is that the quarter sessions would not hear evidence to show that the fact alleged in the statement on oath before the justices or the facts upon which the order purported to be invited were not true. We are all of opinion that neither the magistrates nor quarter sessions have to decide whether there is a nuisance or not, but they may have to consider whether there is reasonable ground for suspecting there is a nuisance, and there is an obvious difference between cases of complaint of sanitary appliances or sufficiency of drains, as to which inspection may in many cases be the only way to decide if they are fit or not; but when allegations are based on questions of fact we think it would be going too far and Mr. Russell did not ask us to go so far as to say that the justices ought not to be allowed to receive evidence as to what was the true state of facts before them on which they purport to act. This provision, though very salutary, is a provision whereby persons are allowed to inspect other men's property. Therefore it must be in a proper case, where there is liberal ground for thinking there is necessity for inspection. In this case it was suggested that the allegations of fact were wholly inaccurate, and it being a *quasi-judicial* proceeding, an order

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made under notice with the right of appeal, it seems impossible to say that the justices in the first instance or quarter sessions in the second instance were not entitled to receive evidence to show that the only allegation of fact on which a ground for inspection was based was without foundation. As to the other point, Mr. Russell has indicated he did not mean that a roving commission should be given to an inspector, and we think the order ought to be made in reference to the particular subject-matter, not to give an officer the right to inspect everything.

DARLING, J.—I have nothing to add.

CHANNELL J.—I should like to say, in reference to the main point, "house" includes school and "inmates" scholars, and I only want to add a word or two about the other question about the construction of sect. 102. That appears to give in the first part of it, as I read it, to the local authorities and proper officers power to enter premises for the purpose of examining as to the existence of any nuisance thereon. Obviously it refers, mainly at any rate to nuisances the existence of which can be determined one way or another by an examination of the premises. When you have got such as here, an allegation that certain persons are there at times and not there at other times, it is obvious there is a considerable difficulty about ascertaining if the nuisance exists or not by mere examination of the premises. That is a circumstance which has to be considered, and necessarily considered, when you come to the second part about the order of the justice. It is mainly wanted after the right has been given by the former part of the section in order to prevent any breach of the peace by the officer entering of his own accord and without the authority of the justice. There certainly were acts on a somewhat similar subject in which the person was given the right of entering by his own authority as it were, and, of course, that led to difficulties, and in this act there is introduced the order of the justice which is to sanction the entry, and mainly for the purpose of preventing any breach of the peace or anything of that sort. But it is to be made on notice to the party, and therefore it is obvious that the justice must have something else to consider than the mere fact that the officer desires to go. I think the justice is entitled and bound to see the object for which the officer wants to go, and see if it is a matter that can come within the first part of the section. Suppose, for instance, that Miss Hastings had said, "It is an entire mistake; I do not keep any school at all. I have no scholars coming to me, and no one in the house at all." It is perfectly clear she would be entitled to give that evidence, and to say: "This is not a school. There are not 400 or 200 or thirty-two, or any other number. There are only two or three children of my own or inmates of the house." The object for which the person wants to go is certainly a matter to be inquired into by the justice, and it seems to me that the other party is entitled to offer evidence not for the purpose of showing that there is no nuisance in fact, but for the purpose of showing there is no object in examining the premises.

Case remitted.

Solicitors: Sharpe, Parker, and Co., for R. H. S. Butterworth, Wimbledon; L. J. Morrison.

Tuesday, June 24, 1902.

(Before LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

EDGILL (app.) v. J. AND G. ALWARD LIMITED (resps.). (a)

Seaman—Disobeying lawful command—Order to join boat—Desertion—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 376.

A seaman can be convicted under sect. 376 (1) (d) of the Merchant Shipping Act 1894 for disobeying a lawful command, even although such disobedience amounts to desertion or absence without leave within sect. 376 (1) (a) or (b).

CASE stated on an information preferred by the respondents against the appellant, under sect. 376 (1) (d) of the Merchant Shipping Act 1894, charging him that he, being a seaman and having been lawfully engaged to serve on a British fishing boat, unlawfully and wilfully disobeyed on the 25th Jan. 1902 a lawful command of the master thereof.

The appellant was engaged by the respondents to serve them as second engineer of the *Andes* under an agreement for the half year beginning on the 1st Jan. 1902.

On the 22nd Jan. the *Andes* arrived at Grimsby fish dock from a fishing voyage. The appellant had acted as second engineer during that voyage.

On the 24th Jan. the appellant, being at his work on the *Andes*, was ordered by the foreman manager of the respondents, acting for them and the master of the *Andes*, to be on board at 6 a.m. on the 25th Jan., when the *Andes* was to start to the knowledge of the appellant on another voyage. The appellant assented to such orders, and asked and was informed where the boat would be lying at the time when he was to join.

The appellant did not go aboard the *Andes* at all on the 25th Jan. Search was made for him, and the vessel was detained until another second engineer could be engaged.

The justices found that the appellant wilfully disobeyed the command, without any excuse or reason for so doing.

It was contended on behalf of the appellant that he was wrongly charged, as it was not proved that any order had been given him by the master on board the vessel; that he could not be convicted of wilfully disobeying a lawful command as the facts showed that if he had committed any offence it was that of desertion, or of absence without leave, under sect. 376 (1) (a) and (b), and that in such a case sect. 376 (1) (d) was not applicable. For the respondent it was contended that the appellant had committed the offence under sect. (1) (d), and that a seaman was not relieved for wilful disobedience under sect. (1) (d) because that act of disobedience was desertion under (a) or absence without leave under (b).

The justices were of opinion that the appellant had disobeyed a lawful order, and had committed an offence under sect. 376 (1) (d), and that it was immaterial whether he had or had not committed either the offence of desertion or absence without leave, and they convicted the appellant.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 376:

(1) If a seaman lawfully engaged to serve in any fishing boat or an apprentice in any sea fishing service

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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commits any of the following offences, that seaman or apprentice shall be punished summarily as follows:

(a) For the offence of desertion he shall be liable to forfeit all or any part of the effects he leaves on board and all or any part of the wages which he has earned, and to satisfy any excess of wages paid by the skipper or owner of the fishing boats from which he deserts to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him.

(b) For the offence of absence without leave—that is to say, for neglecting or refusing without reasonable cause to join or to proceed to sea in his fishing boat, or for being absent without leave at any time within twenty-four hours of his boat's sailing from any port, either at the commencement or during the progress of the engagement, or for being absent at any time without leave and without sufficient reason from his boat—if the offence does not amount to desertion, or is not treated as such by the skipper, he shall be liable to forfeit a sum not exceeding two days' wages, and in addition for every twenty-four hours of absence either a sum not exceeding four days' wages or any expenses properly incurred in respect of a substitute. . . . (d) For the offence of wilful disobedience—that is to say, for disobeying any lawful command during the engagement—he shall be liable to imprisonment for any period not exceeding four weeks, and also to forfeit a sum not exceeding two days' wages.

(5) A seaman or apprentice shall not be relieved by his refusal or neglect to go to sea or by his desertion from being liable to punishment under this section for an offence of wilful disobedience, continued breach of duty, or unlawful combination, and, in addition to any such punishment, shall also be liable to be punished for the offence of desertion or absence without leave.

Hugo Young, K.C. and Balloch for the appellant.

Avory, K.C., Bodkin, and Bruce Williamson for the respondents.

LORD ALVERSTONE, C.J.—We have to construe sect. 376 of the Merchant Shipping Act 1894. It is perfectly true that that was a consolidation Act; but it was more, and, although at times I agree some light can be gained by seeing the course of legislation, I doubt very much whether that applies to this class of legislation, which is obviously part of a code. I think there were two classes of offences contemplated by sub-sections. (a), (b), and (c), as contrasted with subsequent sub-sections. There may be many absences without leave or acts of neglect to join without reasonable cause which would not be wilful disobedience. One would be that a man was not there because he had a reasonable excuse, or that he was not there for some cause which would not be wilful on his part, and he would be liable then to the lesser penalty. But wilful disobedience is made the subject of express enactment, and by that I understand it is meant that the man meant intentionally to disobey something that he was told to do. Speaking for myself, I think it is clear that that construction is very much assisted by sub-sect. 5, which shows that the Legislature was dealing with the same subject-matter in one sense, because they have spoken of punishment for the offence of wilful disobedience, and the punishment for the offence of disobedience or absence without leave is not to relieve him from being liable to punishment for the offence of wilful disobedience. Then, with regard to sub-sect. 4, I think that in all probability it was inserted in order to deal with the cases of apprentices, who are under stricter discipline all the time. Certainly I do not think it

was intended to apply to the case where a seaman has had an order with regard to his duty given to him on board the ship. Now, here the evidence before the magistrate was that the man was told to be on board by six o'clock on the following morning. He was the engineer, and it was not to be supposed that he could safely go away and that the ship could sail without someone else being supplied to take his place, and they have found as a fact that he wilfully disobeyed an order. I am quite clear that there was sufficient evidence to come to the conclusion that the offence of wilful disobedience of a lawful command during the engagement had been committed, and therefore we ought not to interfere. I think the words "during the engagement" would seem to show that you must look at what the contract between the employer and employed is for this purpose, and if there is a wilful disobedience of an order given to him during the engagement, and he was bound to obey it, it may well be that sub-sect. (d) deals with a different subject-matter than that which was contemplated by sub-sections. (a), (b), and (c).

DARLING and CHANNELL, JJ. concurred.

Appeal dismissed.

Solicitors: *Protheroe and Price*, for Reed and Bloomer, Grimsby; *Williamson, Hill, and Co.*, for Bates and Mountain, Grimsby.

April 24 and 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MACKENZIE (app.) v. HAWKE (resp.). (a)

Gaming—User of office for betting—Coupon competition—Office opened abroad—Office of newspaper in this country—Advertisement of competition in newspaper—Conviction of newspaper proprietor for permitting user of office—Betting Act 1853 (16 & 17 Vict. c. 119), ss. 1, 3.

The appellant was the occupier of an office in London at which he published a weekly newspaper of which he was the proprietor.

A person who had an office in Middelburg, in Holland, and who was conducting certain "Sporting Coupon Competitions," advertised each week in the appellant's newspaper his competitions as "Football Skill Competitions." The advertisements were headed with the name of the person in Middelburg, and contained the rules under which the competitions were conducted and also coupon-sheets specifying several coming football matches with spaces in which intending competitors could fill in their selections. These coupons were, when filled in, cut off and sent with the money for the same in the form of postal orders addressed to the office in Middelburg, which in the advertisement was stated to be the sole address. The postal orders were returned to this country, but not to the appellant, for collection, and out of the proceeds the appellant was paid for the advertisements and for lists of the winners which were also published in the newspaper, and he received for the same considerably more than for ordinary

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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advertisements, but he did not share in the profits of the coupon competitions. Upon two informations against the appellant under sects. 1 and 3 of the Betting Act 1853: Held, that there was sufficient evidence on which it could be found that the person who had the office in Holland was using the appellant's office in London, within the meaning of sect. 1 of the Betting Act 1853, for the purpose of money being received on the consideration of promises to pay money on the result of football matches; and that the appellant knowingly and wilfully permitted such user within the meaning of sect. 3; and opened and kept an office for the purpose of such user by the person in Holland within the meaning of sect. 1; and that the appellant was therefore properly convicted under both sections.

CASE stated by a metropolitan police magistrate.

At a court of summary jurisdiction sitting at Bow Street Police Court two informations were preferred by John Hawke (the respondent) against Donald Mackenzie (the appellant) under the statute 16 & 17 Vict. c. 119 (the Betting Act 1853):

(1) For that he the respondent, being the occupier of a certain office or place situate at 23, Bedford-street, unlawfully did on the 12th Nov. 1901, at 23, Bedford-street, Strand, aforesaid, within the district aforesaid, knowingly and wilfully permit the said office to be used by H. T. Terry, a person using the same for the purpose of money or valuable things being received by or on behalf of the said H. T. Terry as and for the consideration for an undertaking or promise to pay or give thereafter money on events or contingencies of or relating to the game of football, contrary to the form of the statute in such case made and provided; and (2) for that he the respondent being such occupier as aforesaid unlawfully did on the date aforesaid at the place aforesaid within the district aforesaid open, keep, and use the said office or place for the purpose of money or valuable things being received by or on behalf of a person, the said H. T. Terry, using the said office or place for the like consideration.

These informations were heard and determined by the magistrate in Dec. 1901, when he convicted the appellant on both informations.

At the hearing the following facts were admitted or proved before the magistrate:

On the 12th Nov. 1901 the appellant was the occupier of an office situate at 23, Bedford-street, Strand. He was also the registered proprietor of a weekly newspaper called *Football Chat* and *Athletic World*, and this office was the principal place at which the newspaper was published and the business thereof conducted.

The person H. T. Terry mentioned in the informations was a person having an office at Middelburg, Holland, and was, at the period mentioned, to the knowledge of the appellant, conducting certain competitions known as "Sporting Coupon Competitions." These competitions were by agreement between Terry and the appellant advertised week by week in *Football Chat* and *Athletic World*, for which advertisements the appellant received pecuniary consideration amounting to about 27l. in each issue of the newspaper, in addition to which the names of the prize winners were periodically published in lists of different lengths and were paid for at the same rate, and the advertisements which were headed "*Football Chat* Competitions" contained the rules

and conditions subject to which the competitions were conducted.

Part of such advertisements consisted of coupon sheets on which intending competitors could fill in their selections.

Copies of *Football Chat* dated the 12th and 19th Nov. 1901 were put in evidence and were annexed to this case.

It was not obligatory on competitors to fill in their selections in such coupon sheets; they were at liberty to use plain paper.

All the moneys remitted by competitors in respect of the competitions were in the form of postal orders, and they with their senders' selections were, in accordance with the advertised conditions, addressed by post to *Football Chat* at Middelburg.

The postal orders were returned to this country for collection by the London and Westminster Bank, and the proceeds thereof placed to the credit of one B. W. Blydenstein (agent of the said H. T. Terry), who paid the appellant by Terry's instructions for the advertisements.

The appellant stated in his evidence that he had not received any benefit from the coupon competitions other than that accruing to him as payment for the insertion of the advertisements in his newspaper. H. T. Terry had no interest in the newspaper *Football Chat* other than that accruing to him through advertising the coupon competitions therein, and it appeared that he never made any personal use of the above office except that he once called there.

The magistrate held that H. T. Terry was a person using the office 23, Bedford-street, and that he used the same for the purpose of money being received by himself on the consideration for his promises to pay money on the result of football matches. He also found that the appellant permitted the said user by H. T. Terry, and that he opened and kept the said office for the purpose of such user by H. T. Terry. He also found that the appellant derived benefit from the insertion of the coupon advertisements and lists of winners, for which he received considerably more than for ordinary advertisements, but that he did not share in the profits of the coupon competitions. He accordingly convicted the appellant, and fined him 100l. on the first information and 1s. on the second information, and ordered him to pay twenty guineas costs.

The question for the opinion of the court was whether the magistrate was right in law in so holding and finding, and, if not, what should be done in the premises.

The advertisement in the issue of the 12th Nov. was headed:

H. T. Terry's, Middelburg, Holland, Advertisement.—*Football Chat* Football Skill Competition.—150l. for ten correct results or next best, and 50l. in fifty consolation prizes of 1l. each. Ten coupons for sixpence. Twenty-four coupons for one shilling postal orders.

Then followed:

Coupons for matches played Saturday, Nov. 16.

The coupon then contained a list of the football matches to be played, and lines indicating where the coupon was to be cut out for the purpose of being sent. Then it stated:

Coupons must be addressed to *Football Chat*, Middelburg, Holland.

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Then followed certain "Coupon Rules" for competitors, and

Sole Address: *Football Chat*, Middelburg, Holland.

Then at the end of the advertisement was a statement:

Printed and published by the Proprietors of the Bedford Publishing Press, at 23, Bedford-street, Strand, London, W.C. (Tuesday, 12th Nov.).

The Betting Act 1853 (16 & 17 Vict. c. 119) provides:

Whereas a kind of gaming has of late sprung up tending to the injury and demoralisation of improvident persons by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies: For the suppression thereof, be it enacted as follows:—

SECT. 1. No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

SECT. 3. Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months.

C. W. Mathews (G. H. Stutfield with him) for the appellant.—To sustain these informations there must be proved, first, a user by Terry for the prohibited purposes; and, secondly, that the appellant knowingly permitted this unlawful user by Terry. It is submitted that there was no user of the office by Terry. The facts found by the magistrate show no other relation established between Terry of Middelburg, and the appellant of London, than that of newspaper proprietor and

advertiser. All that was done here was that for payment as an advertisement there appears in the issue of the paper in question an advertisement as "Terry's, Middelburg, Holland, advertisement," and in the body of that advertisement no doubt there appears that which may be used for the purpose of being returned to Middelburg. It is not to be returned to any place in this country, and the only address to be seen upon the advertisement from beginning to end is the address of Middelburg, in Holland. The proprietor of a newspaper who advertises any business does not thereby convert the public office of his newspaper to a place where he permits his advertiser to carry on his business; and the advertiser does not, merely because he inserts advertisements in a newspaper, carry on his business or any part of his business at the office of the newspaper. This was merely an advertisement, and all the appellant got was the payment for the advertisement. According to the decision in *Powell v. Kempton Park Racecourse Company* (80 L. T. Rep. 538; (1899) A. C. 143), for a person to use a place within the meaning of these sections there must be a localisation of his business of betting at that place; and not only must there be a permitting by the appellant of Terry to use the place, but Terry must use it, in the sense of localising his betting business at this office. There was no evidence, except the payment for the advertisement, of any carrying on of business at this office. [Lord ALVERSTONE, C.J.—How do you distinguish *Stoddart v. Hawke* (ante, p. 354; 85 L. T. Rep. 687; (1902) 1 K. B. 353) from this case?] That case is distinguishable. *Stoddart* in London began the thing; he owned the office in London, and he being resident in London did from his office in London publish a newspaper which advocated the filling up of coupons and the sending of the money to his son (his agent) in Holland and his son sending back the postal orders to this country. What was held there was that a person may not, merely by taking an office abroad, shield himself from responsibility if, in taking the office abroad, all he does is to divert the channel by which the money comes into his office. The present case is wholly different; in the first place, the appellant has no share at all in the coupon competitions; in the second place, Terry has no share at all in the newspaper; it is the appellant's paper; and there is an absence of any evidence that any part of the betting business was carried on at this office in Bedford-street. It would be going too far to make the proprietor of a newspaper criminally responsible for an advertisement in his newspaper. To be a user of the place the person must be in the control and occupation of the place and must conduct the business there. That cannot apply to Terry. He was never at the office at all; he was resident abroad, and the correspondence was carried on from abroad; it was expressly stated in the advertisement that his office was at Middelburg and not in London, and no part of his business was carried on at this office. Terry therefore was not a person using the office, and the appellant cannot be convicted of permitting him to use it: (per Lord Halsbury in *Powell v. Kempton Park Racecourse Company*, 80 L. T. Rep., at p. 540; (1899) A. C., at p. 159).

Horace Ivory, K.C. (J. K. Mackay with him) for the respondent.—I accept the test suggested in this case—namely, whether Terry could have

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been convicted under sect. 1 of using this office for the prohibited purpose. It is submitted that Terry, if he had been charged, could not have escaped from the decision in *Stoddart v. Hawke (ubi sup.)*. The facts show that Terry used this office in the sense that he paid the appellant to issue and sell his coupons at that office; he paid, as the magistrate has found, a price far in excess of the ordinary price of advertisements, and that payment was made to the appellant in order that the appellant might sell at this office Terry's coupons. The coupon itself on the face of it described the price at which they were to be sold. The real object of the paper was this back sheet—namely, the coupon—and the rest was all padding. Terry paid the appellant to issue these coupons, and the moment that is found the case is within the decision of *Stoddart v. Hawke (ubi sup.)*. Lord Alverstone, C.J. in that case says: "And from that office are issued the coupons, without which he would not receive any of the money which he does receive"; and Channell, J. says: "What is done here is that there is an office in this country from which are issued newspapers with an appendix to them called coupons. In my opinion these documents are an essential part of the system, and without them the money cannot be received," &c. Those words precisely apply to this case. [Lord ALVERSTONE, C.J.—Do you say that it carries you to this extent, that any paper putting in the coupon can be convicted?] Yes; if the evidence raises fairly the inference of fact that the paper is being bought for the sake of the coupon. Even if it were shown that some persons bought the newspaper for the joint purpose of reading the news and getting the coupon, that would not take the case out of the operation of the section, as it has been said more than once that the office need not be exclusively used for the prohibited purpose: (see the judgment of Mathew, J. in *Hornsby v. Raggett*, 66 L. T. Rep. 21; (1892) 1 Q. B. 20). If one of the purposes is the carrying on of this forbidden business it is enough. It is suggested that this case differs from *Stoddart v. Hawke (ubi sup.)* in this, that there is here no suggestion of agency; but we do suggest there was an agency, and that Terry employed the appellant as his agent to carry on this system in his office, and the appellant does everything there except receive the money. The phrase "to localise his business" goes beyond the judgments in the House of Lords in the *Kempton Park* case (*ubi sup.*). Lord Halsbury there says (1899) A. C. at p. 161) that there must be a person who, although neither owner nor occupier, is analogous to the owner, &c.; and Smith, L.J., whose judgment was expressly approved and adopted by the Lord Chancellor, points out the nature of the user: (see 77 L. T. Rep. at p. 13; (1897) 2 Q. B. at p. 276). There was abundant evidence on which the magistrate could find that Terry was a person using the office, and that the appellant permitted such user.

Stutfield in reply.—The question really is whether Terry was using the office at all, not for what purpose he was using it, because if he was not using it at all the appellant cannot be convicted. Using is a different thing from resorting to a place, and, even if Terry had gone to the office personally, that would have been not a user of the place, but a resorting to it. There must be

a physical user either by the person himself or his agent, and a user by a person who is in control of the office; just as resorting means a physical resorting:

Reg. v. Brown, 72 L. T. Rep. 22; (1895) 1 Q. B. 119.

Here the betting business was not the appellant's; he took no part of the profits, and the very utmost that can be said is that he was assisting to carry on the business, and the business was the business of the newspaper:

Reg. v. Cooke, 51 L. T. Rep. 21; 13 Q. B. Div. 377.

It has been held in *Stoddart v. Argus Printing Company (ante)*, p. 277; 85 L. T. Rep. 110; (1901) 2 K. B. 470) that these advertisements are not illegal. *Hornsby v. Raggett (ubi sup.)*, it is submitted, has been overruled by the *Kempton Park* case (*ubi sup.*). *Reg. v. Stoddart (ante)*, p. 48; 83 L. T. Rep. 538; (1901) 1 K. B. 177) was also referred to.

Lord ALVERSTONE, C.J.—This is one of four cases stated by a metropolitan police magistrate under the Betting Act 1853. Three of them to a large extent involve the same point. I will deal with them in their order, indicating so far as is necessary what are the distinctive features of one from the other. In this case the magistrate convicted the appellant Mackenzie on two summonses which are set out in the case, for permitting the office at Bedford-street to be used by Terry, who was a person using the same for the prohibited purposes, and for opening, keeping, and using the office for the purpose of money being there received by or on behalf of Terry for the like consideration. The facts may be shortly summarised in this way. At that office there was published by the appellant a newspaper which was called *Football Chat and Athletic World*, and which contained on the last page that which is called an advertisement: "H. T. Terry's, Middelburg, Holland, Advertisement. *Football Chat* Football Skill Competition." It is not necessary to say more about the competition than that it clearly comes within the class of cases held to be illegal in many decisions in which these questions have arisen. The coupon was, when cut out, filled up and sent with money, addressed to "Football Chat, Middelburg, Holland." There were certain coupon rules from which it appeared that the names of the winners, as the result of the competition, would be advertised in the paper and the prizes remitted on a certain day, and everybody claiming to be a prize winner whose name did not appear in that list was required to send in a remonstrance or claim before a certain day. The sole address was said to be "*Football Chat, Middelburg, Holland*," and there appears below, "Printed and published by the proprietors, Bedford Publishing Press, at 23, Bedford-street, Strand." It was stated before the magistrate—but he has not found it one way or the other as a matter of fact—that the appellant had no interest in the competitions, and we do not proceed upon any view that there is any finding upon which we could act that the competition itself was on behalf of the appellant. It was stated that the appellant received a considerable amount more for the advertisements than the ordinary rate, and that the moneys were remitted to Holland and were returned, not, of course, passing through the hands of the appellant again. Upon that state of facts it was contended for the

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appellant that there was no user by Terry of the office at 23, Bedford-street for an illegal purpose, and that, if there were no user by Terry, there could be no permission by the appellant that Terry should so use it. I think it is extremely important to read the finding of the magistrate, and to see what it amounts to. [His Lordship read the findings of the magistrate as set out in the case, and proceeded:] It is scarcely necessary to say that that finding of the office being opened and kept for the purpose of such user by Terry, and of Terry using the office for the purpose of these competitions, if there is evidence to support it, brings the case within one or more previous decisions. It is said by counsel on behalf of the appellant that there is no evidence on which that finding could properly be supported, because all that was done was that the coupons were printed and sent out from that office. In our opinion there was evidence upon which the magistrate could come to that conclusion. The coupon, and the receipt of the money by Terry with the coupon, is really of the essence of the scheme. The coupon goes out in order that the person may fill it up and may send it to Terry. It seems to us that that operation carried out at Bedford-street, where the paper could be obtained, was evidence of a user by Terry of that place for the carrying out of an essential part of his scheme, and therefore we think there was evidence upon which the magistrate could rightly find that Terry himself used this office, and that the appellant permitted Terry so to use it. It is to be noticed that there is no finding here of what I may call any independent newspaper undertaking; and, if it were an independent newspaper undertaking, it is difficult to understand why the money should be sent to *Football Chat* at Middelburg, and why the competition should be spoken of as "*Football Chat Football Skill Competition*." If it were a mere case of an ordinary innocent advertisement, a very different state of things would prevail. I have only to add with reference to this case that in the previous case of *Stoddart v. Hawke* (*ubi sup.*) we decided that the money need not be received at the place. The substantial finding that we there pointed out, and I repeat again, to be material, is that the place is used as a part of the essential machinery for the receipt of the money for the illegal purpose. Holding, as I do, that the findings of facts by the magistrate in this case could be justified by the evidence, I think he has come to a right conclusion, and that this appeal must be dismissed.

DAELING, J.—I am of the same opinion. It appears to me to be found by the magistrate, and upon evidence which cannot be disputed, that the appellant permitted Terry, who had the office at Middelburg in Holland, to advertise in the paper *Football Chat*, and in that paper to issue the coupons which were procured at the office of the newspaper. Counsel for the appellant has argued that this sheet of *Football Chat* was nothing but an advertisement. He spoke of it as an advertisement, and as though all we were dealing with was an advertisement in the newspaper as to where one might go and get some information as to betting. But it is to be noticed that the real thing that was issued was much more than an advertisement. What was issued there was the

series of coupons. They were issued as a part of the paper, but none the less they were coupons which people used for the purpose of betting; and the coupons that were issued from that office of *Football Chat* were a part of the machinery by which Terry carried on the business of betting with people who affected to choose, according to his system, what football clubs would win certain matches. When we have to consider whether he used the place for the purpose of betting with persons, clearly Terry used the newspaper for those purposes, and the newspaper was published at the office of *Football Chat*, and issued therefrom with the coupons attached. That possibly might alone be enough to bring this office within the statute. It is not necessary to decide that in this case, and I will not say whether I think it would be enough to bring it within the statute or not. I do not affect to decide that, and it is not necessary to do so, because the magistrate has here found that the appellant permitted the user of the office by Terry, and that he opened and kept the office for the purpose of such user by Terry, and that he derived a profit from it; that he charged considerably more than he charged for ordinary advertisements; he charged Terry for the privilege of putting these coupons into his paper considerably more than the ordinary charge. That being so, it seems to me that Terry did use this office for an illegal purpose within the meaning of this Betting Act, and that he used it by the permission of the appellant in the way which has been pointed out, and that therefore the appellant was also guilty within the Act for permitting the illegal thing to be done, which illegal thing Terry did. Therefore I am also of the same opinion as my Lord.

CHANNELL, J.—I agree. I also wish to say that I found my judgment entirely on the finding in this case, which I think is a finding absolutely justified, and I have not the slightest doubt that it is absolutely true, that this office was opened and kept by the appellant Mackenzie for the express purpose of this thing being done. The whole object of this paper called *Football Chat* and *Athletic World* beyond all doubt was for the purpose of working this coupon competition and scheme. The magistrate has found that, and, as he has found that, it seems to me it brings the case absolutely and entirely within our previous decision in the case of *Stoddart v. Hawke* (*ubi sup.*). If it had not been for that finding I should have had some difficulty, because I think the argument for the appellant was right to a considerable extent—namely, that there must be something like a physical user of the office. The whole object of this Betting Act of 1853 is to prohibit betting offices within the meaning which the Legislature put on that word; and it is necessary that a person to be held liable for using the place must be a person who uses it either in the character of owner, keeper, or manager, or conductor of the business. If he is a person who has not that character, then he must be some other person who is analogous to and is of the same genus as the owner, keeper, and occupier, as we see by one portion of the judgment of the Lord Chancellor (Lord Halsbury) in *Powell v. Kempton Park Racecourse Company* (*ubi sup.*). It must be the use by some person having some kind of dominion or control over the place, or conducting

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his business there. Consequently, if this really were the case of two independent persons, one carrying on a newspaper and the other having a scheme for receiving money by himself in Holland which he desired to advertise, and if this were a *bonâ fide* advertisement in a *bonâ fide* newspaper, I should think that the mere use of the newspaper was not the use of the office of the newspaper within the meaning of this statute. But on the findings, which, as I have said, are perfectly justified, that question does not really arise, and I therefore agree in dismissing this appeal.

Appeal dismissed.

Solicitor for the appellant, *Edward M. Lazarus*.
Solicitors for the respondent, *Malkin and Co.*

Friday, April 25, 1902.

(Before Lord ALVERSTONE, O.J., DARLING and CHANNELL, J.J.)

HAWKE v. MACKENZIE (Nos. 1 and 2). (a)

Gaming—Office used for betting—Persons not resorting physically for that purpose—Coupon competition—Advertisement—Betting Act 1853 (16 & 17 Vict. c. 119), ss. 1, 7—Betting Act 1874 (37 Vict. c. 15), s. 3 (1).

M. was the proprietor of a sporting newspaper published at an office in B.-street, London. T., who resided abroad, published in M.'s newspaper advertisements of certain illegal coupon competitions carried on by T. The only personal use T. made of the office of the newspaper was by occasionally calling there; the remittances for the competitions were sent direct to him at his residence abroad; and the only payment M. received was payment for the advertisements and for the lists of winners in the competitions.

Held, that the office in B.-street was kept by M. for the purpose of "making bets and wagers in manner aforesaid" within sect. 7 of the Betting Act 1853, and that these words do not apply merely to the making of bets and wagers by persons physically resorting to the office, but to all the modes of gambling referred to in sect. 1 of that Act.

M. also published in his paper advertisements in which J. O' B. and others offered to send advice as to the coupon competitions on application to them at their respective addresses.

Held, that M. was guilty of a breach of sect. 3 (1) of the Betting Act 1874, which forbids under a penalty the publication of an advertisement whereby it is made to appear that any person will on application give information or advice with respect to any bet or wager or any event or contingency mentioned in the Betting Act 1853.

Reg. v. Stoddart (ante, p. 48; 83 L. T. Rep. 538; (1901) 1 K. B. 177) approved.

Stoddart v. Argus Printing Company (ante, p. 277; 85 L. T. Rep. 110; (1901) 2 K. B. 470) dissented from.

HAWKE v. MACKENZIE (No. 1).

APPEAL by case stated from the decision of Marsham, Esq., a metropolitan magistrate.

An information was preferred by John Hawke, the appellant, under sect. 7 of the Betting Act 1853 (16 & 17 Vict. c. 119) against Donald Mackenzie, the respondent, for that he being the

occupier of a certain office or place—to wit, an office or place situate at 23, Bedford-street, Strand, in the county of London—did on the 12th Nov. 1901 unlawfully cause certain advertisement to be published whereby it appeared that the said office or place was opened, kept, or used for the purpose of making bets or wagers.

The Betting Act 1853 (16 & 17 Vict. c. 119):

Sect. 7. Any person exhibiting or publishing or causing to be exhibited or published any placard, handbill, card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid or for the purpose of exhibiting lists for betting or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers in manner aforesaid, or any person who on behalf of the owner or occupier of any such house, office, room, or place or person using the same shall invite other persons to resort thereto for the purpose of making bets or wagers in the manner aforesaid, shall upon summary conviction thereof before two justices of the peace forfeit and pay a sum not exceeding 30*l.*, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, and on the nonpayment of such penalty and costs or in the first instance if to such justices it shall seem fit may be committed to the common gaol or house of correction with or without hard labour for any term not exceeding two calendar months.

At the respective hearings on the 5th and 7th Dec. 1901 the summons on the above information was heard, and the following facts were proved or admitted:—

On the date specified the respondent was occupier of the office in Bedford-street and also the registered proprietor of a newspaper called *Football Chat and Athletic World*. The office was the principal one at which *Football Chat* was published and the business of that newspaper conducted.

A copy of *Football Chat* dated the 12th Nov. 1901 was put in evidence at the hearing, as was also one of its posters for the 12th Nov. 1901. The copy contained an advertisement of a football coupon competition, and was procurable at the office by intending competitors. A copy of *Football Chat* for the 12th Nov. 1901 was annexed to this case, as was also the poster given in evidence.

All the coupons filled up and dispatched by the competitors, together with the remittances accompanying, were, in accordance with the instructions in the advertisements, addressed to "*Football Chat*, Middelburg, Holland," and remittances were to be made payable to H. T. Terry.

The respondent stated in evidence that H. T. Terry was the sole promoter of the competitions, and that H. T. Terry received all the money sent by competitors in respect thereof, and all the profits derived from them belonged to H. T. Terry.

The respondent swore he had no interest in the competitions or the profits thereof except moneys received from advertising them in the newspaper, which moneys amounted to about 27*l.* in each issue of *Football Chat*, and also the moneys arising from the periodical publication in *Football Chat* of the list of prize winners, the number of which varied from time to time, the insertion of such lists being paid for at the same rate as

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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the advertisements. H. T. Terry made personal use of the office by occasionally calling there.

It was proved that the competitions for which the money was received were in respect of football matches, and that they were described in *Football Chat* as *Football Chat Football Skill Competitions*, and that the address in Holland was given as "*Football Chat*, Middelburg, Holland."

Upon the above facts, counsel for the appellant contended that the decision of the Divisional Court in the case of *Stoddart v. Argus Printing Company* (ante, p. 277; 85 L. T. Rep. 110; (1901) 2 K. B. 470) was not fully argued as both parties had the same interest, and that it was inconsistent with the opinions expressed by several of the judges in the case of *Reg. v. Stoddart* (ante, p. 48; 83 L. T. Rep. 538; (1901) 1 K. B. 177) in the Court for Crown Cases Reserved, and that, as this latter court was the superior one, the magistrate would be bound by its decision rather than that of the Divisional Court.

Counsel for the respondent contended that the office was not opened, kept, or used for the purpose of H. T. Terry making bets or wagers in manner prohibited by the Act; that the respondent did not advertise the office as being so opened, kept, or used; and that the decision in *Stoddart v. Argus Printing Company* (sup.) would be binding on the magistrate as it was later in time than that in *Reg. v. Stoddart* (sup.).

The following cases were also referred to before the learned magistrate: *Cox v. Andrews* (12 Q. B. Div. 126), *Reg. v. Brown* (72 L. T. Rep. 22; (1895) 1 Q. B. 119), and *Stoddart v. Hawke* (18 Times L. Rep. 23).

H. Avory, K.C. (Mackay with him) for the appellant.—The point in this case is as to the extent of sect. 7 of the Betting Act 1853. The learned magistrate, following the decision of Phillimore, J. in *Stoddart v. Argus Printing Company* (sup.), has held that that section applies to advertisements of places kept for the purpose of betting with persons physically resorting thereto. We contend that this decision is wrong, and that sect. 7 applies to advertisements of houses kept for any of the purposes mentioned in sects. 1 and 3 of the Act. There is no reason for the restriction placed upon sect. 7 by Phillimore, J. as far as the mischief against which the Betting Acts are directed is concerned. The only ground given is that sect. 7 refers only to houses "kept for the purpose of making bets or wagers," but in *Reg. v. Stoddart* (sup.) several of the learned judges held that the receiving of money "as or for the consideration for an assurance, undertaking, promise, or agreement" to pay money "on the event or contingency of or relating to" a game comes within the meaning of betting as used in sect. 2, and, if so, then the advertisement here must be an advertisement of betting within the Act. Moreover, the case of *Stoddart v. Argus Printing Company* (sup.) was a friendly if not collusive action. Both parties wished to get the judgment they did in fact get.

Stutfield (C. W. Mathews with him) for the respondent.—The words of sect. 7 are "for the purpose of making bets or wagers." Now, these words are used only in the first part of sect. 1, which deals with betting by persons resorting to the place in question. It is a natural

construction to read these words in sect. 7 in the sense and only in the sense in which they are used in sect. 1. As to *Reg. v. Stoddart* (sup.), the observations made by two of the learned judges in that case were merely *obiter dicta*, and, since *Stoddart v. Argus Printing Company* (sup.) is a specific decision on this point given since those observations were made, it must, I submit, be taken as overruling them. No doubt *Stoddart v. Argus Printing Company* (sup.) was a friendly action, but it was not collusive in the sense that the arguments of both sides were directed to securing the decision desired. The point was fully argued, and, as the report shows, the attention of the judge was drawn to *Reg. v. Stoddart* (sup.). Further, this office was not in fact used for purposes of betting of any kind. The coupons and the money were all sent, not to it, but to Holland.

Avory, K.C. in reply.—The coupons were obtained at the respondent's office. Practically the whole paper is an advertisement of betting, and published for the purpose of betting. The court will note that in sect. 11 of the Act the only words used are "betting house," so that, if the respondent is right, it, too, is limited to houses kept for the purpose of betting with persons physically resorting to them.

[As the facts and points of law in the following case were in many respects identical with those in the above, the court directed that it should be argued before they delivered judgment.]

HAWKE v. MACKENZIE (No. 2).

Appeal by case stated from the decision of Marsham, Esq., a metropolitan magistrate.

Two informations were preferred by John Hawke, the appellant, under sect. 3 (1) of the Betting Act 1874 (37 & 38 Vict. c. 15) for that he did on the 12th Nov. 1901 unlawfully cause two certain advertisements to be published whereby it appeared that J. O'Reilly, of 55, Chatham-road, Rock Ferry, Cheshire, and J. Taylor, of 46A, Market-street, Manchester, respectively would on application give information for the purpose of or with respect to certain bets, wagers, events, or contingencies mentioned in the Betting Act 1874.

At the respective hearings on the 5th and 7th Dec. 1901 the summonses on the above informations were heard, and the following facts were proved or admitted:—

On the date specified, the respondent was the occupier of an office, 23, Bedford-street, and also registered proprietor of a newspaper called *Football Chat and Athletic World*. The office was the principal one at which the newspaper was published and the business thereof conducted.

A copy of the newspaper, dated the 12th Nov. 1901, was put in evidence at the hearing. The copy contained advertisements whereby it appeared that J. O'Reilly and J. Taylor respectively would on application give information with respect to certain bets, wagers, events, or contingencies with respect to the game of football. A copy of the newspaper for the 12th Nov. 1901 was annexed to this case.

Upon the above facts, counsel for the appellant contended that the decision of the Divisional Court in the case of *Stoddart v. Argus Printing Company* (sup.) was not fully argued as both

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thereon, at any time between the hours of nine in the forenoon and six in the afternoon, or, in a case of a nuisance arising in respect of any business, then at any hour when such business is in progress or is usually carried on.

By the same section it is further enacted that

If admission to premises for any of the purposes of this section is refused any justice on complaint thereof on oath by any officer of the local authority (made after reasonable notice in writing of the intention to make the same has been given to the person having custody of the premises) may by order under his hand require the person having custody of the premises to admit the local authority or their officer into the premises during the hours aforesaid, and if no person having custody of the premises can be found, the justice shall, on oath made before him of that fact, by order under his hand authorise the local authority or any of their officers to enter such premises during the hours aforesaid.

The medical officer of health for the district received the following complaint in writing dated the 10th Nov. 1901 and signed—namely:

I do not know if I am right in asking you the question or should have applied to the sanitary inspector. It is of the overcrowding of the junior class rooms of the girls' high school. I am not alone of that opinion. The school is deservedly popular, but we who send our girls there expect them to have the legal amount of space. There are now 400 pupils besides the teachers. There were thirty-two and a mistress in the room my niece was in last term. There are thirty-two pupils also in the present one, and it is smaller.

This letter was given to the inspector of nuisances for the district for inquiry into the complaint. The inspector accordingly on the 18th Nov. 1901 visited the school and saw the respondent. He explained to her the nature of the complaint received, and applied for admission to examine the school for the purpose of seeing whether the alleged nuisance existed.

The respondent refused to grant the inspector admission to make the desired examination.

The inspector on the evening of the same day reported the matter to the sanitary committee of the appellant council, and they instructed the clerk of the council to forthwith take such proceedings as might be necessary to enforce compliance with the provisions of the Public Health Act 1875.

Accordingly the clerk on the day following (the 19th Nov. 1901) wrote the following letter to the respondent:

Complaint was made last evening to the sanitary committee of this council that you had refused to permit the sanitary inspector of the council to examine the premises occupied by you. I would point out to you that this is a direct violation of the provisions of the Public Health Act 1875, but I can hardly believe that you have wittingly offended against that Act. The sanitary inspector will attend at your premises at two o'clock this Tuesday afternoon for the purposes of making an examination required by him, and I am instructed to inform you that in the event of your again refusing him admission or obstructing him in the execution of his duties an application will be made to the magistrates to deal with the matter without delay—a course which I trust will be unnecessary.

The inspector, in accordance with the terms of such letter, attended at the school at the hour named and applied to be admitted for the purpose above mentioned, but was again refused admission, and on the same day the respondent

forwarded the following letter to the clerk of the council:

I must again decline to allow any inspector to examine the school without the authority of my council or their secretary.

An application was made to justices of the peace for an order under sect. 102 of the Public Health Act 1875 requiring the respondent to admit the inspector to the school for the purpose aforesaid, and in support of such application a complaint was made on oath by the inspector, and an order was made requiring the respondent to admit the officer of the Wimbledon District Council to the premises for the purposes aforesaid.

The respondent being dissatisfied with the decision appealed against the same to the Court of Quarter Sessions.

It was contended on behalf of the respondent: (1) That the alleged nuisance was not within sect. 91 (5) at all (a) because that clause referred only to houses in the ordinary sense of the term, or at any rate only houses used as dwellings, and (b) because the scholars were not inmates, and accordingly that the justices had no jurisdiction to make, or at any rate had no sufficient materials before them on which to make, their order; (2) that under sect. 102 of the Public Health Act 1875 the justice before making such an order as aforesaid must be satisfied that there are reasonable grounds for such entry, and that in this present case there were no such reasonable grounds, and they referred to *Duncan v. Dowding* (1897) 1 Q. B. 575 and to *Vines v. Governors of the North London Collegiate School for Girls* (63 J. P. 244); (3) that the entry was not sought to be made during the hours at which the business of the school was being carried on; and (4) that the order was wrong in substance and form because it did not specify any particular nuisance, and therefore did not properly specify the purpose for which the entry was to be made and did not specify the hours during which the entry was to be allowed.

The respondent tendered evidence for the purpose of proving that the number of pupils at the school was 270, and not 400 as stated in the letter, and that the class rooms therein referred to were not used for thirty-two pupils and a mistress, and that the alleged nuisance did not at any time in fact exist, but the quarter sessions were of opinion that the question as to the existence of overcrowding in fact was not before them, and they decided not to hear any such evidence.

On behalf of the appellants it was contended:

(1) That by sect. 4 of the Public Health Act 1875 the word "house" includes schools, and therefore sect. 91 of the same Act, which for the purpose of the Act states what are to be deemed nuisances including (*inter alia*) "any house or part of a house so overcrowded as to be dangerous or injurious to the health of the inmates, whether or not members of the same family," applies to the school, and that therefore the justices were right and acting within their jurisdiction in making such order as aforesaid; (2) that sect. 92 of the Public Health Act 1875 imposes upon the local authority an imperative duty of causing to be made from time to time inspection of their district with a view to ascertaining what nuisances exist calling for abatement under the powers of

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the Act, and that sect. 102 of the Act gives to the local authority and to their officers an absolute right to enter the premises for the purpose of examining as to the existence thereon of any nuisance, and the section, in the event of admission being refused, empowers any justice, upon complaint thereof on oath by any officer of the local authority (made after reasonable notice in writing of the intention to make the same has been given to the person having custody of the premises), by order under his hand to require the person having custody of the premises to admit the local authority or their officer into the premises during the hours mentioned in the section; that therefore there is no obligation on the part of the local authority to show that they or their officer have reasonable grounds for believing that a nuisance exists upon the premises, but that, even if it should be necessary to show that there were such reasonable grounds, then in the present case it was shown that the inspector had such reasonable grounds for believing that the alleged nuisance did exist upon the premises of the school; and (3) that the order was not wrong in form, but that, even if it were wrong, the appellants are not and have never been averse to the same being amended so as to refer to the specific nuisance complained of only.

The quarter sessions were of opinion that the scholars attending at the school were not inmates within the meaning of sect. 91 (5) of the Public Health Act 1875, and accordingly that the appellants had not alleged the existence of any nuisance within the meaning of that Act or shown any reasonable grounds for suspecting the existence of such a nuisance, and they accordingly made an order allowing the appeal and quashing the order of the justices. They did not decide any of the other points raised by the respondent.

C. A. Russell, K.C. and Geo. Humphreys for the appellants.

Macmorran, K.C. and Daldy for the respondent.

LORD ALVERSTONE, C.J.—Under sect. 102 of the Public Health Act 1875, if a local authority desire to obtain admission to a house for the purpose of seeing as to whether or not there is a nuisance there, they may apply to a magistrate or justices on complaint on oath by an officer of the local authority, after reasonable notice in writing of intention to make the same to the person having custody of the premises, who may by order require the person having the custody to admit the local authority by their officer into the premises. It is quite plain that it is a very salutary provision to enable inspection of premises to be made in order to see if there is a nuisance or not. Now, in this case some representations had been made, we do not exactly know what, about the school and an order was made by the justices to allow the school to be inspected. The quarter sessions have decided that that was not a proper order, because it related to a school, and that school was not in their opinion a house or part of a house so overcrowded as to be dangerous or injurious to the health of the inmates. Now, the interpretation clause of the Act, sect. 4, says that "house" is to include school, and *prima facie*, when you are dealing with the matter of nuisances, there would not seem to be any reason

why there should not be the same power of inspection with regard to a school kept for the purpose of girls or boys being received and passing several hours of the day there for the purpose of their education, just in the same way as power is given to go into a private house under certain circumstances in a proper case where the magistrate might make the order for inspection in the private house. Mr. Macmorran contends that must mean dwelling-house in the ordinary sense of the word, where people sleep, and he fortifies his argument by referring to sect. 91 (6), dealing with factories and the overcrowding of a factory which would otherwise come within sect. 91 (5), and he says that that shows that, as overcrowding of a factory is mentioned in sect. 91 (6), "house" is limited to a dwelling-house in this sub-section (5). I think the answer to that is the one I ventured to indicate in the course of the argument. With regard to factories, they were desirous to bring in other things to give a wider scope of the power and authority, and they used the words "keep in a clean state" and "not ventilated" in a certain way so as to take off gas, vapour, dust, and then, to avoid it being said that being overcrowded was not a ground, they have to add those words again. Therefore, to my mind, that is not sufficient. Then I think we ought to look at sect. 5 and see the object with which it was passed. I must say, speaking for myself, I think it would be impossible in the face of *Reg. v. Mead*; *Ex parte Gates* (59 J. P. 150) to say that "house" must be limited to an ordinary dwelling. Lord Russell there decided that a shelter was within the purview of the section, and though the appeal there was as to the form of the order, still the substance of the matter was the same as in the previous case of *Reg. v. Mead*. Certainly there was no more ground for applying the Act to such a case than there is to a school. We think the particular point upon which the quarter sessions held the order was bad was wrong, and the case must be further dealt with. Then there are two subordinate points which we have to deal with. The first point is that the quarter sessions would not hear evidence to show that the fact alleged in the statement on oath before the justices or the facts upon which the order purported to be invited were not true. We are all of opinion that neither the magistrates nor quarter sessions have to decide whether there is a nuisance or not, but they may have to consider whether there is reasonable ground for suspecting there is a nuisance, and there is an obvious difference between cases of complaint of sanitary appliances or sufficiency of drains, as to which inspection may in many cases be the only way to decide if they are fit or not; but when allegations are based on questions of fact we think it would be going too far and Mr. Russell did not ask us to go so far as to say that the justices ought not to be allowed to receive evidence as to what was the true state of facts before them on which they purport to act. This provision, though very salutary, is a provision whereby persons are allowed to inspect other men's property. Therefore it must be in a proper case, where there is liberal ground for thinking there is necessity for inspection. In this case it was suggested that the allegations of fact were wholly inaccurate, and it being a quasi-judicial proceeding, an order

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made under notice with the right of appeal, it seems impossible to say that the justices in the first instance or quarter sessions in the second instance were not entitled to receive evidence to show that the only allegation of fact on which a ground for inspection was based was without foundation. As to the other point, Mr. Russell has indicated he did not mean that a roving commission should be given to an inspector, and we think the order ought to be made in reference to the particular subject-matter, not to give an officer the right to inspect everything.

DARLING, J.—I have nothing to add.

CHANNELL J.—I should like to say, in reference to the main point, "house" includes school and "inmates" scholars, and I only want to add a word or two about the other question about the construction of sect. 102. That appears to give in the first part of it, as I read it, to the local authorities and proper officers power to enter premises for the purpose of examining as to the existence of any nuisance thereon. Obviously it refers, mainly at any rate to nuisances the existence of which can be determined one way or another by an examination of the premises. When you have got such as here, an allegation that certain persons are there at times and not there at other times, it is obvious there is a considerable difficulty about ascertaining if the nuisance exists or not by mere examination of the premises. That is a circumstance which has to be considered, and necessarily considered, when you come to the second part about the order of the justice. It is mainly wanted after the right has been given by the former part of the section in order to prevent any breach of the peace by the officer entering of his own accord and without the authority of the justice. There certainly were acts on a somewhat similar subject in which the person was given the right of entering by his own authority as it were, and, of course, that led to difficulties, and in this act there is introduced the order of the justice which is to sanction the entry, and mainly for the purpose of preventing any breach of the peace or anything of that sort. But it is to be made on notice to the party, and therefore it is obvious that the justice must have something else to consider than the mere fact that the officer desires to go. I think the justice is entitled and bound to see the object for which the officer wants to go, and see if it is a matter that can come within the first part of the section. Suppose, for instance, that Miss Hastings had said, "It is an entire mistake; I do not keep any school at all. I have no scholars coming to me, and no one in the house at all." It is perfectly clear she would be entitled to give that evidence, and to say: "This is not a school. There are not 400 or 200 or thirty-two, or any other number. There are only two or three children of my own or inmates of the house." The object for which the person wants to go is certainly a matter to be inquired into by the justice, and it seems to me that the other party is entitled to offer evidence not for the purpose of showing that there is no nuisance in fact, but for the purpose of showing there is no object in examining the premises.

Case remitted.

Solicitors: Sharpe, Parker, and Co., for R. H. S. Butterworth, Wimbledon; L. J. Morrison.

Tuesday, June 24, 1902.

(Before LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

EDGILL (app.) v. J. AND G. ALWARD LIMITED (resps.). (a)

Seaman—Disobeying lawful command—Order to join boat—Desertion—Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 376.

A seaman can be convicted under sect. 376 (1) (d) of the Merchant Shipping Act 1894 for disobeying a lawful command, even although such disobedience amounts to desertion or absence without leave within sect. 376 (1) (a) or (b).

CASE stated on an information preferred by the respondents against the appellant, under sect. 376 (1) (d) of the Merchant Shipping Act 1894, charging him that he, being a seaman and having been lawfully engaged to serve on a British fishing boat, unlawfully and wilfully disobeyed on the 25th Jan. 1902 a lawful command of the master thereof.

The appellant was engaged by the respondents to serve them as second engineer of the *Andes* under an agreement for the half year beginning on the 1st Jan. 1902.

On the 22nd Jan. the *Andes* arrived at Grimsby fish dock from a fishing voyage. The appellant had acted as second engineer during that voyage.

On the 24th Jan. the appellant, being at his work on the *Andes*, was ordered by the foreman manager of the respondents, acting for them and the master of the *Andes*, to be on board at 6 a.m. on the 25th Jan., when the *Andes* was to start to the knowledge of the appellant on another voyage. The appellant assented to such orders, and asked and was informed where the boat would be lying at the time when he was to join.

The appellant did not go aboard the *Andes* at all on the 25th Jan. Search was made for him, and the vessel was detained until another second engineer could be engaged.

The justices found that the appellant wilfully disobeyed the command, without any excuse or reason for so doing.

It was contended on behalf of the appellant that he was wrongly charged, as it was not proved that any order had been given him by the master on board the vessel; that he could not be convicted of wilfully disobeying a lawful command as the facts showed that if he had committed any offence it was that of desertion, or of absence without leave, under sect. 376 (1) (a) and (b), and that in such a case sect. 376 (1) (d) was not applicable. For the respondent it was contended that the appellant had committed the offence under sect. (1) (d), and that a seaman was not relieved for wilful disobedience under sect. (1) (d) because that act of disobedience was desertion under (a) or absence without leave under (b).

The justices were of opinion that the appellant had disobeyed a lawful order, and had committed an offence under sect. 376 (1) (d), and that it was immaterial whether he had or had not committed either the offence of desertion or absence without leave, and they convicted the appellant.

By the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), s. 376:

(1) If a seaman lawfully engaged to serve in any fishing boat or an apprentice in any sea fishing service

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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commits any of the following offences, that seaman or apprentice shall be punished summarily as follows:

(a) For the offence of desertion he shall be liable to forfeit all or any part of the effects he leaves on board and all or any part of the wages which he has earned, and to satisfy any excess of wages paid by the skipper or owner of the fishing boats from which he deserts to any substitute engaged in his place at a higher rate of wages than the rate stipulated to be paid to him.

(b) For the offence of absence without leave—that is to say, for neglecting or refusing without reasonable cause to join or to proceed to sea in his fishing boat, or for being absent without leave at any time within twenty-four hours of his boat's sailing from any port, either at the commencement or during the progress of the engagement, or for being absent at any time without leave and without sufficient reason from his boat—if the offence does not amount to desertion, or is not treated as such by the skipper, he shall be liable to forfeit a sum not exceeding two days' wages, and in addition for every twenty-four hours of absence either a sum not exceeding four days' wages or any expenses properly incurred in respect of a substitute. . . . (d) For the offence of wilful disobedience—that is to say, for disobeying any lawful command during the engagement—he shall be liable to imprisonment for any period not exceeding four weeks, and also to forfeit a sum not exceeding two days' wages.

(5) A seaman or apprentice shall not be relieved by his refusal or neglect to go to sea or by his desertion from being liable to punishment under this section for an offence of wilful disobedience, continued breach of duty, or unlawful combination, and, in addition to any such punishment, shall also be liable to be punished for the offence of desertion or absence without leave.

Hugo Young, K.C. and Balloch for the appellant.

Avory, K.C., Bodkin, and Bruce Williamson for the respondents.

LORD ALVERSTONE, C.J.—We have to construe sect. 376 of the Merchant Shipping Act 1894. It is perfectly true that that was a consolidation Act; but it was more, and, although at times I agree some light can be gained by seeing the course of legislation, I doubt very much whether that applies to this class of legislation, which is obviously part of a code. I think there were two classes of offences contemplated by sub-sections. (a), (b), and (c), as contrasted with subsequent sub-sections. There may be many absences without leave or acts of neglect to join without reasonable cause which would not be wilful disobedience. One would be that a man was not there because he had a reasonable excuse, or that he was not there for some cause which would not be wilful on his part, and he would be liable then to the lesser penalty. But wilful disobedience is made the subject of express enactment, and by that I understand it is meant that the man meant intentionally to disobey something that he was told to do. Speaking for myself, I think it is clear that that construction is very much assisted by sub-section 5, which shows that the Legislature was dealing with the same subject-matter in one sense, because they have spoken of punishment for the offence of wilful disobedience, and the punishment for the offence of disobedience or absence without leave is not to relieve him from being liable to punishment for the offence of wilful disobedience. Then, with regard to sub-section 4, I think that in all probability it was inserted in order to deal with the cases of apprentices, who are under stricter discipline all the time. Certainly I do not think it

was intended to apply to the case where a seaman has had an order with regard to his duty given to him on board the ship. Now, here the evidence before the magistrate was that the man was told to be on board by six o'clock on the following morning. He was the engineer, and it was not to be supposed that he could safely go away and that the ship could sail without someone else being supplied to take his place, and they have found as a fact that he wilfully disobeyed an order. I am quite clear that there was sufficient evidence to come to the conclusion that the offence of wilful disobedience of a lawful command during the engagement had been committed, and therefore we ought not to interfere. I think the words "during the engagement" would seem to show that you must look at what the contract between the employer and employed is for this purpose, and if there is a wilful disobedience of an order given to him during the engagement, and he was bound to obey it, it may well be that sub-section. (d) deals with a different subject-matter than that which was contemplated by sub-sections. (a), (b), and (c).

DARLING and CHANNELL, JJ. concurred.

Appeal dismissed.

Solicitors: *Protheroe and Price*, for *Reed and Bloomer*, Grimsby; *Williamson, Hill, and Co.*, for *Bates and Mountain*, Grimsby.

April 24 and 25, 1902.

(Before LORD ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MACKENZIE (app.) v. HAWKE (resp.). (a)

Gaming—User of office for betting—Coupon competition—Office opened abroad—Office of newspaper in this country—Advertisement of competition in newspaper—Conviction of newspaper proprietor for permitting user of office—Betting Act 1853 (16 & 17 Vict. c. 119), ss. 1, 3.

The appellant was the occupier of an office in London at which he published a weekly newspaper of which he was the proprietor.

A person who had an office in Middelburg, in Holland, and who was conducting certain "Sporting Coupon Competitions," advertised each week in the appellant's newspaper his competitions as "Football Skill Competitions." The advertisements were headed with the name of the person in Middelburg, and contained the rules under which the competitions were conducted and also coupon-sheets specifying several coming football matches with spaces in which intending competitors could fill in their selections. These coupons were, when filled in, cut off and sent with the money for the same in the form of postal orders addressed to the office in Middelburg, which in the advertisement was stated to be the sole address. The postal orders were returned to this country, but not to the appellant, for collection, and out of the proceeds the appellant was paid for the advertisements and for lists of the winners which were also published in the newspaper, and he received for the same considerably more than for ordinary

(a) Reported by W. W. OBE, Esq., Barrister-at-Law.

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advertisements, but he did not share in the profits of the coupon competitions.

Upon two informations against the appellant under sects. 1 and 3 of the Betting Act 1853:

Held, that there was sufficient evidence on which it could be found that the person who had the office in Holland was using the appellant's office in London, within the meaning of sect. 1 of the Betting Act 1853, for the purpose of money being received on the consideration of promises to pay money on the result of football matches; and that the appellant knowingly and wilfully permitted such user within the meaning of sect. 3; and opened and kept an office for the purpose of such user by the person in Holland within the meaning of sect. 1; and that the appellant was therefore properly convicted under both sections.

CASE stated by a metropolitan police magistrate.

At a court of summary jurisdiction sitting at Bow Street Police Court two informations were preferred by John Hawke (the respondent) against Donald Mackenzie (the appellant) under the statute 16 & 17 Vict. c. 119 (the Betting Act 1853):

(1) For that he the respondent, being the occupier of a certain office or place situate at 23, Bedford-street, unlawfully did on the 12th Nov. 1901, at 23, Bedford-street, Strand, aforesaid, within the district aforesaid, knowingly and wilfully permit the said office to be used by H. T. Terry, a person using the same for the purpose of money or valuable things being received by or on behalf of the said H. T. Terry as and for the consideration for an undertaking or promise to pay or give thereafter money on events or contingencies of or relating to the game of football, contrary to the form of the statute in such case made and provided; and (2) for that he the respondent being such occupier as aforesaid unlawfully did on the date aforesaid at the place aforesaid within the district aforesaid open, keep, and use the said office or place for the purpose of money or valuable things being received by or on behalf of a person, the said H. T. Terry, using the said office or place for the like consideration.

These informations were heard and determined by the magistrate in Dec. 1901, when he convicted the appellant on both informations.

At the hearing the following facts were admitted or proved before the magistrate:

On the 12th Nov. 1901 the appellant was the occupier of an office situate at 23, Bedford-street, Strand. He was also the registered proprietor of a weekly newspaper called *Football Chat and Athletic World*, and this office was the principal place at which the newspaper was published and the business thereof conducted.

The person H. T. Terry mentioned in the informations was a person having an office at Middelburg, Holland, and was, at the period mentioned, to the knowledge of the appellant, conducting certain competitions known as "Sporting Coupon Competitions." These competitions were by agreement between Terry and the appellant advertised week by week in *Football Chat and Athletic World*, for which advertisements the appellant received pecuniary consideration amounting to about 27*l.* in each issue of the newspaper, in addition to which the names of the prize winners were periodically published in lists of different lengths and were paid for at the same rate, and the advertisements which were headed "*Football Chat Competitions*" contained the rules

and conditions subject to which the competitions were conducted.

Part of such advertisements consisted of coupon sheets on which intending competitors could fill in their selections.

Copies of *Football Chat* dated the 12th and 19th Nov. 1901 were put in evidence and were annexed to this case.

It was not obligatory on competitors to fill in their selections in such coupon sheets; they were at liberty to use plain paper.

All the moneys remitted by competitors in respect of the competitions were in the form of postal orders, and they with their senders' selections were, in accordance with the advertised conditions, addressed by post to *Football Chat* at Middelburg.

The postal orders were returned to this country for collection by the London and Westminster Bank, and the proceeds thereof placed to the credit of one B. W. Blydenstein (agent of the said H. T. Terry), who paid the appellant by Terry's instructions for the advertisements.

The appellant stated in his evidence that he had not received any benefit from the coupon competitions other than that accruing to him as payment for the insertion of the advertisements in his newspaper. H. T. Terry had no interest in the newspaper *Football Chat* other than that accruing to him through advertising the coupon competitions therein, and it appeared that he never made any personal use of the above office except that he once called there.

The magistrate held that H. T. Terry was a person using the office 23, Bedford-street, and that he used the same for the purpose of money being received by himself on the consideration for his promises to pay money on the result of football matches. He also found that the appellant permitted the said user by H. T. Terry, and that he opened and kept the said office for the purpose of such user by H. T. Terry. He also found that the appellant derived benefit from the insertion of the coupon advertisements and lists of winners, for which he received considerably more than for ordinary advertisements, but that he did not share in the profits of the coupon competitions. He accordingly convicted the appellant, and fined him 100*l.* on the first information and 1*s.* on the second information, and ordered him to pay twenty guineas costs.

The question for the opinion of the court was whether the magistrate was right in law in so holding and finding, and, if not, what should be done in the premises.

The advertisement in the issue of the 12th Nov. was headed:

H. T. Terry's, Middelburg, Holland, Advertisement.—*Football Chat* Football Skill Competition.—150*l.* for ten correct results or next best, and 50*l.* in fifty consolation prizes of 1*l.* each. Ten coupons for sixpence. Twenty-four coupons for one shilling postal orders.

Then followed:

Coupons for matches played Saturday, Nov. 16.

The coupon then contained a list of the football matches to be played, and lines indicating where the coupon was to be cut out for the purpose of being sent. Then it stated:

Coupons must be addressed to *Football Chat*, Middelburg, Holland.

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Then followed certain "Coupon Rules" for competitors, and

Sole Address: *Football Chat*, Middelburg, Holland.

Then at the end of the advertisement was a statement:

Printed and published by the Proprietors of the Bedford Publishing Press, at 23, Bedford-street, Strand, London, W.C. (Tuesday, 12th Nov.).

The Betting Act 1853 (16 & 17 Vict. c. 119) provides:

Whereas a kind of gaming has of late sprung up tending to the injury and demoralisation of improvident persons by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse races and the like contingencies: For the suppression thereof, be it enacted as follows:—

SECT. 1. No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

SECT. 3. Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them; and any person who being the owner or occupier of any house, room, office, or other place shall knowingly and wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them; and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding one hundred pounds, as shall be adjudged by such justices, and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable; and on the nonpayment of such penalty and costs, or in the first instance, if to the said justices it shall seem fit, may be committed to the common gaol or house of correction, with or without hard labour, for any time not exceeding six calendar months.

C. W. Mathews (G. H. Stutfield with him) for the appellant.—To sustain these informations there must be proved, first, a user by Terry for the prohibited purposes; and, secondly, that the appellant knowingly permitted this unlawful user by Terry. It is submitted that there was no user of the office by Terry. The facts found by the magistrate show no other relation established between Terry of Middelburg, and the appellant of London, than that of newspaper proprietor and

advertiser. All that was done here was that for payment as an advertisement there appears in the issue of the paper in question an advertisement as "Terry's, Middelburg, Holland, advertisement," and in the body of that advertisement no doubt there appears that which may be used for the purpose of being returned to Middelburg. It is not to be returned to any place in this country, and the only address to be seen upon the advertisement from beginning to end is the address of Middelburg, in Holland. The proprietor of a newspaper who advertises any business does not thereby convert the public office of his newspaper to a place where he permits his advertiser to carry on his business; and the advertiser does not, merely because he inserts advertisements in a newspaper, carry on his business or any part of his business at the office of the newspaper. This was merely an advertisement, and all the appellant got was the payment for the advertisement. According to the decision in *Powell v. Kempton Park Racecourse Company* (80 L. T. Rep. 538; (1899) A. C. 143), for a person to use a place within the meaning of these sections there must be a localisation of his business of betting at that place; and not only must there be a permitting by the appellant of Terry to use the place, but Terry must use it, in the sense of localising his betting business at this office. There was no evidence, except the payment for the advertisement, of any carrying on of business at this office. [Lord ALVERSTONE, C.J.—How do you distinguish *Stoddart v. Hawke* (ante, p. 354; 85 L. T. Rep. 687; (1902) 1 K. B. 353) from this case?] That case is distinguishable. *Stoddart* in London began the thing; he owned the office in London, and he being resident in London did from his office in London publish a newspaper which advocated the filling up of coupons and the sending of the money to his son (his agent) in Holland and his son sending back the postal orders to this country. What was held there was that a person may not, merely by taking an office abroad, shield himself from responsibility if, in taking the office abroad, all he does is to divert the channel by which the money comes into his office. The present case is wholly different; in the first place, the appellant has no share at all in the coupon competitions; in the second place, Terry has no share at all in the newspaper; it is the appellant's paper; and there is an absence of any evidence that any part of the betting business was carried on at this office in Bedford-street. It would be going too far to make the proprietor of a newspaper criminally responsible for an advertisement in his newspaper. To be a user of the place the person must be in the control and occupation of the place and must conduct the business there. That cannot apply to Terry. He was never at the office at all; he was resident abroad, and the correspondence was carried on from abroad; it was expressly stated in the advertisement that his office was at Middelburg and not in London, and no part of his business was carried on at this office. Terry therefore was not a person using the office, and the appellant cannot be convicted of permitting him to use it: (per Lord Halsbury in *Powell v. Kempton Park Racecourse Company*, 80 L. T. Rep., at p. 540; (1899) A. C., at p. 159).

Horace Ivory, K.C. (J. K. Mackay with him) for the respondent.—I accept the test suggested in this case—namely, whether Terry could have

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been convicted under sect. 1 of using this office for the prohibited purpose. It is submitted that Terry, if he had been charged, could not have escaped from the decision in *Stoddart v. Hawke* (*ubi sup.*). The facts show that Terry used this office in the sense that he paid the appellant to issue and sell his coupons at that office; he paid, as the magistrate has found, a price far in excess of the ordinary price of advertisements, and that payment was made to the appellant in order that the appellant might sell at this office Terry's coupons. The coupon itself on the face of it described the price at which they were to be sold. The real object of the paper was this back sheet—namely, the coupon—and the rest was all padding. Terry paid the appellant to issue these coupons, and the moment that is found the case is within the decision of *Stoddart v. Hawke* (*ubi sup.*). Lord Alverstone, C.J. in that case says: "And from that office are issued the coupons, without which he would not receive any of the money which he does receive"; and Channell, J. says: "What is done here is that there is an office in this country from which are issued newspapers with an appendix to them called coupons. In my opinion these documents are an essential part of the system, and without them the money cannot be received," &c. Those words precisely apply to this case. [Lord ALVERSTONE, C.J.—Do you say that it carries you to this extent, that any paper putting in the coupon can be convicted?] Yes; if the evidence raises fairly the inference of fact that the paper is being bought for the sake of the coupon. Even if it were shown that some persons bought the newspaper for the joint purpose of reading the news and getting the coupon, that would not take the case out of the operation of the section, as it has been said more than once that the office need not be exclusively used for the prohibited purpose: (see the judgment of Mathew, J. in *Hornsby v. Raggett*, 66 L. T. Rep. 21; (1892) 1 Q. B. 20). If one of the purposes is the carrying on of this forbidden business it is enough. It is suggested that this case differs from *Stoddart v. Hawke* (*ubi sup.*) in this, that there is here no suggestion of agency; but we do suggest there was an agency, and that Terry employed the appellant as his agent to carry on this system in his office, and the appellant does everything there except receive the money. The phrase "to localise his business" goes beyond the judgments in the House of Lords in the *Kempton Park* case (*ubi sup.*). Lord Halsbury there says (1899) A. C. at p. 161) that there must be a person who, although neither owner nor occupier, is analogous to the owner, &c.; and Smith, L.J., whose judgment was expressly approved and adopted by the Lord Chancellor, points out the nature of the user: (see 77 L. T. Rep. at p. 13; (1897) 2 Q. B. at p. 276). There was abundant evidence on which the magistrate could find that Terry was a person using the office, and that the appellant permitted such user.

Stutfield in reply.—The question really is whether Terry was using the office at all, not for what purpose he was using it, because if he was not using it at all the appellant cannot be convicted. Using is a different thing from resorting to a place, and, even if Terry had gone to the office personally, that would have been not a user of the place, but a resorting to it. There must be

a physical user either by the person himself or his agent, and a user by a person who is in control of the office; just as resorting means a physical resorting:

Reg. v. Brown, 72 L. T. Rep. 22; (1895) 1 Q. B. 119.

Here the betting business was not the appellant's; he took no part of the profits, and the very utmost that can be said is that he was assisting to carry on the business, and the business was the business of the newspaper:

Reg. v. Cooke, 51 L. T. Rep. 21; 13 Q. B. Div. 377.

It has been held in *Stoddart v. Argus Printing Company* (*ante*, p. 277; 85 L. T. Rep. 110; (1901) 2 K. B. 470) that these advertisements are not illegal. *Hornsby v. Raggett* (*ubi sup.*), it is submitted, has been overruled by the *Kempton Park* case (*ubi sup.*). *Reg. v. Stoddart* (*ante*, p. 48; 83 L. T. Rep. 538; (1901) 1 K. B. 177) was also referred to.

LORD ALVERSTONE, C.J.—This is one of four cases stated by a metropolitan police magistrate under the Betting Act 1853. Three of them to a large extent involve the same point. I will deal with them in their order, indicating so far as is necessary what are the distinctive features of one from the other. In this case the magistrate convicted the appellant Mackenzie on two summonses which are set out in the case, for permitting the office at Bedford-street to be used by Terry, who was a person using the same for the prohibited purposes, and for opening, keeping, and using the office for the purpose of money being there received by or on behalf of Terry for the like consideration. The facts may be shortly summarised in this way. At that office there was published by the appellant a newspaper which was called *Football Chat and Athletic World*, and which contained on the last page that which is called an advertisement: "H. T. Terry's, Middelburg, Holland, Advertisement. *Football Chat* Football Skill Competition." It is not necessary to say more about the competition than that it clearly comes within the class of cases held to be illegal in many decisions in which these questions have arisen. The coupon was, when cut out, filled up and sent with money, addressed to "*Football Chat*, Middelburg, Holland." There were certain coupon rules from which it appeared that the names of the winners, as the result of the competition, would be advertised in the paper and the prizes remitted on a certain day, and everybody claiming to be a prize winner whose name did not appear in that list was required to send in a remonstrance or claim before a certain day. The sole address was said to be "*Football Chat*, Middelburg, Holland," and there appears below, "Printed and published by the proprietors, Bedford Publishing Press, at 23, Bedford-street, Strand." It was stated before the magistrate—but he has not found it one way or the other as a matter of fact—that the appellant had no interest in the competitions, and we do not proceed upon any view that there is any finding upon which we could act that the competition itself was on behalf of the appellant. It was stated that the appellant received a considerable amount more for the advertisements than the ordinary rate, and that the moneys were remitted to Holland and were returned, not, of course, passing through the hands of the appellant again. Upon that state of facts it was contended for the

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appellant that there was no user by Terry of the office at 23, Bedford-street for an illegal purpose, and that, if there were no user by Terry, there could be no permission by the appellant that Terry should so use it. I think it is extremely important to read the finding of the magistrate, and to see what it amounts to. [His Lordship read the findings of the magistrate as set out in the case, and proceeded:] It is scarcely necessary to say that that finding of the office being opened and kept for the purpose of such user by Terry, and of Terry using the office for the purpose of these competitions, if there is evidence to support it, brings the case within one or more previous decisions. It is said by counsel on behalf of the appellant that there is no evidence on which that finding could properly be supported, because all that was done was that the coupons were printed and sent out from that office. In our opinion there was evidence upon which the magistrate could come to that conclusion. The coupon, and the receipt of the money by Terry with the coupon, is really of the essence of the scheme. The coupon goes out in order that the person may fill it up and may send it to Terry. It seems to us that that operation carried out at Bedford-street, where the paper could be obtained, was evidence of a user by Terry of that place for the carrying out of an essential part of his scheme, and therefore we think there was evidence upon which the magistrate could rightly find that Terry himself used this office, and that the appellant permitted Terry so to use it. It is to be noticed that there is no finding here of what I may call any independent newspaper undertaking; and, if it were an independent newspaper undertaking, it is difficult to understand why the money should be sent to *Football Chat* at Middelburg, and why the competition should be spoken of as "*Football Chat Football Skill Competition*." If it were a mere case of an ordinary innocent advertisement, a very different state of things would prevail. I have only to add with reference to this case that in the previous case of *Stoddart v. Hawke* (*ubi sup.*) we decided that the money need not be received at the place. The substantial finding that we there pointed out, and I repeat again, to be material, is that the place is used as a part of the essential machinery for the receipt of the money for the illegal purpose. Holding, as I do, that the findings of facts by the magistrate in this case could be justified by the evidence, I think he has come to a right conclusion, and that this appeal must be dismissed.

DARLING, J.—I am of the same opinion. It appears to me to be found by the magistrate, and upon evidence which cannot be disputed, that the appellant permitted Terry, who had the office at Middelburg in Holland, to advertise in the paper *Football Chat*, and in that paper to issue the coupons which were procured at the office of the newspaper. Counsel for the appellant has argued that this sheet of *Football Chat* was nothing but an advertisement. He spoke of it as an advertisement, and as though all we were dealing with was an advertisement in the newspaper as to where one might go and get some information as to betting. But it is to be noticed that the real thing that was issued was much more than an advertisement. What was issued there was the

series of coupons. They were issued as a part of the paper, but none the less they were coupons which people used for the purpose of betting; and the coupons that were issued from that office of *Football Chat* were a part of the machinery by which Terry carried on the business of betting with people who affected to choose, according to his system, what football clubs would win certain matches. When we have to consider whether he used the place for the purpose of betting with persons, clearly Terry used the newspaper for those purposes, and the newspaper was published at the office of *Football Chat*, and issued therefrom with the coupons attached. That possibly might alone be enough to bring this office within the statute. It is not necessary to decide that in this case, and I will not say whether I think it would be enough to bring it within the statute or not. I do not affect to decide that, and it is not necessary to do so, because the magistrate has here found that the appellant permitted the user of the office by Terry, and that he opened and kept the office for the purpose of such user by Terry, and that he derived a profit from it; that he charged considerably more than he charged for ordinary advertisements; he charged Terry for the privilege of putting these coupons into his paper considerably more than the ordinary charge. That being so, it seems to me that Terry did use this office for an illegal purpose within the meaning of this Betting Act, and that he used it by the permission of the appellant in the way which has been pointed out, and that therefore the appellant was also guilty within the Act for permitting the illegal thing to be done, which illegal thing Terry did. Therefore I am also of the same opinion as my Lord.

CHANNELL, J.—I agree. I also wish to say that I found my judgment entirely on the finding in this case, which I think is a finding absolutely justified, and I have not the slightest doubt that it is absolutely true, that this office was opened and kept by the appellant Mackenzie for the express purpose of this thing being done. The whole object of this paper called *Football Chat* and *Athletic World* beyond all doubt was for the purpose of working this coupon competition and scheme. The magistrate has found that, and, as he has found that, it seems to me it brings the case absolutely and entirely within our previous decision in the case of *Stoddart v. Hawke* (*ubi sup.*). If it had not been for that finding I should have had some difficulty, because I think the argument for the appellant was right to a considerable extent—namely, that there must be something like a physical user of the office. The whole object of this Betting Act of 1853 is to prohibit betting offices within the meaning which the Legislature put on that word; and it is necessary that a person to be held liable for using the place must be a person who uses it either in the character of owner, keeper, or manager, or conductor of the business. If he is a person who has not that character, then he must be some other person who is analogous to and is of the same genus as the owner, keeper, and occupier, as we see by one portion of the judgment of the Lord Chancellor (Lord Halsbury) in *Powell v. Kempton Park Racecourse Company* (*ubi sup.*). It must be the use by some person having some kind of dominion or control over the place, or conducting

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his business there. Consequently, if this really were the case of two independent persons, one carrying on a newspaper and the other having a scheme for receiving money by himself in Holland which he desired to advertise, and if this were a *bonâ fide* advertisement in a *bonâ fide* newspaper, I should think that the mere use of the newspaper was not the use of the office of the newspaper within the meaning of this statute. But on the findings, which, as I have said, are perfectly justified, that question does not really arise, and I therefore agree in dismissing this appeal.

Appeal dismissed.

Solicitor for the appellant, *Edward M. Lazarus*.
Solicitors for the respondent, *Malkin and Co.*

Friday, April 25, 1902.

(Before Lord ALVERSTONE, O.J., DARLING and CHANNELL, J.J.)

HAWKE v. MACKENZIE (Nos. 1 and 2). (a)

Gaming—Office used for betting—Persons not resorting physically for that purpose—Coupon competition—Advertisement—Betting Act 1853 (16 & 17 Vict. c. 119), ss. 1, 7—Betting Act 1874 (37 Vict. c. 15), s. 3 (1).

M. was the proprietor of a sporting newspaper published at an office in B.-street, London. T., who resided abroad, published in M.'s newspaper advertisements of certain illegal coupon competitions carried on by T. The only personal use T. made of the office of the newspaper was by occasionally calling there; the remittances for the competitions were sent direct to him at his residence abroad; and the only payment M. received was payment for the advertisements and for the lists of winners in the competitions.

Held, that the office in B.-street was kept by M. for the purpose of "making bets and wagers in manner aforesaid" within sect. 7 of the Betting Act 1853, and that these words do not apply merely to the making of bets and wagers by persons physically resorting to the office, but to all the modes of gambling referred to in sect. 1 of that Act.

M. also published in his paper advertisements in which J. O' R. and others offered to send advice as to the coupon competitions on application to them at their respective addresses.

Held, that M. was guilty of a breach of sect. 3 (1) of the Betting Act 1874, which forbids under a penalty the publication of an advertisement whereby it is made to appear that any person will on application give information or advice with respect to any bet or wager or any event or contingency mentioned in the Betting Act 1853.

Reg. v. Stoddart (ante, p. 48; 83 L. T. Rep. 538; (1901) 1 K. B. 177) approved.

Stoddart v. Argus Printing Company (ante, p. 277; 85 L. T. Rep. 110; (1901) 2 K. B. 470) dissented from.

HAWKE v. MACKENZIE (No. 1).

APPEAL by case stated from the decision of Marsham, Esq., a metropolitan magistrate.

An information was preferred by John Hawke, the appellant, under sect. 7 of the Betting Act 1853 (16 & 17 Vict. c. 119) against Donald Mackenzie, the respondent, for that he being the

occupier of a certain office or place—to wit, an office or place situate at 23, Bedford-street, Strand, in the county of London—did on the 12th Nov. 1901 unlawfully cause certain advertisement to be published whereby it appeared that the said office or place was opened, kept, or used for the purpose of making bets or wagers.

The Betting Act 1853 (16 & 17 Vict. c. 119):

Sect. 7. Any person exhibiting or publishing or causing to be exhibited or published any placard, handbill, card, writing, sign, or advertisement whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid or for the purpose of exhibiting lists for betting or with intent to induce any person to resort to such house, office, room, or place for the purpose of making bets or wagers in manner aforesaid, or any person who on behalf of the owner or occupier of any such house, office, room, or place or person using the same shall invite other persons to resort thereto for the purpose of making bets or wagers in the manner aforesaid, shall upon summary conviction thereof before two justices of the peace forfeit and pay a sum not exceeding 30l., and may be further adjudged by such justices to pay such costs attending such conviction as to the said justices shall seem reasonable, and on the nonpayment of such penalty and costs or in the first instance if to such justices it shall seem fit may be committed to the common gaol or house of correction with or without hard labour for any term not exceeding two calendar months.

At the respective hearings on the 5th and 7th Dec. 1901 the summons on the above information was heard, and the following facts were proved or admitted:—

On the date specified the respondent was occupier of the office in Bedford-street and also the registered proprietor of a newspaper called *Football Chat and Athletic World*. The office was the principal one at which *Football Chat* was published and the business of that newspaper conducted.

A copy of *Football Chat* dated the 12th Nov. 1901 was put in evidence at the hearing, as was also one of its posters for the 12th Nov. 1901. The copy contained an advertisement of a football coupon competition, and was procurable at the office by intending competitors. A copy of *Football Chat* for the 12th Nov. 1901 was annexed to this case, as was also the poster given in evidence.

All the coupons filled up and dispatched by the competitors, together with the remittances accompanying, were, in accordance with the instructions in the advertisements, addressed to "*Football Chat*, Middelburg, Holland," and remittances were to be made payable to H. T. Terry.

The respondent stated in evidence that H. T. Terry was the sole promoter of the competitions, and that H. T. Terry received all the money sent by competitors in respect thereof, and all the profits derived from them belonged to H. T. Terry.

The respondent swore he had no interest in the competitions or the profits thereof except moneys received from advertising them in the newspaper, which moneys amounted to about 27l. in each issue of *Football Chat*, and also the moneys arising from the periodical publication in *Football Chat* of the list of prize winners, the number of which varied from time to time, the insertion of such lists being paid for at the same rate as

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the advertisements. H. T. Terry made personal use of the office by occasionally calling there.

It was proved that the competitions for which the money was received were in respect of football matches, and that they were described in *Football Chat* as *Football Chat Football Skill Competitions*, and that the address in Holland was given as "*Football Chat*, Middelburg, Holland."

Upon the above facts, counsel for the appellant contended that the decision of the Divisional Court in the case of *Stoddart v. Argus Printing Company* (ante, p. 277; 85 L. T. Rep. 110; (1901) 2 K. B. 470) was not fully argued as both parties had the same interest, and that it was inconsistent with the opinions expressed by several of the judges in the case of *Reg. v. Stoddart* (ante, p. 48; 83 L. T. Rep. 538; (1901) 1 K. B. 177) in the Court for Crown Cases Reserved, and that, as this latter court was the superior one, the magistrate would be bound by its decision rather than that of the Divisional Court.

Counsel for the respondent contended that the office was not opened, kept, or used for the purpose of H. T. Terry making bets or wagers in manner prohibited by the Act; that the respondent did not advertise the office as being so opened, kept, or used; and that the decision in *Stoddart v. Argus Printing Company* (sup.) would be binding on the magistrate as it was later in time than that in *Reg. v. Stoddart* (sup.).

The following cases were also referred to before the learned magistrate: *Cox v. Andrews* (12 Q. B. Div. 126), *Reg. v. Brown* (72 L. T. Rep. 22; (1895) 1 Q. B. 119), and *Stoddart v. Hawke* (18 Times L. Rep. 23).

H. Ivory, K.C. (Mackay with him) for the appellant.—The point in this case is as to the extent of sect. 7 of the Betting Act 1853. The learned magistrate, following the decision of Phillimore, J. in *Stoddart v. Argus Printing Company* (sup.), has held that that section applies to advertisements of places kept for the purpose of betting with persons physically resorting thereto. We contend that this decision is wrong, and that sect. 7 applies to advertisements of houses kept for any of the purposes mentioned in sects. 1 and 3 of the Act. There is no reason for the restriction placed upon sect. 7 by Phillimore, J. as far as the mischief against which the Betting Acts are directed is concerned. The only ground given is that sect. 7 refers only to houses "kept for the purpose of making bets or wagers," but in *Reg. v. Stoddart* (sup.) several of the learned judges held that the receiving of money "as or for the consideration for an assurance, undertaking, promise, or agreement" to pay money "on the event or contingency of or relating to" a game comes within the meaning of betting as used in sect. 2, and, if so, then the advertisement here must be an advertisement of betting within the Act. Moreover, the case of *Stoddart v. Argus Printing Company* (sup.) was a friendly if not collusive action. Both parties wished to get the judgment they did in fact get.

Stutfield (C. W. Mathews with him) for the respondent.—The words of sect. 7 are "for the purpose of making bets or wagers." Now, these words are used only in the first part of sect. 1, which deals with betting by persons resorting to the place in question. It is a natural

construction to read these words in sect. 7 in the sense and only in the sense in which they are used in sect. 1. As to *Reg. v. Stoddart* (sup.), the observations made by two of the learned judges in that case were merely *obiter dicta*, and, since *Stoddart v. Argus Printing Company* (sup.) is a specific decision on this point given since those observations were made, it must, I submit, be taken as overruling them. No doubt *Stoddart v. Argus Printing Company* (sup.) was a friendly action, but it was not collusive in the sense that the arguments of both sides were directed to securing the decision desired. The point was fully argued, and, as the report shows, the attention of the judge was drawn to *Reg. v. Stoddart* (sup.). Further, this office was not in fact used for purposes of betting of any kind. The coupons and the money were all sent, not to it, but to Holland.

Ivory, K.C. in reply.—The coupons were obtained at the respondent's office. Practically the whole paper is an advertisement of betting, and published for the purpose of betting. The court will note that in sect. 11 of the Act the only words used are "betting house," so that, if the respondent is right, it, too, is limited to houses kept for the purpose of betting with persons physically resorting to them.

[As the facts and points of law in the following case were in many respects identical with those in the above, the court directed that it should be argued before they delivered judgment.]

HAWKE v. MACKENZIE (No. 2).

Appeal by case stated from the decision of Marsham, Esq., a metropolitan magistrate.

Two informations were preferred by John Hawke, the appellant, under sect. 3 (1) of the Betting Act 1874 (37 & 38 Vict. c. 15) for that he did on the 12th Nov. 1901 unlawfully cause two certain advertisements to be published whereby it appeared that J. O'Reilly, of 55, Chatham-road, Rock Ferry, Cheshire, and J. Taylor, of 46A, Market-street, Manchester, respectively would on application give information for the purpose of or with respect to certain bets, wagers, events, or contingencies mentioned in the Betting Act 1874.

At the respective hearings on the 5th and 7th Dec. 1901 the summonses on the above informations were heard, and the following facts were proved or admitted:—

On the date specified, the respondent was the occupier of an office, 23, Bedford-street, and also registered proprietor of a newspaper called *Football Chat and Athletic World*. The office was the principal one at which the newspaper was published and the business thereof conducted.

A copy of the newspaper, dated the 12th Nov. 1901, was put in evidence at the hearing. The copy contained advertisements whereby it appeared that J. O'Reilly and J. Taylor respectively would on application give information with respect to certain bets, wagers, events, or contingencies with respect to the game of football. A copy of the newspaper for the 12th Nov. 1901 was annexed to this case.

Upon the above facts, counsel for the appellant contended that the decision of the Divisional Court in the case of *Stoddart v. Argus Printing Company* (sup.) was not fully argued as both

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parties had the same interest, and that it was inconsistent with the opinions expressed by some of the judges in the case of *Reg. v. Stoddart (sup.)* in the Court for Crown Cases Reserved, and that, as this latter court was the superior one, the magistrate would be bound by its decision rather than that of the Divisional Court; and, further, that the decision in *Stoddart v. Argus Printing Company (sup.)* did not itself apply to advertisements such as those of O'Reilly and Taylor.

Counsel for the respondent contended: (1) That the advertisements did not relate to information to be given for the purpose of wagers to be made in any house or place prohibited by 16 & 17 Vict. c. 119. (2) That the decision in *Stoddart v. Argus Printing Company (sup.)* would be binding on the magistrate as it was later in time than that of *Reg. v. Stoddart (sup.)*.

Upon the facts as proved and stated in other special cases now being stated by the magistrate with reference to decisions given by himself at the same hearing on other informations, the magistrate held that the office, 33, Bedford-street, was used by H. T. Terry (a person referred to in the other special cases) for the purpose of money being received by him as the consideration for his promise to pay money on the events of football matches; and the magistrate further found that the respondent permitted the user by H. T. Terry, and that the respondent opened and kept the office for the purpose of such user by H. T. Terry, but the magistrate was of opinion that the case of *Stoddart v. Argus Printing Company (sup.)* did apply to all the advertisements in question, and he dismissed the summonses.

The Betting Act 1874 (37 & 38 Vict. c. 15):

SECT. 3. Where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published (1) whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager or any such event or contingency as is mentioned in the principal Act (16 & 17 Vict. c. 119) or will make on behalf of any other person any such bet or wager as is mentioned in the principal Act . . . every person sending, exhibiting, or publishing or causing the same to be sent, exhibited, or published shall be subject to the penalties provided in the 7th section of the principal Act with respect to offences under that section.

Avory, K.C. (Mackay with him) for the appellant.—Two points arise in this case. The first is whether the advertisements here in question are advertisements within sect. 3 (1) of the Betting Act 1874. On this point the respondents rely upon *Cox v. Andrews (sup.)*. There all that the court held was that where a newspaper publishes an advertisement to the effect that the advertiser will give information for the purpose of betting, without itself affording any facilities to persons desirous of taking advantage of the advertisement, there is no evidence that there is any house or place used for the purpose of betting. Here, however, the newspaper did give facilities for taking advantage of the advertisement. The newspaper contained the coupons which were to be filled up in connection with the betting and were published at the respondent's office. The second point is whether sect. 1 (3) applies only to advertisements of houses or places to which persons physically resort for the

purpose of betting, or whether it refers to houses kept for all the purposes referred to in sect. 1 of the principal Act. In *Stoddart v. Argus Printing Company (sup.)* Phillimore, J. has held that sect. 7 of the principal Act applies only to houses of the former kind, and, if this be correct, then sect. 1 (3) of the Act of 1874, which is to be read with the principal Act, is similarly restricted in its operation. But this decision is contrary to the opinions expressed in *Reg. v. Stoddart (sup.)*, and, as the latter decision is one of the Court for Crown Cases Reserved, it should prevail.

Stutfield (C. W. Mathews with him) for the respondent.—It was not shown at the hearing that the advertisements referred to the competitions for which coupons were provided by the newspaper. Even if this had been shown, I submit that *Cox v. Andrews (sup.)* would apply. Though the coupons may have been supplied from the respondent's office, he afforded no facilities for carrying out betting transactions there. The coupons once filled up were not sent to the office, but to Holland. I submit, further, that the decision of Phillimore, J. in *Stoddart v. Argus Printing Company (sup.)* is right. The opinions expressed in *Reg. v. Stoddart (sup.)* were only *obiter dicta*, and, moreover, *Stoddart v. Argus Printing Company (sup.)* was decided since *Reg. v. Stoddart (sup.)*, and therefore any opinions expressed by the learned judges in deciding the latter case must be taken to be overruled by it.

LORD ALVERSTONE, C.J.—These two appeals involve the same point, although the summonses were under different sections. The first summons was a summons under the 7th section of the Act of 1853, that Mackenzie, being the occupier of a certain office, did unlawfully cause certain advertisements to be published whereby it appeared that the said office was kept and used for the purpose of making certain bets or wagers, against the form of the statute. The second case was framed on the 1st sub-section of the 3rd section of the Amending Act of 1874, which provides that where any letter, circular, telegram, placard, handbill, card, or advertisement is sent, exhibited, or published (1) whereby it is made to appear that any person, either in the United Kingdom or elsewhere, will on application give information or advice for the purpose of or with respect to any such bet or wager or any such event or contingency, and so on. The learned magistrate practically recapitulates, upon the summons for the issue of the advertisement and also in respect of the offence under the Act of 1874, what he has found with regard to the case we have just disposed of (*Mackenzie v. Hawke, ante, p. 591*). He repeats, in fact, that Terry was using this place for the purpose, and would have come to the conclusion that, so far as that ingredient of the case was concerned, there was sufficient evidence for him to act, but he considered that he was bound by the case of *Stoddart v. Argus Printing Company (sup.)*, which was a judgment of my learned brother Phillimore, J. and my learned brother Gainsford Bruce, J. Before that case was argued, the matter was considered in the Court for Crown Cases Reserved in *Reg. v. Stoddart (sup.)*. It is contended, and I think rightly contended, that the principle and ground of the decision in the

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case in the Court for Crown Cases Reserved is inconsistent with the view taken by Bruce and Phillimore, JJ. It depends on the language of the Act of 1853. Sect. 7 provides: [Reads it]. Now, in an action brought by Stoddart against the Argus Printing Company in connection with the printing of these advertisements, it was contended before my brothers Bruce and Phillimore that the contract was not illegal, because sect. 7 only meant to refer to advertisements in respect of what has been called the first branch of sect. 1. All I say is this, looking to what was decided in the case of *Reg. v. Stoddart (sup.)* and to the ground of the judgment there, and to the ground of the judgment given by my brother Wills, I certainly cannot think that sect. 7 is so confined. I think the language of sect. 7 is inconsistent with its being confined solely to the case of betting by persons who resort to the place, and I think the attempt that was there made to confine the meaning of sect. 1 to the more narrow construction based on sect. 7 to a certain extent shows the inconsistency of the view that sect. 7 is to be confined to the first part of sect. 1. It seems to me that, having enumerated the main and principal offence in sect. 1, in dealing with the subordinate offence in sect. 7, they have said enough in sect. 7 to indicate that they are referring to the transaction referred to in sect. 1, and it would certainly serve no useful purpose, nor ought we to adopt a mode of construction that would cut down sect. 7 to the limited case referred to in the judgment in *Stoddart v. Argus Printing Company (sup.)*, the mischief of the evil aimed at by the statute certainly being as great in one case as in the other. I do not wish to say too much on the *Argus* case having been what is called a friendly case. It certainly does not seem to have been argued on the part of the defendants as strenuously as it might have been argued if the parties had been hostile, but I think in such a matter as this, if the two cases are inconsistent, as to a certain extent they are, we must in this case follow the decision in the Court for Crown Cases Reserved, and we must treat that for the purposes of these proceedings as being the authority by which we are bound. Now, the same point arises with regard to the third case—that is to say, the summons under sect. 3 of the Act of 1874 with a slight addition to which I must refer. There the learned magistrate, having again stated the facts in reference to Terry's user, considered he was bound by the decision in *Stoddart v. Argus Printing Company (sup.)* because, in addition to that, there was the case of *Cox v. Andrews (sup.)* which had held, and I think rightly held, that the Act of 1874 was an amendment with an extension of the Act of 1853, and that the two Acts were to be read together, and, of course, having regard to the fact that the two Acts are to be read together, if a limited construction were to be put on sect. 7, so that it was only to be confined to the first class of offences mentioned in the 1st section of the Act of 1853, the same argument would or might be applied with reason to sect. 3 of the Act of 1874, because it might then be successfully maintained that the Act of 1874, when it referred to any such bet or wager, or any such event or contingency as is mentioned, would of course be limited in the same way as sect. 7 would be limited. I might say at once that I do not adopt the wide conten-

tion of Mr. Ivory that the words "any such event or contingency" were meant to widen the scope of the Act altogether by including information about bets, or information about contingencies. I think they are very important to indicate that sub-sect. 1 of sect. 3 of the Act of 1874 includes all the 1st section of the Act of 1853, but I still think there must be the element, which I think is essential in all these cases under the Act, of some place which is used as a part of the machinery whereby the unlawful transaction is carried out, though the money may not be actually received there. I think, therefore, that, adopting the view the learned magistrate did of sect. 7 of the Act of 1853, he was quite logical and consistent in applying the same view to sect. 3 of the Act of 1874; but, as I think he should have followed the decision of the Court for Crown Cases Reserved in *Reg. v. Stoddart (sup.)* and that his judgment in this respect should be reversed as regards the information under sect. 7, so I think it must under sect. 3 of the Act of 1874, and therefore in both these cases, these two appeals, the case must be remitted to the magistrate.

DARLING, J.—I am of the same opinion. I desire to say a word with regard to the first of these appeals. I quite agree that the case on which the learned magistrate felt bound to act—*Stoddart v. Argus Printing Company (sup.)*—is in conflict with the other case to which my Lord has alluded, and which was decided by the full court, and I think that decision must prevail. But, besides that, I should disagree with this case of *Stoddart v. Argus Printing Company (sup.)* and with the judgment that was given. Phillimore, J. held that sect. 7, which created the punishment for the offence, was confined to the offences which are enumerated in sect. 1 of the Betting Act 1853. He says: "And when one comes to examine that section carefully"—that is, sect. 7—"it seems clear that it is directed only against advertisements of houses kept for the purpose mentioned in the first part of sect. 1—that is to say, for the purpose of betting with persons physically resorting thereto—and is not directed against advertisements of houses kept for the purpose mentioned in the second part of sect. 1." I think, if you examine it carefully, you will see that sect. 7 is not exclusively confined to offences against the first half of sect. 1, because it says: "Any person exhibiting or publishing"—the things Phillimore, J. alluded to—"whereby it shall be made to appear that any house, office, room, or place is opened, kept, or used for the purpose of making bets or wagers in manner aforesaid"—that is quite true, that is all within the first part of sect. 1—"or for the purpose of exhibiting lists for betting"; but exhibiting lists for betting is not forbidden by sect. 1 at all, neither by the first nor the second part of it. Therefore this deals with an offence for which one may be prosecuted under sect. 7, which is certainly, wherever it may be, not in the first part of sect. 1 of the Betting Act of 1853. Now, to hold that sect. 7 does apply to the first part of sect. 1, and to nothing more, is obviously to put a most technical and a most limited construction on this Act of Parliament. Why should one put it? It is not necessary to do so, as was shown by the case to which my Lord has alluded. This decision, as I say, is, I think, inconsistent with that. But on general grounds I can see no reason

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for holding that this sect. 7 was necessarily cut down to those offences in the first part of sect. 1, and left undealt with all the offences mentioned in the second part of sect. 1, and therefore reduced the second part of sect. 1 to a nullity. It seems to me that what one must do in these cases is to have some regard to what the Legislature was aiming at. The Legislature was not aiming so much at a person who goes to a house to bet, and bets with a person in a house, or bets with a person who comes into a house. It was really trying to put down what it considered was a public vice. That is shown by the fact that they did from time to time prohibit such things as the advertising, the publication, or exhibition of lists for betting. You need not go into the house to look at the list. It does not say so, and therefore I cannot say that we ought, in construing such an Act as this, to assume that the Legislature meant to forbid things, and then to make it impossible that anybody should be prosecuted who did the thing which was forbidden. It seems to me that this case was wrongly decided, and one of the consequences of its being wrongly decided is that it came in conflict with the other case to which my Lord has referred. I do not wonder that it was decided as it was. It was brought before the court in a most unsatisfactory way. It was a mock battle altogether. The plaintiff and defendants engaged one another in order that no genuine person should sue either of them. That was the object of it. Goodness knows what instructions were given to their counsel. Of course their counsel only argued upon the instructions that they got. I can only say that the argument which did not prevail was a very short one. It did not draw attention to the point to which I have drawn attention. It appears to me not only to have been very short, but it was a very perfunctory argument altogether. I refer to the argument for the defendants. They desired to have a verdict against them, and they got it, and it seems to me they cannot hope to maintain it any longer.

CHANNELL, J.—I agree. I only want to add that I think sect. 7, as to the expression "bets and wagers," bets refer to the first part of the 1st section, and wagers to the second part, and wagers is quite apt to refer to that second part of the 1st section, and consequently I think the words expressly relate to it. I agree I cannot see that there is any reason why it should not relate to it. Then, as an additional reason why we are not bound by the decision in *Stoddart v. Argus Printing Company (sup.)*, I point out that there is no appeal from our present decision, it being in a criminal matter; and I understand, where you have conflicting cases, in such a case as that the court is bound to form its own opinion.

Appeals remitted.

Solicitors for the appellant, *Malkin and Co.*
Solicitor for the respondent, *E. M. Lazarus.*

Friday, April 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HAWKE v. MACKENZIE (No. 3). (a)

Gaming—Convictions under the Betting Acts 1853 and 1874—Penalties—Informer—Claim to moiety—Discretion of magistrate—Metropolitan Police Courts Act 1839 (2 & 3 Vict. c. 71), s. 34—Betting Act 1853 (16 & 17 Vict. c. 119), s. 9.

H. laid two informations against M. under the Betting Act 1853, and M. was convicted on both informations. The magistrate fined M. 100l. on the first and 1s. on the second conviction, and ordered him to pay 20 guineas costs. Thereupon H. claimed that he was entitled as of right under sect. 9 of the Betting Act 1853 to a moiety of the penalties, or, if the magistrate had a discretion under sect. 34 of the Metropolitan Police Courts Act 1839 to refuse such moiety, he could only exercise such discretion on proof that H. was guilty of corrupt practices. The magistrate found that H. had not been guilty of corrupt practices, but held that he had a discretion under sect. 34 of the Metropolitan Police Courts Act 1839 and that such discretion was not limited to cases where there were corrupt practices, and he adjudged that H. should not receive a moiety of the penalties.

H. appealed.

Held, that the decision of the magistrate must be affirmed.

APPEAL by case stated from the decision of a metropolitan magistrate.

An information was preferred by the appellant, John Hawke, against the respondent, Donald Mackenzie, under sect. 7 of the Betting Act 1853 (16 & 17 Vict. c. 119) for that he being the occupier of a certain office or place—to wit, an office or place situate at 23, Bedford-street, Strand—did on the 12th Nov. 1901, at 23, Bedford-street, Strand, knowingly and wilfully permit the office to be used by H. T. Terry, a person using the same for the purpose of money or valuable things being received by or on behalf of H. T. Terry as and for the consideration for an undertaking or promise to pay or give thereafter money on events or contingencies of or relating to the game of football, against the form of the statute in such case made and provided.

At the respective hearings on the 5th and 7th Dec. 1901 the two summonses issued on the above informations were heard, and on the 11th Dec. the magistrate convicted Donald Mackenzie on these informations and fined him 100l. on (1) and 1s. on (2) and ordered him to pay 20 guineas costs. The magistrate found also as a fact that the informer, the present appellant, was not guilty of corrupt practices, but he considered this to be immaterial (see 2 & 3 Vict. c. 71, s. 34), and he adjudged that he should not receive any part of the penalties.

Upon the above facts counsel for the appellant contended: That under the above circumstances the informer was by virtue of sect. 9 of 16 & 17 Vict. c. 119 entitled to one half of the penalties, notwithstanding sect. 34 of the Metropolitan Police Courts Act 1839 (2 & 3 Vict. c. 71).

The magistrate was of opinion that he had discretion to deprive the informer of the whole

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or any part of the moiety of the penalties although he did not think that the informer was guilty of corrupt practices.

The question on which the opinion of the court was desired was whether the magistrate upon the statement of facts came to a correct determination in point of law, and, if not, what should be done in the premises.

The Betting Act 1853 (16 & 17 Vict. c. 119):

Sect. 9. One half of every pecuniary penalty which shall be adjudged to be paid under this Act shall be paid to the informer, and the remaining half shall be paid or applied in aid of the poor rate of the parish in which the offence shall have been committed.

The Metropolitan Police Courts Act (2 & 3 Vict. c. 71):

Sect. 34. And whereas by divers Acts the moiety or other fixed portion of the penalties to be thereby recovered is directed to be adjudged to the informer, and the same has been found to encourage corrupt practices of common informers; for prevention thereof be it enacted that where, by any Act now in force or hereafter to be passed, a moiety or other fixed portion of the penalty or penalties thereby imposed is or shall be directed to be paid to the informer, not being the party aggrieved, it shall be lawful for any one of the said magistrates before whom the conviction shall be had to adjudge that no part, or such part only of the penalties as he shall think fit, shall be paid to the informer.

By the Statute Law Revision Act (No. 2) 1890 (52 & 53 Vict. c. 51), schedule, part 2, sect. 34 (*sup.*) is repealed from the beginning to the words "enacted that."

Avory, K.O. (Mackay with him) for the appellant.—The magistrate had in fact no discretion to refuse the appellant the moiety of the penalties which sect. 9 of the Betting Act 1853 gave him. The latter statute was passed since the Metropolitan Police Courts Act, and sect. 9 is a specific enactment that the informer in prosecutions under the Act is entitled to a moiety of the penalties. This is sufficient to take it out of sect. 34 of the Metropolitan Police Courts Act. At all events, if he has a discretion under sect. 34, it can only be exercised on proof that the informer was guilty of corrupt practices. The preamble to sect. 34 is repealed by the Statute Law Revision Act 1890, but that does not and was not intended to alter the effect of the section. The preamble may still be looked at to see the nature of the mischief aimed at:

Reg. v. Titterton, 73 L. T. Rep. 345; (1895) 2 Q. B. 61;

Powell v. Kempton Park Racecourse Company, 80 L. T. Rep. 588; (1899) A. C. 143.

The learned magistrate has given no reason whatever for depriving the appellant of his rights under sect. 9.

The respondent did not appear.

Lord ALVERSTONE, C.J.—The last case raises an entirely different point. The magistrate has convicted Mr. Mackenzie and fined him 100*l.*, and ordered him to pay 20 guineas costs; and then he said: "I found also as a fact that the informer, the present appellant, was not guilty of corrupt practices; but I considered this to be immaterial" (referring to the Acts), "and I adjudged that he"—that is to say, Mr. Hawke, the present appellant—"should not receive any part of the penalties." The question arises under two sections. Under sect. 9 of the Act passed in

the year 1853, "one half of every pecuniary penalty which shall be adjudged to be paid under this Act shall be paid to the informer, and the remaining half shall be applied in aid of the poor rate." If the matter had stood there, of course the appellant would have been entitled to succeed, but there was at the time under the Metropolitan Police Courts Act of 1839, s. 34, this section: "And whereas by divers Acts the moiety or other fixed portion of the penalties to be thereby recovered is directed to be adjudged to the informer, and the same has been found to encourage the corrupt practices of common informers; for prevention thereof be it enacted that where, by any Act now in force or hereafter to be passed, a moiety or other fixed portion of the penalty or penalties thereby imposed is or shall be directed to be paid to the informer, not being the party aggrieved, it shall be lawful for any one of the said magistrates before whom the conviction shall be had to adjudge that no part, or such part only of the penalty as he shall think fit, shall be paid to the informer." Now, the learned magistrate here has justly and rightly in the interests of the appellant negatived the existence of corrupt practices, and he has found that there were none, but he has exercised a discretion. Mr. Avory makes two points. He first says that because the Act of 1853 was passed in that year—that is to say, some fourteen years later than the Act of 1839—full effect must be given to the words "one half shall be paid to the informer," and that it is an enactment inconsistent with there being any discretion on the part of the learned magistrate. I think that goes too far. The section says in terms it is to apply to Acts hereafter to be passed—I mean the section of the Act of 1839; and it further says this, it is to apply in every case where a moiety is or shall be directed to be paid to the informer. The words are express. Therefore to the main argument of Mr. Avory I am not able to accede. Then he said, but at least if there is a discretion, that discretion can only be exercised for good cause, and that good cause must be either something that amounts to corrupt practices, or some other good cause which the magistrate has in his mind, and which can be, so to speak, appreciated by us. Now, I think it is quite impossible to confine it to corrupt practices. I may say parenthetically that I attach no importance to the repeal of this preamble of the section by the Statute Law Revision Act. I am dealing with the Act as though it had not been repealed, but the motive of the section is one thing, the enactment is another. The motive is that it had been found to encourage corrupt practices, but, instead of limiting the enacting part to the case of corrupt practices, they say there shall be a discretion. Now, I wish to say that I do not want to lay down the rule that the magistrate has an arbitrary discretion which he can exercise without good reason. I think, if no corrupt practices are suggested or established, that under ordinary circumstances most certainly the magistrate ought to give the informer half the penalty; but it seems perfectly impossible to say that he has not got a discretion upon other grounds, and I can well imagine, not to repeat the cases that were put in argument, that either from the amount of the penalty in cases that have been before him, or other considerations, he might be of opinion that the informer, who was

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appearing and performing a public duty, and not wishing to make a profit, ought not to receive a part of the penalty. At any rate, I think it is impossible for us to say that the magistrate had no discretion, and I certainly think there is no ground for our interfering with his discretion. All I do say is this, that of course where there is no case of corrupt practices the magistrate must exercise a judicial discretion as to whether or not he will deprive the informer of his penalty. But I think we should be wrong if we were to overrule, or attempt to overrule, the discretion of the magistrate in this case, there being no ground for our so doing. Therefore I think that the last appeal by Mr. Hawke must be dismissed.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, Malkin and Co.

April 21 and 22, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

HAYES (app.) v. RULE AND ANOTHER (resps.). (a)
Adulteration of food—Butter—Notice in shop—Notice on wrapper—Label—Protection of seller by notice on wrapper delivered with article—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6, 8.

To a purchaser who went into a shop and asked for half a pound of best fresh butter the seller sold butter which was found to be adulterated by the addition of water, and which was in fact milk-blended butter containing an excess of water.

There was hung in a conspicuous place in the shop a notice that all butter sold in the shop was milk-blended butter, and the butter when handed to the purchaser was wrapped up in a paper wrapper on which was printed a notice that the butter was choicest butter blended with milk, whereby the percentage of water in it was increased.

Upon an information against the seller under sect. 6 of the Sale of Food and Drugs Act 1875 for selling butter which was not of the nature, substance, and quality of the butter demanded, the justices found that the sale was to the prejudice of the purchaser, but that the seller was protected by sect. 8 of the Act by reason of the notice in the shop, and by reason that the butter was wrapped in a printed notice disclosing the fact that the article was a mixture, but there was no finding by them as to whether the notice on the wrapper could or could not be seen by an ordinary purchaser.

Held, that the notice on the wrapper was a sufficient notice by label within sect. 8, and was a good defence under that section, and that the justices were right in dismissing the information.

CASE stated by justices of the peace for the county of Worcester, sitting as a court of summary jurisdiction at Redditch.

An information was preferred by Alfred Hayes (the appellant) against William Rule and Owen Law (the respondents) under sect. 6 of the Sale of Food and Drugs Act 1875, charging the respon-

dents that they, being servants of Messrs Pearks, Gunston, and Tee Limited, unlawfully and wilfully sold to the appellant and to his prejudice an article of food—namely, butter—which was not of the nature, substance, and quality of the article of food demanded by the appellant as purchaser.

The charge was dismissed by the justices subject to this case.

Upon the hearing of the information the following facts were proved or admitted:—

The appellant was an inspector of police, and was authorised to act under the Sale of Food and Drugs Acts.

On the 26th Sept. 1901 Mrs. Dufield went, under the direction of the appellant, to the r-tail shop of Messrs. Pearks, Gunston, and Tee Limited (known as Pearks' Stores) in the town of Redditch, and asked a shop assistant (the respondent Rule) to be supplied with half a pound of best fresh butter, which the respondent supplied, and for which he was paid 6d. Shortly after this purchase Mrs. Dufield pointed to another lump of butter on the counter and said she would have half a pound of that butter, which was supplied and handed to her, and for which she paid 5½d. At this point the appellant came into the shop and complied with the provisions of the Act for the purpose of analysis. The manager of Messrs. Pearks, Gunston, and Tee Limited (the respondent Law) was present when Mrs. Dufield was supplied with the second lot of butter.

Each lot of the butter when it was handed to Mrs. Dufield was wrapped up in a paper wrapper or label on which was printed in blue letters: "This is choicest butter, blended with pure English full cream milk, whereby the percentage of water in the butter is increased to about twenty-four per cent. Pearks' Butter (Milk-blended), Half Pound."

When the appellant came into the shop the respondent Law pointed to a printed notice hung in the shop. This was headed "Notice," and was as follows:

All butter sold at this establishment is Pearks' milk-blended butter and is choicest butter, blended with pure English full cream milk whereby the percentage of water in the butter is increased to about twenty-four per cent.—For Pearks, Gunston, and Tee Limited.—By Order, JOHN DUMPHREYS, Secretary."

This notice was hanging in such a position as to be facing and readily seen by any purchaser coming into the shop, although the appellant denied having seen the notice up to the time he began dividing the butter, but he admitted that if he had wished he could have read the notice. There were two such notices in the shop.

The appellant before purchasing had read of cases affecting Pearks' butter, and he knew how the company were trading, but he did not know anything about butter.

The analyst in his certificate certified that

The above sample is adulterated by the addition of water to the extent of at least 4·6 per cent. The sample contained the parts as under: Moisture, 20·6 parts; fat, curds, and salt, 79·4 parts. The above opinion is based upon the fact that the above sample contained at least 20·6 per cent. of water, whereas a genuine butter should not contain more than 16 per cent. of moisture. No change had taken place in the constitution of the sample which would interfere with the analysis.

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It was contended for the appellant that the label and notice did not protect the respondents from the provisions of the Act, and that it had not been proved that the notice was seen by the purchaser prior to the completion of the purchase, and that the recognised standard of moisture in butter was 16 per cent., whereas the analyst's certificate proved that the butter sold contained 20.6 per cent.; that the onus lay upon the respondents to show how the excessive amount of moisture came to be in the butter, and that if they failed to satisfy the justices that it was from causes beyond their control, or was not intentionally introduced by mixing milk with the butter, then the offence charged under sect. 6 was complete, and no label they could frame could protect them against what was alleged to be the fraudulent purpose of the respondents.

It was contended on behalf of the respondents that the appellant had not made out a case; that the notice in the shop entirely protected the respondents; also that there was not any legal standard as to the percentage of water in butter, and that the prosecution had no case, the notice clearing them from liability, and disposing of any plea the appellant might urge of fraudulent intent; that the appellant had admitted that before he went to the shop he knew what he went to purchase, and that he had read of previous cases and knew how the respondents' employers were trading, and that they were selling milk-blended butter, and that he did not require the notice to be put prominently before him.

It was also contended that the notice protected the respondents from the charge that the goods were sold "to the prejudice of the purchaser": (*Sandys v. Small*, 39 L. T. Rep. 118; 3 Q. B. Div. 449; *Morris v. Johnson*, 54 J. P. 612).

The justices determined (1) that as the appellant had by his agent asked to be supplied with best butter, and had received an article which was not pure butter, although an article of commerce, the sale was a sale "to the prejudice of the purchaser"; (2) that the respondents were entitled to the protection afforded by sect. 8 of the Sale of Food and Drugs Act 1875, by reason of the printed notices exposed in the shop of Messrs. Pearks, Gunston, and Tee Limited, and by reason that the butter sold to the appellant was wrapped in a printed notice disclosing the fact that the article was a mixture, and having regard to the admissions of the appellant that he knew how the respondents' principals were trading.

The questions of law for the opinion of the court were: 1. Whether the sale of milk-blended butter by the respondent Rule was under the circumstances hereinbefore stated a sale to the prejudice of the purchaser within sect. 6 of the Sale of Food and Drugs Act 1875. 2. Whether in what the respondent Rule did in wrapping the butter in the paper with the notice printed thereon as stated in the case, and calling the appellant's attention to the notice hung in the shop in the manner and under the circumstances proved by the evidence, he was protected by sect. 8 of the Act.

The Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63) provides:

Sect. 6. No person shall sell to the prejudice of the purchaser any article of food or any drug which is not

of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds.

Sect. 8. Provided that no person shall be guilty of any such offence as aforesaid in respect of the sale of an article of food or a drug mixed with any matter or ingredient not injurious to health, and not intended fraudulently to increase its bulk, weight, or measure, or conceal its inferior quality, if at the time of delivering such article or drug he shall supply to the person receiving the same a notice, by a label distinctly and legibly written or printed on or with the article or drug, to the effect that the same is mixed.

The Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51) provides:

Sect. 12. The label referred to in section eight of the Sale of Food and Drugs Act 1875 shall not be deemed to be distinctly and legibly written or printed within the meaning of that section unless it is so written or printed that the notice of mixture given by the label is not obscured by other matter on the label.

Amphlett, K.C. (*Carmichael* with him) for the appellant.—The justices ought to have convicted the respondents. The present case differs essentially from the case recently before the court, the case of *Pearks, Gunston, and Tee Limited v. Houghton* (*ante*, p. 445; 86 L. T. Rep. 325; (1902) 1 K. B. 889), where it was held that the seller was protected by the notice hung on the wall of the shop. In that case the purchaser asked for half a pound of 1s. butter and got it; here the purchaser asked for the best fresh butter, but did not get it. That constitutes a difference between the two cases. Therefore in this case the purchaser did not get butter of the nature, substance, and quality demanded, and the onus was thrown on the seller, and, as the article was sold in a mixed state, the seller was bound, under sect. 24, to tell the purchaser that the butter he was selling was not the best fresh butter, which was the article demanded. The seller did not discharge the onus on him, and ought to have been convicted:

Pearks, Gunston, and Tee Limited v. Houghton (*ubi sup.*);

Spiers and Pond v. Bennett, 74 L. T. Rep. 697; (1896) 2 Q. B. 65;

Pearks, Gunston, and Tee Limited v. Knight, ante, p. 824; 85 L. T. Rep. 379; (1901) 2 K. B. 825.

A guilty knowledge by the seller is not necessary to constitute the offence. Although the appellant sent another person into the shop to make the purchase, the appellant was really the purchaser:

Stace v. Smith, 45 J. P. 141.

The justices have found that there was a sale to the prejudice of the purchaser; and therefore all that the appellant has to show now is that there was evidence to support such a finding. There was such evidence, as the purchaser asked for best fresh butter and did not get it. Sect. 8 affords no defence here. The appellant did not see the notice until the purchase was complete, and that was too late. There is no finding by the justices that the purchaser saw the notice or that the label could be read by an ordinary purchaser. Therefore the label was no defence:

Liddiard v. Reese, 44 J. P. 233.

Sect. 8 of the Act of 1875 is controlled by sect. 12 of the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), which provides that the label must not be obscured by other matter on the label. Before sect. 8 is held to be a defence in

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this case there ought to be a clear and distinct finding by the justices that the label was a label which could be clearly seen by an ordinary purchaser, but there is no such finding. [Lord ALVERSTONE, C.J. referred to sect. 6 of the Margarine Act 1887.]

Avory, K.C. (Asquith, K.C. and W. Frampton with him) for the respondents.—The justices were right in dismissing the information. The only fault (if any) which can be found with the justices is that the respondents may complain that the justices ought also to have found that there was no evidence of a sale to the prejudice of the purchaser within the meaning of sect. 6. As to sect. 8, they have clearly found that there was a printed label within the meaning of, and complying with the provisions of, sect. 8, and therefore it is not correct to say that they had not fully before them the question under sect. 8. The points were fully brought before them in the contentions of the parties. It was contended for the respondents that the notice "cleared them from liability and disposed of any plea the appellant might urge of fraudulent intent." Therefore that was brought to the attention of the justices, and, that being so, they expressly find that the "butter sold to the appellant was wrapped in a printed notice disclosing the fact that the article was a mixture." That must mean disclosing that fact to the purchaser, and upon that the justices very properly found that the respondents were entitled to the protection afforded by sect. 8. Even if there had been no printed notice hung up in the shop, the seller would still have been protected under sect. 8 by reason of the printed label on the wrapper. Sect. 8 provides an absolute and unqualified defence; sect. 6 does not do so, and there is that distinction between the two sections. The second finding of the justices shows that they have found in favour of the respondents on sect. 8. He referred to the case of *Pearks, Gunston, and Tee Limited v. Houghton* (*ubi sup.*), and was stopped.

Amphlett, K.C., in reply, on the question of sect. 8. There is no distinct finding of the justices one way or the other as to whether the notice on the label could or could not be seen by an ordinary purchaser. There ought to be such a finding, and the case ought to be sent back to the magistrates for them to find that question. If they found that the notice on the label could not be seen or read by an ordinary purchaser, then the notice by label would not be a defence within sect. 8; if, on the other hand, they found that it could be seen, then it probably would be a defence. The label must come to the knowledge of the purchaser:

Morris v. Askew, 57 J. P. 724;

Morris v. Johnson, 54 J. P. 612.

Lord ALVERSTONE, C.J.—In this case we are asked to set aside an acquittal on a prosecution under sect. 6 of the Sale of Food and Drugs Act 1875. I wish the ground to be distinctly understood on which I consider that the acquittal was right, so that the affirming of the acquittal and the dismissing of this appeal may not be supposed to involve any larger consequences than I think it should involve, having regard to the facts found. I think this case is essentially different in one respect from the case which was argued before us a short time ago, the case of

Pearks, Gunston, and Tee Limited v. Houghton (*ubi sup.*). In this case we have the purchaser asking for half a pound of the best fresh butter. The magistrates found, perfectly properly, that what was supplied was not best fresh butter, and that the sale was to the prejudice of the purchaser in this case, if there was no other defence. We, of course, cannot in any way interfere with that finding. It is a right finding, and it only shows that we must consider something further than that. That having happened, I do not think it would have been sufficient for the defence to have relied upon the notice in the shop without it was shown that that notice was called to the attention of the person who had asked for the article because it seems to me that asking for best fresh butter and nothing further being said would, or might have, raised the question as to whether or not the purchaser really did see or know anything about the notice. Therefore if the matter rested on the notice in the shop alone, I should not have been satisfied in this case. But the magistrates have found also that there was a defence under sect. 8 by reason of the printed notices exposed in the shop, and by reason of the fact that the butter sold to the appellant was wrapped in a printed notice disclosing the fact that the article was a mixture. That is the blue notice on the label to which attention has been frequently called. Unless that notice was so put round the butter that it could not be seen, or was covered with another paper, as in the case of *Pearks, Gunston, and Tee Limited v. Houghton* (*ubi sup.*), I think the magistrates were perfectly right in coming to the conclusion that it was a sufficient notice under sect. 8. Counsel for the appellant raised one point directly and another point indirectly. He says that there ought to have been a specific finding that the blue label when it was round the butter was so handed over to the purchaser that it could be seen. I must say that if that point were going to be raised, or if there were any evidence at all before the magistrates, who certainly seem to have understood the case, that the condition of matters was that the blue label could not be seen by the purchaser, the magistrates would not have said that the butter when sold to the appellant was wrapped in a printed notice disclosing the fact that the article was a mixture. To my mind, to send back the case to the magistrates, to ask them to find that the blue label was not visible to the purchaser, when there is not a suggestion that that point was made before them, would be taking upon ourselves a duty and imposing upon the magistrates consequences which we ought not to do, having regard to the case before us. The other point suggested by counsel for the appellant is that there was not a negating of the preliminary condition in sect. 8 that what was mixed was an ingredient not injurious to health and not intended fraudulently to increase its bulk and weight. I think from the argument of counsel for the respondents, and from reading the case, it is quite clear that if that point had been intended to be raised, it must have been found by the magistrates quite independently of the question as to the notice. I think they did intend by their finding to negative any ground of conviction based upon the earlier words of sect. 8. Therefore, though it must not be understood that I mean

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that any notice stuck up in the shop will do, I think in this case that the blue label delivered to the purchaser with the butter, disclosing, as the magistrates found it did, what was the real article supplied, was a good defence under sect. 8. I have for myself no doubt that but for that notice there would have been a conviction under sect. 6.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellant, *Blundell, Gordon, and Co., for G. W. Hobson, Droitwich.*

Solicitors for the respondents, *Neve, Beck, and Kirby.*

Thursday, April 24, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. MEAD AND ANOTHER. (a)

Sunday observance—Bread, sale of—Metropolis—Condition precedent to prosecution—Written consent—Sunday Observance Act 1877 (29 Car. 2, c. 7)—London Bread Act 1822 (3 Geo. 4, c. cvi.), s. 16—Sunday Observation Prosecution Act 1871 (34 & 35 Vict. c. 87), s. 1.

The provision in sect. 1 of the Sunday Observation Prosecution Act 1871, which requires certain consent in writing to be obtained as a condition precedent to the institution of proceedings for offences under the Sunday Observance Act of Charles II., does not apply to the institution of proceedings for offences under sect. 16 of the London Bread Act 1822 (3 Geo. 4, c. cvi.), for selling and exposing for sale or for delivering bread on the Sunday; and consequently proceedings for these offences may be instituted without any such consent being first obtained.

RULE nisi for a mandamus to a metropolitan police magistrate, sitting at Thames Police-court, to state and sign a case for the opinion of the High Court.

A summons had been taken out at the instance of one Thomas Venters, of Tottenham, against one G. Werbitsky, of 75, Oxford-street, Stepney, in the county of London, master baker, for that he, being, a master baker, did on Sunday, the 16th Feb. 1902, unlawfully exercise or cause to be exercised the business of a baker by selling and exposing bread for sale, contrary to sect. 16 of the London Bread Act 1822 (3 Geo. 4, c. cvi.).

From the affidavit made by the applicant Werbitsky in support of the rule it appeared that he was served with the above summons for unlawfully exercising or causing to be exercised the trade or calling of a baker by selling and exposing bread for sale on the Lord's day.

On the 17th Feb. 1902 he accordingly appeared at the police-court before Mr. Mead, metropolitan police magistrate, to answer the information.

Before evidence was called, counsel on his behalf objected to the hearing of the summons, on the ground that the consent required by the Sunday Observation Prosecution Act 1871 had not first been had and obtained. The magistrate overruled the objection, and, after hearing evidence, convicted the defendant of the offence

charged in the information, and ordered him to pay a fine of 10s. and 12s. 6d. costs.

On the 24th Feb. the defendant made formal application in writing to the magistrate to state and sign a case setting forth the facts and grounds of his determination for the opinion of the court.

On the 13th March the magistrate issued a certificate refusing to state such case, on the ground that the application for the case was merely frivolous.

The defendant then applied for the above rule for a mandamus to the magistrate commanding him to state a case.

There was a similar rule obtained on behalf of one H. Grodzinsky, a master baker, who had also been convicted at the same time by the magistrate upon two summonses, one for unlawfully exercising or causing to be exercised, on the 16th Feb. 1902, the trade or calling of a baker by selling and exposing for sale bread on the Lord's day, contrary to the statute, and the second for unlawfully exercising or causing to be exercised on the same day the trade or calling of a baker by delivering bread at 8.15 a.m. on the Lord's day, contrary to the statute.

The two cases raised the same point, namely, whether the consent in writing of the chief officer of police, or of two justices of the peace, or of a stipendiary magistrate, which by sect. 1 of the Sunday Observation Prosecution Act 1871 was made necessary before a prosecution could be instituted for offences under 29 Car. 2, c. 7 (the Sunday Observance Act 1677), was also necessary to the institution of proceedings under the Act 3 Geo. 4, c. cvi.

The learned magistrate was of opinion that the provisions of the Sunday Observation Prosecution Act 1871 had no application to proceedings taken under the Act 3 Geo. 4, c. cvi., and he refused to state a case upon that ground, as he considered the application frivolous.

The Act 3 Geo. 4, c. cvi., was:

An Act to repeal the Acts now in force relating to bread to be sold in the city of London and the liberties thereof, and within the weekly bills of mortality, and ten miles of the Royal Exchange; and to provide other regulations for the making and sale of bread, and preventing the adulteration of meal, flour, and bread, within the limits aforesaid. (1822.)

The Act then recited and repealed certain local Acts relating to the sale of bread in London, and in sect. 2 provided that it should and might

Be lawful for the several bakers or sellers of bread within the city of London and the liberties thereof, within the weekly bills of mortality, and within ten miles of the Royal Exchange, to make and sell, or offer for sale, in his, her, or their shop, or deliver to his, her, or their customer or customers, bread made of flour. . . .

Sect. 16. Provided always, and be it further enacted, that no master, mistress, journeyman, or other person respectively exercised or employed in the trade or calling of a baker within the limits aforesaid, shall, on the Lord's day, or on any part thereof, make or bake any bread, rolls, or cakes of any sort or kind; or shall, on any other part of the said day than between the hours of nine of the clock in the forenoon and one of the clock in the afternoon, on any pretence whatsoever, sell or expose to sale, or permit or suffer to be sold, or exposed to sale, any bread, rolls, or cakes, of any sort or kind; or bake or deliver, or permit or suffer to be baked or delivered, any meat, pudding, pie, tart, or

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victuals, except as hereinafter is excepted, or in any other manner exercise the trade or calling of a baker, or be engaged or employed in the business or occupation thereof, save and except so far as may be necessary in setting and superintending the sponge to prepare the bread or dough for the following day's baking; and every person offending against the last-mentioned regulations, or any one or more of them, or making any sale or delivery hereby allowed otherwise than within the bakehouse or shop, and being thereof convicted before any justice of the peace of the city, county, or place where the offence shall be committed, . . . shall for every such offence pay and undergo the forfeiture, penalty, and punishment hereinafter mentioned; that is to say, for the first offence the penalty of ten shillings; for the second offence the penalty of twenty shillings; and for the third and every subsequent offence respectively the penalty of forty shillings; and shall, moreover, upon every such conviction, bear and pay the costs and expenses of the prosecution. . . .

The Sunday Observation Prosecution Act 1871 (34 & 35 Vict. c. 87), which was "an Act to amend the law with respect to prosecutions for offences against the Act of the 29 Car. 2, c. 7" (the Sunday Observance Act 1677), provided:

Sect. 1. No prosecution or other proceeding shall be instituted against any person or the property of any person for any offence committed by him under the Act of the twenty-ninth year of the reign of King Charles the Second, chapter seven, intitled "An Act for the better observation of the Lord's Day, commonly called Sunday," or for the recovery of any forfeiture or penalty for any such offence, except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed, or with the consent in writing of two justices of the peace or a stipendiary magistrate having jurisdiction in the place where such offence is committed. No such prosecution shall be heard before the justices of the peace or stipendiary magistrate by whom or with whose consent the same has been instituted.

The learned magistrate showed cause against the rule by an affidavit, which was read by the master.

Arthur Powell, K.C. (McBarnet with him) showed cause against the rule.—The magistrate was right in refusing to state a case. The sale of bread in the metropolis is regulated not by a general Act, but by a local Act—namely, 3 Geo. 4, c. cvi.—which applies only to London and ten miles round London, measured from the Exchange, and the sole question is whether the provision in sect. 1 of the Sunday Observation Prosecution Act 1871, which in terms requires certain consent to be given before prosecutions can be instituted for offences against the Sunday Observance Act 1677 (29 Car. 2, c. 7), applies also to prosecutions for offences against the Act 3 Geo. 4, c. cvi. The provision in sect. 1 of the Act of 1871 has no application at all to the Bread Act 1822 (3 Geo. 4, c. cvi.); it applies in terms to the Sunday Observance Act 1677, and its application is limited to that Act. The objects of the two Acts—the Sunday Observance Act 1677 and the Bread Act 1822—are wholly different. The latter Act (3 Geo. 4, c. cvi.) is not an Act to provide for Sunday observance at all; it is an Act to ensure the purity of bread and to prevent bakers working seven days a week, and the provisions apply only to London and ten miles round, but there are similar provisions in the general Act, the Bread Act 1836 (6 & 7 Will. 4, c. 37). It is a re-enactment of local Acts wholly distinct from

the Act of Charles II., and it would still remain in force even if the Act of Charles II. were repealed. The Act of Charles II. was considered to be a different law altogether. The magistrate was therefore right in saying that the case was frivolous and in refusing to state a case.

Henriques, for the defendant, in support of the rule.—The only point is whether this was a frivolous application to state a case. It was not so, as the affidavit of the magistrate which has been read shows. Sect. 1 of the Act of 1871 applies, and consent in writing ought to have been given before the proceeding was instituted. If consent in writing was necessary, it ought to have been given before the information was laid:

Thorpe v. Priestnall, (1897) 1 Q. B. 159.

The title of the Act of 1871 speaks of prosecution^s for offences "against" the Act of 29 Car. 2, c. 7; in sect. 1 the words are for any offence committed "under" the Act of 29 Car. 2, c. 7. The offence charged here was an offence "under" the Act 29 Car. 2, c. 7, and the words of the section precisely describe the offence in this case. Further, sect. 16 of the Act 3 Geo. 4, c. cvi., is merely explanatory of the Act 29 Car. 2, c. 7, and that which is an offence under sect. 16 of the later Act is also an offence under 29 Car. 2, c. 7. This was an offence against the Act 29 Car. 2, c. 7, and, being so, it was protected against prosecution by sect. 1 of the Act of 1871, which applies to the case. He referred to

Ree v. Cos, 2 Burr. 786;

Crepps v. Durdan, 2 Cowp. 640;

Ree v. Younger, 5 T. R. 449;

Reg. v. Pawlett, 11 Mod. 114;

Hawkins' Pleas of the Crown, book 1, c. 26, s. 8;

34 Geo. 3, c. 61.

Lord ALVERSTONE, C.J.—This rule was moved to state a case upon a point which has been fully dealt with by the learned magistrate in the affidavit made by him. If there had been any other point of law raised, or if the point had depended on anything not before the court, we should order a case to be stated; but we really are in a position upon the materials before us to deal with the case and to decide the whole issue between the parties. The contention in support of this rule is that the provisions of the Sunday Observation Prosecution Act 1871 apply to prosecutions under 3 Geo. 4, c. cvi., which is the Bread Act applicable to the metropolis, so as to make the written consent required by the Act of 1871 a condition precedent to a prosecution under 3 Geo. 4, c. cvi. But when the matter is considered it is reasonably plain that, however much it might be thought desirable to impose some limits on these prosecutions, the Act of 1871 has not done it. The Act of 1871 deals in terms with prosecutions instituted for offences under the Act of Charles II., and it does not mention any other statute. The statutes relating to bread in the metropolis form a complete code in themselves, and I think we are able to see why they were passed. The Act of Charles II. was a general Act, and it had left out works of necessity and charity, which alone were excepted; and, it being a general Act, it was not unreasonable to suppose that the Legislature might have thought it necessary to give the protection given in sect. 1 of the Act of 1871 before prosecutions were instituted under it. Now, in the year 1793,

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in the case of *Rex v. Younger* (5 T. R. 449), the point was raised as to whether the baking of dinners by bakers on the Sunday came within the description of works of necessity, and, the court having there held that what was done by the baker came within the exception as a work of necessity, in the very next year special legislation was introduced by the Act 34 Geo. 3, c. 61, dealing exhaustively with the business of bakers in the city of London and twelve miles of the City. That Act was repealed, and then we have successively the Acts 55 Geo. 3, c. xcix., and other Acts down to the present Act 3 Geo. 4, c. cvi. Therefore it seems to us that, with regard to the baking of bread in the metropolis, a special code has been enacted by the Legislature, with special provisions as to the time when, and conditions under which, a prosecution should take place, and as to the ingredients of the offence and the exceptions which should be allowed from the general provisions; and, looking at the scheme of the legislation, it would seem too much to say that the Act of 1871, which in terms refers to the Act of Charles II. and makes no mention of the long series of Bread Acts relating to the metropolis, has brought them in by implication merely because it speaks of offences committed under the Act of Charles II. Certain offences under the Bread Acts may also amount to offences under the Act of Charles II., but it is obvious that some of the things which might be offences under the Bread Act would not be offences under the earlier Act; and that may be the reason why the Bread Acts are not referred to by name in the Act of 1871. I think that in order to prevent proceedings from being taken under the Bread Act, in respect of a matter that *prima facie* would come within that Act, the words must be clear, either expressly or by implication, to impose that limitation. I think for the reasons stated by the learned magistrate, as well as for the reasons I have just given, that this objection fails, and that the summonses were rightly entertained by the magistrate, although no consent for the institution of the proceedings had been obtained under the Act of 1871.

DARLING and CHANNELL, JJ. concurred.

Rule discharged.

Solicitors for the prosecutor, *Pattinson and Brewer*.

Solicitor for the defendant, *Albert Solomon*.

Friday, March 14, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

REX v. DOLBY; *Ex parte* NORTHFIELD. (a)

Local government—Omnibus for district council—Repairs—Surcharge—Certiorari.

An urban district council, having purchased an omnibus for the purpose of conveying the members of the council about the district when performing their ordinary duties, expended certain moneys in repairing such omnibus.

The district auditor having surcharged this amount:

Held, that such surcharge was right.

CAUSE shown why a writ of *certiorari* should not issue to remove and quash an order of surcharge by the district auditor of three sums amounting to 13l. 2s. 2d. for repairs to an omnibus on the following grounds: That the property of the council vested in them is held upon trust for the ratepayers, and it is their duty to keep such property in a proper and efficient state of repair; that the Local Government Board, having sanctioned the expenditure for an omnibus, repairs for it were necessary, and that without the use of such omnibus it would be quite impossible for the council to properly and efficiently carry out its duties on account of the straggling nature of the district and the lack of means of intercommunication; that such repairs were absolutely necessary, and were incurred in the best interests of the ratepayers; and that no objection has been made to such an expenditure, and that it was a perfectly legal and proper one.

The following facts appeared from the affidavits and exhibits:

In 1898 the district council of East Ham purchased a second-hand omnibus and some harness and accessories, for the purpose of carrying members of their committees about to inspect works in progress in their districts, and other matters with which they were concerned.

On the 30th June 1898 the assistant district auditor disallowed the sum which had been paid for the omnibus and accessories, the disallowance, as was usual, being surcharged upon the persons who signed the cheque. Upon appeal to the Local Government Board, whilst holding that the auditor's decision was right in point of law, they, on the 20th Oct. 1899, remitted the surcharge.

Before that date, some expenses had been incurred with regard to repairs done to the omnibus, and a sum of 18l. was expended.

This sum was disallowed and surcharged on the 28th July 1900.

Upon appeal to the Local Government Board with regard to this sum, they refused to remit the surcharge, on the 20th October 1900.

Between the 2nd Oct. 1900 and the 5th Feb. 1901, further sums of 13l. 2s. 2d. had been expended on repairs, and that amount was disallowed and surcharged by the auditor on the 12th July 1901.

The reasons given by the auditor for the surcharges for the omnibus were (1) that there was no legal authority for the payment by the urban district council of the travelling expenses of the members when engaged in making their visits of inspection, or while otherwise discharging their duties within the limits of their district, and that the provision of an omnibus for such purpose was equivalent to such payments; (2) because the council had not any legal or other competent authority to make the payments and to charge the same in their accounts.

The reasons for the present surcharges referred to the reasons already given for the former surcharges of the cost of the omnibus and repairs thereto, and stated that the items were disallowed (1) because there was no authority in law enabling the council to incur, defray, and charge upon their funds expenditure connected with the maintenance and keeping up of an omnibus for the use of its members; (2) because it appeared to have been within the knowledge of the council and their officers, prior to the incurring of the expenditure, that the Local Govern-

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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ment Board had already expressed their opinion as to the illegality of payments of this nature.

Macmorran, K.C. (*Lewis Thomas* with him) in support of the rule.—The question here is, are these expenses legal or illegal? Whether or no they were reasonable or not would be a question for the auditor. He referred to sect. 247 (7) of the Public Health Act 1875. *Primâ facie* these expenses are legal, for there is no prohibition by statute against members of a public body incurring travelling expenses. [Lord ALVERSTONE, C.J.—If the members had incurred cab fares could they charge the public funds with them?] I submit, yes. In the case of guardians, the Poor Law Board, on the 21st July 1871, dealt with the matter; (see Poor Law General Orders, p. 505). They are allowed, in the cases there provided for, to make charges for travelling and refreshments.

S. G. Lushington, contrâ.—He referred to *Reg. v. Plumstead Board of Works* ("Times," the 2nd June 1870). The duty of the auditor is set out in *Lumley's Public Health*, p. 1371, vol. 2, art. 14). [Lord ALVERSTONE, C.J.—Does it appear that this omnibus was wanted for any extraordinary duties? No. [He was stopped.]

Lord ALVERSTONE, C.J.—We are asked here to say that this disallowance and surcharge of 13l. 2s. 2d. is wrong, and that it should be quashed. The question is whether such surcharge ought to be made, because the charge or expenditure is lawful. It is not maintained that this omnibus was for extraordinary duties, but for perhaps onerous duties of an ordinary kind. The expenses of the vehicle are put in the same position as cab fares, and cab fares, when members of the board are discharging their duties under ordinary circumstances, could not be paid. Unless it could be successfully argued that it was lawful for members to charge cab fares when ordinarily performing their duties under ordinary circumstances, it is impossible to say that this was a lawful expenditure. If it were conceded that these were extraordinary duties, they might be perhaps properly charged on the regular accounts. But this case is quite different. When the only ground suggested is that this was a large growing district, and that the members of the board had to go about that district, those facts are not sufficient to make this expenditure legal.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion.

Rule discharged.

Solicitors: *Wilson and Son; Landon and Co.*

Wednesday, March 26, 1902.

Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MAYOR OF BLACKPOOL (app.) v.
JOHNSON (resp.) (a)

Local government—Building—Bringing forward in advance of building line—Property passing to new owner—Notice—Offence—Public Health (Building in Streets) Act 1888 (51 & 52 Vict. c. 52), s. 3.

A house, having been erected beyond the front main

wall of the building on either side of the same, contrary to sect. 3 of the Public Health (Buildings in Streets) Act 1888, passed into the ownership of the respondent, who was not aware that the consent of the local authority had not been obtained. The respondent, after written notice, allowed the house to remain as it was.

Held, that the respondent was not liable under sect. 3 for having allowed the offence to continue.

CASE stated on information preferred by the appellants against the respondent under sect. 3 of the Public Health (Buildings in Streets) Act 1888 (51 & 52 Vict. c. 52), charging that a certain building situated in Yates-street, in Blackpool, had, without the written consent of the urban authority, been unlawfully erected or brought forward beyond the front main wall of the house or building on either side thereof in the same street, and that the respondent allowed the offence to continue after written notice.

The facts were as follows:

In Oct., Nov., and Dec. 1900, and Jan. 1901, plans of the premises in question, consisting of a shop, house, and cellar, or workshop, were submitted to the Building Plans Committee of the borough by George Hardman, the then owner, who had built the premises.

The plans were disapproved on each occasion, but the premises were erected by Hardman.

The cellar, which was part of the premises, was 12ft. beyond the building line and 1ft. 9in. above the level of the street adjoining, and was therefore in contravention of sect. 3 of the Public Health (Buildings in Streets) Act 1888. The ownership of the premises passed to the respondent on the bankruptcy of Hardman, after they had been completed, and on the 3rd June 1901 the appellants gave him notice that he had committed an offence against sect. 3 of the Act by erecting and bringing forward part of the house, and had become liable to a penalty of 40s. for every day during which the offence was continued after receipt of the notice.

There was no evidence that the respondent was aware, when he bought the premises, that Hardman had brought the building forward without the written consent of the urban authority.

It was contended for the respondent that so far as he was concerned he had committed no offence, and therefore could not be guilty of a continuing offence.

On behalf of the appellants it was contended that the first part of sect. 3 of the Act was declaratory only, and that the offence for which punishment was imposed was described in the second part of the section, and consisted in the continuance of the offence after notice. *Welsh and Son v. West Ham Corporation* (19 Mag. Cas. 482; 82 L. T. Rep. 262; (1900) 1 Q. B. 324) was cited, and it was argued that if the successive owner were not liable the Act would be made ineffective by a mere change of ownership, or possibly by the fact that the builder had completed his work and gone out of possession.

The justices were of opinion that the respondent had not, without the written consent of the urban authority, erected or brought forward a building in a street beyond the front main wall of the house or building on either side thereof in the same street, and was not therefore liable to the penalty provided for every day during which

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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the offence continued after written notice from the urban authority, and they dismissed the information.

C. F. Pritchard (Macmorran, K.C. with him) for the appellants.—The respondent ought to have been convicted. The respondent is a "person offending against the enactment" by allowing the building to continue to project over the building line after written notice from the urban authority. The offence under the statute is a continuing offence, and a continuing penalty is provided against it. In *Welsh and Son v. West Ham Corporation* (19 Mag. Cas. 482; 82 L. T. Rep. 262; (1900) 1 Q. B. 324), a case under the Public Health Act 1875, s. 158, it was held that a builder who had built a house contrary to the bye-law, but who was not the owner and had never been in possession and had no right to go upon the premises, could not be convicted of allowing the offence to continue, as he had no power to remedy the breach complained of. But in this case the respondent, the owner, can remedy the breach, and he is therefore liable for allowing the offence to continue. *Rumball v. Schmidt* (46 L. T. Rep. 661; 8 Q. B. Div. 603) is a decision to show that the penalty is applicable so long as the offence is continued after written notice from the urban authority, notwithstanding that the offence was fully committed before notice was given.

The respondent was not represented.

Lord ALVERSTONE, C.J.—This is an appeal from a decision of magistrates who declined to convict the purchaser of a house from the builder who had brought some part of the front wall forward, and we must assume for this purpose, beyond the front main wall of the house or building adjoining. But for something that has been suggested to have been said by my learned brother in a previous judgment in the case referred to, I should have had no doubt about the matter at all. It seems to me this is a criminal offence, and you have to find a person offending in the way contemplated in the statute, and that is without the written consent erecting or bringing forward any house or building, or any part of such house or building. The respondent did not do that. That is not suggested, but what is suggested is that, inasmuch as he continued the building up after he had had notice in June 1901 to pull it down, or rather after he had had notice, to be more accurate, that the building did project beyond and so he was liable to a penalty, which is all that the notice was, therefore he is to be held to have committed the offence. I think much stronger words would be required for that purpose, and I think the case of a person who has bought a house, there being already an obstruction, is not dealt with by this section. In the case of *Rumball v. Schmidt* (sup.) the person proceeded against was the person who had offended. He was the person who had put up the obstruction, or made the building contrary to the provisions of the Act, and Huddleston, B. and Grove, J. held that under the words of that section there was a continuing offence, because he continued to do it, he himself having been the original offender. In the case before my brothers Darling and Channell—namely, *Welsh and Son v. West Ham Corporation* (sup.)—it was intended to summons or lodge an information against a man who had previously offended, but had no power to remove the obstruction because he had parted

with the house. Under those words referring to a continuing offence, it was held in that case that proceedings must fail. Neither of those cases seem to me an authority for putting a construction on this section, which is wider than the words would bear, and I think the magistrates were right in this case in holding that this particular person could not be convicted. If it is desired that such a person should be convicted with a penalty, because it is only a penalty, much more stringent words would be required. I am of the opinion that the appeal should be dismissed.

DARLING, J.—I am of the same opinion. I only desire to say with regard to *Welsh and Son v. West Ham Corporation* that our decision there does not in the least conflict with this, and that the terms in which we expressed our opinion were perfectly in accordance with the law.

CHANNELL, J.—I am of the same opinion. Both these cases which have been cited are decisions upon different statutes, and in each case you must look at the actual words of the statute. The words of this statute seem to be quite clear. It enacts that "any person offending against this enactment" shall be liable to a penalty, and so you must look at what goes before. The offence is erecting or bringing forward. There is nothing about the continuing offence, but only about a continuing penalty—that is, a continuing penalty for the original offence. It seems to me quite different from the statutes which were under consideration in the other cases.

Appeal dismissed.

Solicitors: Sharpe, Parker, and Co., for T. Loftos, Blackpool.

Wednesday, April 16, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

EGHAM RURAL DISTRICT COUNCIL v. GORDON. (a)

Highway—Excessive weight—Extraordinary traffic—Person by or in consequence of whose order such traffic has been conducted—Highways and Locomotives Amendment Act 1878 (41 & 42 Vict. c. 77), s. 23—Locomotives Act 1898 (61 & 62 Vict. c. 29), s. 12.

G., erecting a house, ordered a quantity of bricks to be delivered at the building.

He did not give any instructions as to the manner of cartage or the way in which the bricks had to be delivered, but the vendors of the bricks delivered them by a traction engine and trucks without G.'s knowledge, and the excessive weight of this damaged the roads.

Held, that G. was not the person "by or in consequence of whose order" such weight had been conducted.

THIS was an appeal from His Honour Judge Russell, sitting at the Chertsey County Court.

The plaintiffs' claim was for damages, being the amount of extraordinary expenses incurred by the plaintiffs in repairing certain roads by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, and it being by or in consequence of the defendant's order that such traffic had been conducted within the meaning of the Highways

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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and Locomotives Amendment Act 1878, and the Locomotives Act 1898.

The defendant was building a house near Egham, and required a large number of bricks for that purpose, and he gave the Bracknell Brick and Tile Company an order in March 1901 for 250,000 bricks, to be delivered on the land where he was building.

The Brick Company made arrangements with and gave an order to a contractor to deliver the bricks by means of a traction engine and trucks.

The roads were damaged by the engine and trucks.

While this was being done the defendant was away, and he did not stipulate or contract as to the manner of cartage, and he gave no instructions as to the way in which the bricks were to be delivered, and he did not know that an engine and trucks must or would be employed.

In a letter written by the plaintiffs to the defendant, they stated that the haulage of building materials for a building close by, by the ordinary course of cartage, did no special damage, and they stated that the special damage only commenced to occur when the engine and trucks laden with bricks commenced to ply.

The learned judge held that this was a case of excessive weight, but that the damage was not caused by or in consequence of the defendant's orders, and he gave judgment for the defendant.

The plaintiffs appealed on the ground that he was wrong in holding that the defendant was not the person by, or in consequence of whose order the excessive weight was conducted along these highways whereby damage was caused to them, within the meaning of sect. 23 of the Highways and Locomotives Amendment Act 1878 as amended by sect. 12 of the Locomotives Act 1898.

By the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 23:

Where . . . it appears to the authority which is liable . . . to repair any highway . . . that . . . extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover . . . from any person by whose order such weight or traffic has been conducted the amount of such expenses. . . .

By the Locomotives Act 1898 (61 & 62 Vict. c. 29), s. 12, sub-s. 1:

Sect. 23 of the Highways and Locomotives (Amendment) Act 1878 . . . shall be amended as follows . . . (c) There shall be substituted for the words "by whose order" the words "by or in consequence of whose order."

Macmorran, K.C. (Pritchard and McCalmont Hill with him) for the plaintiffs.—It was decided by the House of Lords, in *Kent County Council v. Lord Gerard* (77 L. T. Rep. 109; (1897) A. C. 633) that it was the person who carried the goods, and not the owner who was building, by whose order the weight or traffic had been conducted. It was in order to remedy this that the Act of 1898 substituted the words "by or in consequence of whose order" for "by whose order." It was in consequence of the defendant's order that these things were brought over the road, and merely because the contractor is liable also, that cannot relieve the defendant. This is a case of excessive weight, but the section draws no distinction

between extraordinary traffic and excessive weight. [Lord ALVERSTONE, C.J.—Is not *Colchester, Wemyss, and Co. v. Gloucestershire County Council* (66 L. J. 290, Q. B.) against you?] No. That was decided before the Amending Act of 1898. That was passed in order to get at the person for whose benefit the traffic takes place. He referred to

Epsom Urban District Council v. London County Council, 19 Mag. Cas. 677; 83 L. T. Rep. 284; (1900) 2 Q. B. 751;

Laphorn v. Harvey, 49 J. P. 709;

Hill v. Thomas, 69 L. T. Rep. 553; (1893) 2 Q. B. 333.

Danckwerts, K.C. (R. C. Glen with him) for the defendant.—"In consequence of" is not the same as "for whose benefit." This excessive weight caused by the traction engines was not the ordinary consequence of the order.

Macmorran, K.C. in reply.

Lord ALVERSTONE, C.J.—This case to my mind is by no means free from difficulty. I have a strong suspicion that the argument of Mr. Macmorran is right—that it was intended by the amending Act to make the person responsible for whom the goods had been carried in the ultimate result. I admit that, in any way of stating it, it would probably give rise to the same difficulty, and that is why the particular language which has been used in the Act of Parliament may not have achieved the result which Mr. Macmorran contends for. I think it is difficult to say that the learned judge has gone wrong in law in this case, or has applied a wrong principle of law. He has decided that it is a case of excessive weight, by which I understand that unusually large loads have been brought by unusually heavy and powerful engines, and that that state of things was not caused in consequence of the defendant's orders, the words of the amending section being "any person by or in consequence of whose order" the thing was done. I think that must, in effect, amount to a finding that the particular way in which these bricks were carted, and the particular vehicles which were used to convey them, is in no way affected by anything which the defendant ordered. It was not necessary that the materials should have been brought in that quantity, or in that way, or in that time, because of any order he had given as to the number of bricks that should be delivered, or where or when they should be delivered. That being so, it seems to me that the learned judge has negatived the allegation that the defendant was a person by or in consequence of whose order such weight of traffic has been conducted. If that is the true view of the learned County Court judge's finding, without saying it is a pure question of fact, I do not think he has misdirected himself on any question of law. I think he has rightly considered the matter, and the only way in which Mr. Macmorran can reach him is by saying that he has put a construction upon those words which is too narrow, or, at any rate, by saying he ought to have put a construction on them to the effect that if any order had been given which led to the excessive weight being brought along the road, the words "in consequence of whose order" are wide enough to include that, because if the defendant had not ordered the bricks they never would have come

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there, and there would never have been any heavy traffic. No doubt when one appreciates why an amendment is made in an Act of Parliament, one naturally endeavours to see if the words carry out the object of the amendment. Therefore I come to the conclusion, on the facts of this case, that the learned County Court judge was not wrong in coming to the conclusion that the damage to the road by the excessive weight was not in consequence of any order given by the defendant, but was in consequence of the vendors of the bricks having thought fit to choose this particular method of fulfilling their contract with the defendant. I think, therefore, that the appeal must be dismissed.

DARLING, J.—I am of the same opinion. It seems to me that to accept Mr. Macmorran's argument, with its logical consequence, would be to hold that whoever gave an order would be responsible for everything which was done by the person to whom he gave it. I think that the words "in consequence of" do not mean any more than "as a necessary consequence of" whose order. I think it is a matter to be gathered from the evidence whether what happened is a consequence of the order in the sense that it naturally, though not inevitably, followed from the order being given. The learned County Court judge finds that what occurred here was not in consequence of the order that was given, and I do not think we can say that he could not, in point of law, come to that conclusion. Therefore, I agree that the appeal should be dismissed.

CHANNELL, J.—I also agree. I do not think this is a case of a *sine quâ non*. My learned brother suggested, and I think correctly, that it might be the natural, but not necessarily the inevitable consequence of the order. Here the learned County Court judge must be taken to have found that the damage was occasioned by the mode in which the vendors of the bricks chose to deliver them. I had a good deal of doubt myself about the matter until I saw that he had actually got evidence that a larger quantity of bricks had been delivered on the same road in a different way without damaging it, and when he had that evidence before him, one can understand what he means. I will only add that I do not think Bigham, J.'s decision in *Epsom Urban District Council v. London County Council* (19 Mag. Cas. 677; 83 L. T. Rep. 284; (1900) 2 Q. B. 751) quite covers this case, although it goes a long way towards doing so.

Appeal dismissed.

Solicitors for the plaintiffs, Wood, Bigg, and Nash, for Dallas Brett, Egham.

Solicitor for the defendant, A. M. Bradley.

Wednesday, April 23, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MONMOUTH OVERSEERS (apps.) v. MONMOUTHSHIRE COUNTY COUNCIL (resps.) (a)

Rating—Poor rate—Exemption—Premises used for Crown purposes—Police residence with cell.

Certain premises were formerly the lodge of an old prison now pulled down.

They were occupied by two members of the county constabulary, and were formerly used as a police station with two cells.

The premises are now used for the residence of two constables and their families, and one of the cells is still retained for the detention of prisoners.

A certain weekly sum is deducted from the pay of the constables as rent in respect of their occupation of part of the premises.

No police books are kept there, and charges are not taken there.

The whole of the premises are subject to the inspection of the Government inspector of police, but no inspection had been made for six years, though they were yearly inspected by the county surveyor.

Held, that the premises were not exempt from the poor rate, as being used for police purposes.

CASE stated by the quarter sessions of the county of Monmouth on an appeal by the county council against a rate for the relief of the poor for the parish of Monmouth.

The two houses described in the rate-book are part of one and the same building, and are under the same roof.

Such building is the property of the Monmouthshire County Council. The persons named in the rate-book as "occupiers" are a police sergeant and constable, members of the Monmouthshire county constabulary.

The premises in question were formerly the lodge of an old prison which was pulled down some years ago, and the site of which, except of the lodge and the yard surrounding it, was sold.

The rate appealed against is assessed upon the whole of the premises in question, including the cell hereinafter mentioned.

Before the year 1881 the borough of Monmouth had a separate police force and police station. In that year the county authorities of Monmouthshire took over the borough of Monmouth for police purposes, and the separate police force of the borough was given up.

Before that time a police sergeant and a constable belonging to the county constabulary had been quartered at the premises in question, which was a police station.

In 1881 the county authorities hired a building in Agincourt-street, in the borough of Monmouth, for police purposes and as a police station, but a police sergeant and a constable continued to live at the premises in question as theretofore.

In the year 1895 the Monmouthshire County Council bought a house in Glendower-street, in the borough of Monmouth, situate about 900 yards from the premises in question, and such house was converted into a police station. Thereupon the premises in Agincourt-street were given up.

(a) Reported by W. DE R. HERBERT, Esq., Barrister-at-Law.

The premises, which include a yard, are surrounded on all sides by a high boundary wall, and there is only one entrance to the premises in the wall, which entrance is through large double gates. The building consists of living rooms for two constables and their families, and it contained originally two properly constructed cells for the detention of prisoners. One of the cells was, when the new police-station was opened in 1895, converted into a pantry for the use of one of the constables stationed there, but, if it were expedient to do so, it could again be used as a cell. The other cell always has been and still is retained as a cell for the detention of prisoners and ready for immediate use, and is kept furnished with bedding and all other usual requisites for a cell. No part of the inside of the building is shut off from any other part of it.

The chief constable of the county has power to direct in what way and for what purposes connected with the police the premises in question or any part of them may be used. The chief constable determines which constables shall live at the premises in question, and they are liable to be removed from there at any time at the discretion of the chief constable. The constables living there are required to live there for the performance of their duties as police officers, and each of them has the weekly sum of 2s. deducted from his pay as rent in respect of his occupation of part of the premises.

Above or near to the entrance gates there is a board fixed to the outside of the boundary wall with the words "County Constabulary" painted on it, and there are also large boards fixed there on which notices relating to police matters are regularly exhibited. The premises in question are near the workhouse and to the racecourse, where races are yearly held, and are convenient as a lock-up house for the temporary detention of refractory paupers and of persons arrested upon the racecourse. Applications for police assistance are often made upon the premises in question when wanted at once and at places nearer to these premises than the police station in Glendower-street would be. Applications for information upon police matters are constantly made there. A steam roller, the property of the county council, is kept in a shed in the yard.

Since 1895 the cell in the premises in question has only been used for the detention of a prisoner upon one occasion, but between the years 1881 and 1895 prisoners were detained in the two cells in the building on several occasions, and upon some of those occasions for several days at one time.

In determining the amount of cell accommodation necessary to be provided at the new police-station in Glendower-street, the standing joint committee of the county took into consideration that there was one cell at the premises in question ready and suitable for use. The new police-station contained three cells, and if it had not been for the existence of the cell at the premises in question the committee would have thought it necessary to have constructed four cells there instead of three. The maintenance of the cell in the premises in question is necessary for police purposes, and as it may be used at any time for the detention of a prisoner, it is also necessary that one or more police constables shall live upon the premises.

The new police-station in Glendower-street contains, besides three cells, an office for the superintendent, a charge room, a day room for constables, and living quarters for a sergeant and two constables with their families. All the police books and papers are kept there, and prisoners are locked up, bailed, and remanded there. Constables, including those living at the premises in question, assemble and are dismissed there.

No police books are kept at the premises in question. A constable is not kept permanently on duty there, and charges are not taken there.

The whole of the premises in question, including the rooms occupied by the constables living there, are subject to the inspection of the Government inspector of police, but no inspection has been made since the year 1895. The premises are yearly inspected by the county surveyor.

Upon the hearing of the appeal by respondents, it was contended on their behalf that the premises in question were occupied for Crown or public purposes—that is to say, for police purposes—and were therefore exempt from payment of poor rates; and it was contended on behalf of the appellants: (1) That the whole of the premises in question were liable to be rated, as they did not form part of a building occupied as a whole or mainly for Crown or public purposes, but were in the independent occupation as residences of two police constables, although the use of the premises was taken into account in the remuneration of such constables; and (2) that the one cell was the only part of the premises which was exempt from rating.

The Court of Quarter Sessions held that the premises in question were a police-station or a lock-up, and were wholly used for police purposes, and not liable therefore to payment of poor rates, and the appeal of the respondents was allowed.

The question whether the respondents were entitled to appeal against the rate was not raised, and no evidence was given nor tendered as to what proportionate part of the rate in question was payable in respect of the cell if that part of the premises was alone exempt from the poor rates.

Morton Brown for the overseers.

Corner for the county council.

LORD ALVERSTONE, C.J.—I do not think there is any doubt about the law in this case, and really the consideration of the two recent authorities are sufficient without going back upon all the other cases which have been mentioned to us. I should state it now, as I ventured to state it in the course of the argument, that the question to deal with, or the point to be borne in mind, is the rateable subject-matter of buildings used for public purposes for police administration, whether it be a station or for other kind of police duties to which there are residences attached or part of which is used as a residence on the one side—in which case it is exempt, or is the main object and purpose of the building residences to which there are attached, or part of which is used for police purposes. I think that test is recognised in both the leading cases to which our attention has been called. My brother Darling, in summarising and putting it into language which I cannot improve upon, and which, I think, was perfectly right, said this in *Cross v. West*

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Derby Union (81 L. T. Rep. 645): The question was whether or not certain premises were rateable where they were occupied as residences forming part of a structure, the whole of which might be said to be used for public purposes—"The question, then, comes to this—whether these buildings are used as, or occupied by, a police-station as a whole. What is the fact here? These three appellants do live in these houses; and these houses are all surrounded by one wall. There is frequent communication passing between these officers and those in charge of the prisoners, and the case finds that no prisoner can be locked up, bailed, or remanded, unless one of the three appellants is present. Can it be said that the appellants' houses are not part of the police-station? It seems to me that a place is only half a police-station if it be a place where, if you bring a prisoner, you cannot lock him up. In such a case you would have a very imperfect kind of police-station, because you would have no one connected with the place or forming part of its establishment who could either lock up, bail, or remand a prisoner. The question being largely a question of fact, it seems to me that the proper conclusion of fact to arrive at is that these premises, including the police dwelling-houses, were open as a police-station as a whole, and that the whole was one thing." Now, that was a case which I entirely adopt, and it seems to me to lay down the test where you are dealing with a subject-matter of which the main and substantial part of both the building and its purposes is for police purposes, police administration, with residences there. On the other side, where you are considering residences with some portion of the building used for police purposes, Lord Esher, the late Master of the Rolls, stated it in *Showers v. Chelmsford Union* (64 L. T. Rep. 755; (1891) 1 Q. B. 339) in this way, referring to one of the very authorities cited by Mr. Corner: "Lord Coleridge there pointed out that where there is one building used for public purposes within the recognised meaning of that term, such as a prison, station house, or post office, and rooms in that building are occupied, the court will not inquire whether a room is or is not occupied so as to give a benefit to the person who occupies it, and that if such room forms an integral part of the whole which in itself is not rateable, the person who so occupies is not rateable." Now, in this case, subject to having to say one word as to its being a finding of fact, it seems to me, on the facts stated before us, that this was originally a police-station, or rather part of a prison, and originally was solely used for prison and police purposes, and it is now utilised for residence, but one of the old cells has been retained, and on emergencies that cell is used. I think it would be straining the principle to which I have referred to say that the presence of that one cell and its use from time to time for prison purposes gave exemption to the whole building, and if we are not hampered by the finding of a fact, the case seems to me to be reasonably clear. The quarter sessions held that the premises in question were a police-station and lock-up, and were wholly used for police purposes, and were not liable therefore for the payment of poor rates. I do not think it meant to say, "We found as a fact." I think they meant to say on the facts which they had stated

in a great detail, "We consider that it was a police-station and therefore exempt." In one sense it was a police-station, because policemen lived there and could be got there, and it was a station where you could get police; but in the sense to which we have been referring, it was not a police-station, and I think the magistrate meant to say, "If, on the facts before us, we could lawfully hold it was a police-station entitled to exemption, we hold the premises to be exempt." I think, therefore, we are not bound by any finding of fact by the magistrates, and we were intended to say whether, on the facts which they have found, they were justified in holding it was exempt. I think they were not. The question of being allowed to make a deduction for a particular cell does not arise here. I am clearly of opinion that there was not complete exemption.

DARLING, J.—I am of the same opinion.

CHANNELL, J.—I am of the same opinion.

Appeal allowed.

Solicitors: Doyle, Devonshire, and Woodhouse, for Williams and Sons, Monmouth; T. White and Sons for Gustard and Waddington, Usk.

Wednesday, April 30, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

BAYLEY (app.) v. PEARKS, GUNSTON, AND THE LIMITED (resps.). (a)

Food and drugs—Milk-blended butter—Margarine—Substance with more than 10 per cent. of butter fat—Margarine Act 1887 (50 & 51 Vict. c. 29)—Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 8.

Butter blended with milk so that it contains an excess of water does not become margarine. Therefore a vendor of such milk-blended butter cannot be convicted under sect. 8 of the Sale of Food and Drugs Act 1899 for selling margarine containing more than 10 per cent. of butter fat. The sale of butter blended with milk is lawful if sold as such.

CASE stated on two informations preferred by the appellant against the respondents (1) under the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6, for that the respondents did on the 17th Oct. 1901, at Aldershot, sell a certain article of food—to wit, butter—which was not of the nature, substance, and quality of the article demanded by the appellant, the purchaser thereof; that is to say, was not butter as demanded by him, but was adulterated with excess water to the extent of 7·3 per cent. to his prejudice; (2) under the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 8, for that the respondents did on the 17th Oct. 1901 at Aldershot unlawfully sell to the appellant a quantity of margarine the fat of which contained more than 10 per cent. of butter fat in contravention of the section.

By consent of both parties, who were present, the two informations were heard together, and upon such hearing the justices dismissed both.

Upon hearing of the informations the following facts were proved:—

The appellant was an inspector under the Food

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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and Drugs Acts, appointed by the Hampshire County Council, and on the 17th Oct. 1901 he went to the shop of Pearks, Gunston, and Tee Limited, in Wellington-street, Aldershot, on other business, and saw some butter which was on the counter, and he said to the assistant, "I will take a pound of that butter." The assistant said, "This is Pearks's milk-blended butter." The appellant said "Yes; I will take a pound of Pearks's milk-blended butter," and was served with a pound, and paid 11d. for it. He then stated it was purchased for analysis and divided it into three parts in the usual manner, one of which parts he sent by registered post to the public analyst for the county.

The butter was wrapped in two pieces of paper, on the outside of each of which was printed in large letters: "This is choicest butter blended with pure English full cream milk whereby the full percentage of water in the butter is increased to about 24 per cent."

The appellant admitted that he saw in the window of the shop before he entered a framed notice printed in red letters: "Pearks's milk-blended butter only sold here," and in the shop itself two printed notices were exhibited contained the following words: "Notice. Pearks's milk-blended butter. All butters sold at this establishment contain more than the usual percentage of water. These butters are re-churned with full cream English milk." He saw a printed slip on the pile of butter from which the article in question was taken, and he saw all these before the sale and purchase, and knew he was purchasing milk-blended butter.

The appellant produced the certificate received from the public analyst, which was as follows:

I, the undersigned public analyst for the county of Southampton, do hereby certify that I received, on the 18th day of October, 1901, from Inspector Bayley, by registered post, a sample of butter for analysis (which then weighed 6oz.), and have analysed the same, and declare the result of my analysis to be as follows: I am of opinion that the same is a sample of adulterated butter, and I am of opinion that the said sample contained the parts as under, and the percentages of foreign ingredient as under: Fat, 72.35 per cent.; water, 23.30 per cent.; curd, 2.55 per cent.; salt, 1.80 per cent.—100.00 per cent. Observations: This butter is adulterated with excess water to the extent of 7.3 per cent. This opinion is based upon the fact that normal butter contains not more than 16 per cent. of water, whereas this sample contains 23.3 per cent. of water. No change had taken place in the constitution of the article that would interfere with the analysis.

The public analyst for the county was called as a witness by the appellant, and identified the certificate and confirmed the result of his analysis.

He further proved that the 72.35 was butter fat, and was the only fat present. If there had been any other he should have described it as foreign fat. There was more than 10 per cent. of butter fat. There was an excess of 7.3 of water. The texture of this butter differentiates it from ordinary butter, and he was sure there had been a secondary manufacture, and in his opinion it was a compound article. It was not adulterated with any other substance than water.

On behalf of the appellant it was contended that this milk-blended butter was margarine, and must be dealt with under the Margarine Acts.

It was not the substance usually known as butter, but was compounded of certain ingredients, namely, butter properly so-called and milk unconverted into butter, and underwent a second process of manufacturing. It was made by mixing two kinds of butter together by means of adding milk or cream; it was a mixed article and made in imitation of butter, and came within the definition of margarine in sect. 3 of the Margarine Act 1887 (50 & 51 Vict. c. 29), namely, margarine shall mean all substances, whether compounds or otherwise, prepared in imitation of butter, and whether mixed with butter or not, and no such substance shall be lawfully sold except under the name of margarine and under the conditions set forth under this Act.

On behalf of the respondents it was contended that this article purchased by the appellant was butter, and was so referred to by the analyst in his certificate; that this was admitted to be two butters blended together, and could not be called an imitation of butter; that margarine was made from beef fat or some other like substance, and that if mixed with butter became margarine, but that it could not be contended that two butters mixed together became margarine or were anything else than butter; that this article came within the definition of butter in sect. 3 of the Margarine Act of 1887—namely, butter shall mean the substance usually known as butter, made exclusively from milk or cream or both, with or without salt or other preservative, and with or without the addition of colouring matter; that this article was made exclusively from milk or cream only, and no other substance whatever was mixed with it.

Upon hearing the above facts and arguments of counsel on behalf of both parties, the justices were of opinion that the article in question was not margarine as defined by sect. 3 of the Margarine Act 1887, and they thereupon dismissed the information.

Danckwerts, K. O. (Emanuel with him) for the appellant.—This prosecution is under sect. 8 of the Sale of Food and Drugs Act 1899, which enacts that: "It shall be unlawful to manufacture, sell, or expose for sale, or import any margarine the fat of which contains more than 10 per cent. of butter fat." Therefore it is not 10 per cent. of the whole mass, but the fat that it contains must not be composed of more than one-tenth of butter fat. By sect. 1 of the Act of 1899, "If there is imported into the United Kingdom any of the following articles—namely, (a) margarine or margarine cheese" or (b) "adulterated or impoverished butter (other than margarine)," except in packages marked margarine, the importer is liable. That shows that the Act contemplates things as being either margarine or butter, and that margarine may include adulterated or impoverished butter. Then by subsect. (7): "For the purposes of this section an article of food shall be deemed to be adulterated or impoverished if it has been mixed with any other substance, or if any part of it has been abstracted so as in either case to affect injuriously its quality, substance, or nature." Then in the Margarine Act 1887, s. 3, it says: "The word 'butter' shall mean the substance usually known as butter, made exclusively of milk or cream or both, with or without salt or other preservative,

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and with or without the addition of colouring matter. The word 'margarine' shall mean all substances, whether compounds or otherwise, prepared in imitation of butter, and whether mixed with butter or not, and no such substance shall be lawfully sold except under the name of margarine." In *Pearks, Gunston, and Tea Limited v. Knight* (85 L. T. Rep. 379; (1901) 2 Q. B. 825) Wills, J., in reference to this same article, said: "In each of these cases the purchaser asked for butter, and the appellants sold him an article which had been butter, but was not butter when sold." As this substance is not butter, it is something which is prepared in imitation of butter, and so must be margarine. [O'HANNELL, J.—It seems that this margarine definition is only to be applied in interpreting the Margarine Act.] There is no definition of margarine in the Act of 1899, and margarine was a well-known substance when that Act was passed, which was supplemental to the other Acts.

Asquith, K.C. (Macmorran, K.C., Ricardo, and W. Frampton with him) for the respondents.—The argument of the other side practically is this, that the substance cannot be sold as butter because it is margarine, and it cannot be sold as margarine because it is butter. But in order to prevent the sale of this substance at all, which is, of course, the inference from that argument, very clear language is required. That is not to be found, but the sections when looked at are to the exact contrary. He referred to

Margarine Act 1887 (50 & 51 Vict. c. 29);

Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51).

Danckwerts, K.C. in reply.

Lord ALVERSTONE, C.J.—Speaking for myself, I think that to accede to the argument of the appellants in this case would be to reduce this Act to a practical absurdity, and I consider that this of all Acts should be construed in accordance with its language, giving the natural meaning to the words, and not putting false, idle and absurd constructions upon the words unless, as Mr. Danckwerts very properly put it, the language compels us to do so. The information was for selling margarine, the fat of which contained more than 10 per cent. of butter fat, and the magistrates dealt with it in this way: "We were of opinion that the article in question was not margarine as defined by sect. 3 of the Margarine Act 1887." Now, the force of Mr. Danckwerts' argument rests upon the fact that in the year 1899 you had to construe what the Legislature meant in sect. 8 when it used the word "margarine." There was in the Statute-book a definition that the word margarine shall consist of substances whether compounds or otherwise. You will observe there was in the same section a definition of butter. I need not read it, because it has been referred to more than once, but it is the substance originally known as butter made exclusively from the use of milk or cream or both. Now, the Act of 1899, as Mr. Danckwerts has pointed out, by sect. 25 said that the expressions in that Act are to have the same meaning as in the Sale of Food and Drugs Acts, which include the Margarine Act of 1887. In that state of things Mr. Danckwerts says margarine must include this substance because you are obliged to apply it to the word margarine from the Act of

1887, and inasmuch as this was prepared in imitation of butter, it must be, and could only be, sold under the name of margarine. Therefore, if it is margarine, and could only be sold as margarine, it cannot have more than 10 per cent. of butter fat in it. To my mind the first and important answer to that is this, When you look at the Act of 1899 you go no further. It is quite plain that the Act did contemplate things which within the reserved—if I may use the expression—argument of Mr. Danckwerts ought to be called margarine, and yet under different names, because you have only to go back to sect. 1 and there you find that adulterated or impoverished butter other than margarine, or adulterated or impoverished with milk and cream, is referred to as one of the articles which cannot be imported into this country except it is in a case which would have indicated on it its value. As I have ventured to point out, if the argument is right that having imported impoverished or adulterated butter—impoverished butter may be perhaps the better illustration for illustrating what I mean—and you then proceed to sell that, you are forced to sell it as margarine, and if it contains more than 10 per cent. of butter fat, you cannot sell it. That is the logical consequence, in my opinion, of adopting the argument imposed upon us by Mr. Danckwerts. Now, the facts, of course, in this case are perfectly well known. It is butter mixed with milk. It is not entitled to be sold as butter, not because of anything in this Act as Mr. Danckwerts has perfectly and properly pointed out, but because of sect. 6 of the Act of 1876. It may be sold under this Act, as we have decided in many cases, if a further protective notice is given under sect. 8. Now, Mr. Danckwerts is attempting to say it cannot be sold at all because it contains more than 10 per cent. of butter fat, and as it cannot be described under any other name than margarine, you must say that this stuff has been made margarine by virtue of the Act of Parliament, and, containing more than 10 per cent. of butter fat, cannot be sold. In my opinion this article which was being sold was butter and milk, and there is nothing in the Act of 1899—even if you incorporate the definition for the purpose of construing this Act for certain sections, as you are bound to do—which forces me to say that butter and milk mixed together must be sold under the name of margarine, or must contain, which is the important point for this purpose, less than 10 per cent. of butter fat. If the Legislature is going to say, You are not to sell butter mixed with milk if it contains more than 10 per cent. of butter fat, then of course it can say so, and we shall have to apply the law; but it seems to me to be straining the Act of Parliament, by putting it to an entirely different purpose from the excellent purpose it was intended to serve, to say you are to read into this section, for the purpose of finding out what the stuff is, a definition which precludes you from selling certain imitations of butter except under a certain name. I think the magistrates came to a perfectly right conclusion that this was not margarine, but that this was butter and milk, and therefore no offence had been committed under sect. 8 of the Act of 1899.

DARLING, J.—It appears to me that the contention of Mr. Danckwerts is this: This stuff is properly called margarine, and must not be sold

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as anything else. That is the effect of the statute of 1887. Then this is too like butter in composition, and therefore must not be sold as margarine. That is the effect of the statute of 1897. Therefore the stuff must be called margarine and then not sold at all. Now, it seems to me to arrive at such a conclusion as that one would have to be absolutely forced and bound by the words of the Act of Parliament before one could lay down any such thing. The reason why I do not think we do lay it down is this, that I think the definition of margarine was based on quite another intention, the Legislature having something more in view than what it had in view when it was passing the Act of 1899. My view is that the Legislature did not mean to label as margarine a thing which is butter blended with milk—butter which may not be sold as butter simply, but which it has been decided may be sold as milk-blended butter. I think if that is the result the defendants succeed. You may not sell margarine as anything but margarine. Therefore it has to my mind already been decided that you may sell this stuff as long as you call it milk-blended butter, but you are not bound to call it anything else. It really is not margarine, and need not be called margarine.

CHANNELL, J.—I agree. The puzzle which I admit exists arises solely from the way in which margarine is defined in the Act of 1887, and looking at it in the first instance it does seem to bear out Mr. Danckwerts' argument, but when you look at the whole Act, especially considering what the result is under the section, you certainly see this. The Act of 1899, s. 1 (b), clearly imports, as Mr. Danckwerts says, that adulterated or impoverished butter may be margarine, but it also quite as clearly imports that a substance might be existing which might be called adulterated or impoverished butter, but yet may not be margarine. I fail to see what that substance is if this one is not it, and it is not impossible to me, therefore, to show that there is such a thing. Then that is carried out by holding that this substance comes within the term butter in sect. 3 of the Act of 1887, rather than within the term margarine. I see no difficulty about that. This substance is not ordinary butter. Therefore if a purchaser comes and asks for ordinary butter and gets this with no explanation, he does not get the thing demanded, and it is sold to his prejudice. What he does get is something which he ought not to have—namely, impoverished butter. Then I think it can come, and it is necessary to hold that it does come, within the definition of "butter" under sect. 3 of the Act of 1887, although not ordinary butter. It is butter, and therefore not margarine. In addition to which I am prepared, if necessary, to hold it was not prepared in imitation of butter.

Appeal dismissed.

Solicitors: *Robbins, Billing, and Co. for Barber, Winchester; Neve, Beck, and Kirby.*

Wednesday, April 30, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

IRVING (app.) v. CALLOW PARK DAIRY COMPANY LIMITED (resps.).

BACON (app.) v. THE SAME (resps.). (a).

Food and drugs—Adulteration—Warranty—Contract by letters—Label—Verbal contract—Notice—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 25—Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 20.

The C. P. D. Company Limited by a contract in writing agreed to buy pure new milk with all its cream, each churn to bear a written warranty. To each churn was attached a label: "Warranted pure new milk with all its cream delivered under contract."

The company also verbally agreed to buy milk, and that a written warranty should be given with each consignment in the form of a label.

To a churn delivered under that agreement was attached a label: "Warranted pure new milk with all its cream."

Prosecutions having been instituted against the company under sect. 6 of the Sale of Food and Drugs Act 1875, notice was given on their behalf under sect. 20 (1) of the Sale of Food and Drugs Act 1899, and copies of the labels were inclosed.

It was found by the magistrate that all the requirements of sect. 25 of the Sale of Food and Drugs Act 1875 had been complied with, and he discharged the company from the prosecutions for selling milk not of the nature, substance, and quality demanded by the purchaser, such milk being delivered in pursuance of these contracts. Held, that the magistrate was right.

Semble, that a contract to give a written warranty need not be in writing.

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CASE stated on a complaint charging the respondents with selling milk not of the nature, substance, and quality demanded by the purchaser, the same having had 40 per cent. of its fat abstracted.

Upon the hearing of the complaint the matters charged therein were proved and were not denied by the respondents, but the respondents relied for their defence upon the facts hereinafter stated to have been proved by them, and contended that the proof of these facts entitled them to be discharged from the prosecution by virtue of the provisions of sect. 25 of the Sale of Food and Drugs Act 1875 and sub-sect. (1) of sect. 20 of the Sale of Food and Drugs Act 1899.

By the Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 25, it is enacted:

If the defendant under any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor

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unless he shall have given due notice to him that he will rely on the above defence.

By the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51), s. 20 (1), it is enacted

A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has within seven days after service of the summons sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his intention to such person.

The respondents proved that the milk referred to in the complaint was purchased by them from one F. C. Wilson, of Dals Farm, Ashby-de-la-Zouch, as the same in nature, substance, and quality as that demanded of them by the appellant, and under a written contract made between F. C. Wilson of the one part and the respondents acting by the liquidators and receivers and managers of the business of the respondents of the other part by correspondence.

Such correspondence was put in by the respondents after the appellant had objected that the label hereinafter mentioned did not constitute a sufficient warranty, and he therefore objected to the reception in evidence of such correspondence.

The respondents further proved that the milk in question was delivered by F. C. Wilson to the respondents, in pursuance of the contract, at St. Pancras early in the morning of the 2nd June, in a churn to which was tied a label bearing the following words:

To the Callow Park Dairy Company Limited.—Ashby-de-la-Zouch, M.R. June 1, 1901.—Evening train. Three churns.—Warranted pure new milk with all its cream delivered under contract.—Signed F. C. WILSON.

The respondents further proved that they had no reason to believe at the time when they sold the milk in question that it was otherwise than the same in nature, substance, and quality as that demanded of them by the appellant, and that they sold it in the same state as when they purchased it.

They further proved that they gave notice to the appellant of their intention to rely upon the defence as required by sect. 25 of the Food and Drugs Act 1875, such notice being that set forth below.

They also proved that within seven days after service of the summons they, by their solicitors, Messrs. Francis Miller and Steele, sent to the appellant a copy of the label (but no copy of the correspondence), with a written notice in the following words, and that they also sent a like notice of their intention to F. C. Wilson:

On behalf of the said Callow Park Dairy Company Limited, whom you have summoned to Clerkenwell Police-court under the Sale of Food and Drugs Acts 1875 to 1899 for the 17th day of July, we hereby give you notice that the company intends to rely for its defence on the warranty, a copy of which we give you on the other side hereof. The milk was purchased of Mr. F. C. Wilson, of Dals Farm, Ashby-de-la-Zouch.

A copy of the label was then set out.

The appellant contended by his solicitor: (1) That the label did not by itself constitute a written warranty within the meaning of the

Acts of 1876 and 1899. (2) That, as no copy and no evidence of the correspondence had been sent to the appellant by the respondents before the hearing of the complaint, the respondents were not entitled to put the correspondence in evidence, or to refer to or rely upon it in any way for the purposes of the defence. (3) That the label did not when taken in conjunction with or as supplemented or explained by the correspondence nor did the label and the correspondence together constitute such a warranty as aforesaid.

The magistrate was of opinion: (1) That the label by itself constituted a sufficient warranty under the Acts; (2) that if it did not by itself constitute such a warranty, then the label and correspondence taken together, or the label as supplemented or explained by the correspondence, constituted such a warranty; and (3) the letter set forth above was a sufficient compliance with sect. 20 of the Act of 1899, and entitled the respondents to rely on the correspondence as forming part of the warranty in question.

For the reasons above mentioned he was of opinion that the respondents were entitled to be discharged from the prosecution, and he therefore dismissed the complaint and the summons.

The question upon which the opinion of the court was desired was whether under the circumstances above mentioned he was right in dismissing the complaint and summons.

The correspondence was as follows:

Dals Farm, Ashby Z., Mar. 14, 1901.—Gentlemen,—I see in the papers you are open to buy milk. I would contract you not more than three churns summer and not less than two winter well cooled. Price 1s. 2d. summer six months, 1s. 7d. winter. Delivered St. Pancras. You to find ten churns. An early reply will oblige.—Yours truly, F. C. WILSON.

79 and 81, Copenhagen-street, King's Cross, March 18, 1901.—Dear Sir,—Yours to hand. We shall be pleased to do business with you if we can come to terms. We will offer you the following prices for your pure new milk with all its cream, properly cooled, delivered to London, carriage paid, in your own churns, each consignment to bear a written warranty, March 25th to April 30th, 1s. 2d.; May and June, 1s. 1d.; July and August and September, 1s. 2d. Payments weekly. If you will give us an order for churns we will lend you a few.—Yours truly (signed for the receivers and managers), D. SIBBALD.

Dals Farm, Ashby Z., March 19, 1901.—Gentlemen,—I will sell you my milk if you will find ten churns and give 1s. 2d. for all summer months, but I cannot unless you do.—Yours truly, F. C. WILSON.

79 and 81, Copenhagen-street, King's Cross, March 20, 1901.—Dear Sir,—If we are to find any churns you ought to take 1s. 1d. for May and June.—Yours truly (signed for the receivers and managers), JAMES SMITH.

Telegram.—March 22, 1901.—Ashby-de-la-Zouch.—To Everyday, London.—I will take your price if you will find ten churns. Reply immediately.—WILSON, Ashby.

79 and 81, Copenhagen-street, King's Cross, March 22, 1901.—Dear Sirs,—Your wire to hand accepting our price providing we find ten churns. This we replied to saying we would do so. Let us know your station, and we will at once send on the other empties. Commence sending your milk to us at St. Pancras as soon as you like. Send your account in regularly every week made up to and inclusive of Saturday morning, and cheque will be sent the following Wednesday.—Yours truly (signed for the receivers and managers), JAMES SMITH.

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BACON v. CALLOW PARK DAIRY COMPANY LIMITED.

Case stated on a complaint charging the respondents with selling milk not of the nature, substance, and quality demanded by the purchaser, the same containing 8 per cent. of added water—that is, water in addition to that normally present.

Upon the hearing of the complaint the matters charged were proved and not denied by the respondents, but they relied upon the facts proved, and contended that they were entitled to be discharged from the prosecution by virtue of sect. 25 of the Act of 1875 and sect. 20 (1) of the Act of 1899.

The respondents proved that the milk referred to in the complaint was purchased by them from T. Varnam, of Stretton-in-the-Fields, Ashby-de-la-Zouch, as the same in nature, substance, and quality as that demanded of them by the appellant, and under a verbal contract made in Sept. 1901 between the same T. Varnam of the one part and the respondents, acting by their managing director, of the other part, which contract provided that milk should be supplied by T. Varnam to the respondents in daily consignments over a period including the 13th Oct., and that a written warranty should be given by T. Varnam with each consignment in the form which had been usual in previous transactions between the same parties, which form was a label such as hereinafter described.

The contract was proved by the evidence of the managing director alone.

The respondents further proved that the milk in question was delivered by T. Varnam to the respondents, in pursuance of the contract, early in the morning of the 13th Oct., in a churn to which was tied a label bearing the following words and signed by T. Varnam:

One churn No. 35.—Containing eight gallons.—Warranted pure new milk with all its cream.—Dated Oct. 12.—Signed T. VARNAM.—To the Callow Park Dairy Company Limited.

The respondents further proved that they had no reason to believe at the time when they sold the milk in question that it was otherwise than the same in nature, substance, and quality as that demanded of them by the appellant, and that they sold it in the same state as when they purchased it.

They further proved that they gave notice to the appellant of their intention to rely upon the defence as required by sect. 25 of the Food and Drugs Act 1875, such notice being as set out below.

They also proved that within seven days after service of the summons they by their solicitors, Messrs. Francis Miller and Steele, sent to the appellant a copy of the label with a written notice to the following effect, and that they also sent a like notice of their intention to T. Varnam:

We are instructed by the Callow Park Dairy Company Limited, whom you have summoned to the Clerkenwell Police-court for the 20th instant, under the Sale of Food and Drugs Act, to give you notice that the company intends to rely for its defence upon the warranty which accompanied the milk, of which we send you a copy on the other side. The milk was purchased of T. Varnam, whose address is Stretton-in-the-Fields, Ashby-de-la-

Zouch. We are sending him by this post notice under sect. 20 of the Food and Drugs Act.

A copy of the warranty was set out.

The respondents admitted that no notice had before the hearing of the complaint been given by them to the appellant of the making of the verbal contract or of the terms thereof.

The appellant contended by his solicitor: (1) That the label did not by itself constitute a written warranty within the meaning of the Acts of 1875 and 1899. (2) That as the contract was not in writing, and as no notice had before the hearing of the complaint been given to the appellant by the respondents of the making of the verbal contract or of the terms thereof, the respondents were not entitled to give evidence or to refer to or rely upon the contract in any way for the purposes of the defence. (3) That the label, when taken in conjunction with or as supplemented or explained by the contract (the contract not being in writing), did not nor did the label and the contract together constitute such a warranty as aforesaid.

The magistrate was of opinion that the proof of the facts hereinbefore stated was sufficient in law to entitle the respondents to be discharged from the prosecution, and he therefore dismissed the complaint and the summons.

The question upon which the opinion of the court was desired was whether under the circumstances above mentioned he was right in dismissing the complaint and summons.

Bonsey for both appellants.

Avory, K.C. (J. B. V. Marchant and F. N. Keen with him) for the respondents.

LORD ALVERSTONE, C.J.—These two cases illustrate the importance of looking at the substance of the enactments and applying them unless there is any special limitation. In *Irving's* case there was an offer, which was accepted, to take pure new milk with a written warranty with each consignment, and it cannot be seriously contended that there was not a sale of the milk with a warranty, for each churn had on it "warranted pure new milk with all its cream delivered under contract." I am clearly of opinion that the respondents come within sect. 25 of the Act of 1875 as having purchased the article as the same in nature, &c., as that demanded, and it cannot be argued that this was not a written warranty. Mr. Bonsey then relied on sect. 20 of the Act of 1899. Apart from any technical construction, what was intended by that section was that the prosecutor should know the terms of the warranty under which the defendant had bought, together with the name and address of the person from whom he had bought. "A copy of such warranty" in the latter section refers back to sect. 25 of the Act of 1875, and means a copy of that which entitles the defendant to believe that the article was the same in nature, substance, and quality as that demanded by the prosecutor. Therefore *prima facie* that means a copy of the terms of the warranty on which the defendant bought, in order that the prosecution may know what the defence is going to be. That is shown by the latter part of the section, which shows that the substance of the matter is to be told. A copy of the correspondence would not be half as useful as a copy of the terms of the warranty. The broad view of the statute is that it is neces-

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easy to prove that there was a purchase by the defendant under a warranty which justifies the resale. The word "invoice" in sect. 20 of the Act of 1899 refers to the Margarine Act 1887. There may be cases in which the invoice contains and includes the warranty, and cases in which it does not. I have based my judgment on a broad view of the Act. One has to look at each case, and to find the warranty existing in fact and a notice of that warranty. In *Bacon's* case there was a verbal contract for the sale of milk, and that a written warranty should be given with each consignment, and a subsequent delivery of the milk in churns on each of which there was written, "Warranted pure new milk with all its cream." Why should it be suggested that the contract to give a warranty must be in writing? That there must be a written warranty is plain. All the section requires is that it must be proved that the milk was purchased as that demanded, and that there should be a written warranty to that effect. But in the case of an article that can only be produced day by day, common sense and the words of the section point to the state of things that we have here—namely, an agreement to put a written warranty on every churn. It is said that *Iorns v. Van Tromp* (72 L. T. Rep. 499) is inconsistent with that, but in that case the judges came to the conclusion that one was not entitled to connect together the previous transaction, which was supposed to be a contract, with the description under which the person sold the goods. It is the same with *Laidlaw v. Wilson* (1894) 1 Q. B. 74 and other cases. The judges, dealing with the facts of each particular case, had only applied the principles which I have been suggesting to be right principles. Having regard to more recent cases, I doubt whether *Harris v. May* (12 Q. B. Div. 97) can be regarded as law. If it was meant to lay down any general principle, it has certainly been qualified by later cases. I have come to the conclusion that in both cases here the purchaser had purchased the milk in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and had in each case had a written warranty to the same effect. I think that both appeals should be dismissed.

DARLING, J.—I am of the same opinion. The contract was one in which the vendor agreed to sell so much pure new milk at a certain price, and that he would with each can warrant it pure. Thus the label becomes the warranty. That is in accord with *Iorns v. Van Tromp* (72 L. T. Rep. 499). There it was said the warranty must be some express individual representation from the buyer to the seller forming part of the contract, and that warranty has been given here.

CHANNELL, J.—I agree. Apart from any previous cases, I cannot see why the label should not be a written warranty. Some cases looked as though it (the label) could not be so, but they are not really to that effect. All they said was that in some cases an invoice or label might not be a defence under sect. 25 of the Sale of Food and Drugs Act 1875. But that was because two things were required. The label might be a warranty, but the defendant would not be able to prove that he purchased the article under that warranty as pure. In effect it is said that the label may be a warranty, but it does not show

the defendant purchased the article as pure, because the label was a manufacturer's label.

Appeals dismissed.

Solicitors: *A. M. Bramall; Francis Miller and Steele.*

Thursday, May 1, 1902.

(Before Lord ALVERSTONE, O.J., DARLING and CHANNELL, JJ.)

MAYOR, ALDERMEN, AND COUNCILLORS OF THE CITY OF WESTMINSTER (apps.) v. ARMY AND NAVY AUXILIARY CO-OPERATIVE SUPPLY LIMITED (resps.). (a)

Rating—Metropolis—Distress warrant—Increase of assessment in valuation list—Omission to give notice of alteration in assessment—Application for distress warrant—Right to raise objection of omission to give notice—Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), ss. 9, 45.

Upon an application to a magistrate against the respondents for the issue of a distress warrant for a rate made upon them as the occupiers of premises in the metropolis, it appeared that the respondents were assessed at a larger amount in the quinquennial valuation list made in 1900, upon which the rate was based, than they had been assessed under the preceding valuation list made in 1895, but that no notice of the increase in their assessment had been given by the overseers to the respondents, as required by sect. 9 of the Valuation (Metropolis) Act 1869, and, in objection to such application, the respondents contended that, as no notice in the alteration of their assessment was given to them under sect. 9, the valuation list made in 1900 was not, as against them, the valuation list "for the time being in force" within the meaning of sect. 45 of the Act, and that they were only liable to pay the amount of the rate as based on the preceding valuation list of 1895, which they had paid.

Held, that the objection that no notice had been given under sect. 9 of the alteration in the assessment could not be raised on the application for a distress warrant, but that such objection could only be raised by way of appeal against the valuation list, or against the rate.

CASE stated by the metropolitan police magistrate sitting at Westminster Police Court.

A complaint was made by the mayor, aldermen, and councillors of the city of Westminster (the appellants) that the Army and Navy Auxiliary Co-operative Supply Limited (the respondents), being duly rated and assessed in the parish of St. Margaret and St. John, in the city of Westminster, had not paid the sum of 8*l.* 7*s.* 9*d.*, which had been demanded of them.

The magistrate, after hearing the parties and the evidence adduced by them, refused to issue a distress warrant, and dismissed the summons, subject to this case.

The respondents were at all times material to this case the occupiers of certain premises in Caxton-street, in the parish of St. Margaret, in the city of Westminster.

On the 12th April 1901 a general rate was made and published by the appellants acting as the

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overseers of the parish under and by virtue of the London Government Act 1899.

In this rate the respondents were assessed in respect of the premises at the sum of 33*l.* 2*s.* 9*d.*, being at the rate of 2*s.* 9*d.* in the pound upon a rateable value of 24*l.*, which was the rateable value of the premises as stated in the quinquennial valuation list for the parish made in the year 1900 under the Valuation (Metropolis) Act 1869.

This sum of 33*l.* 2*s.* 9*d.* was demanded of the respondents, and they paid to the appellants the sum of 24*l.* 15*s.*, the amount due on the assessment entered in the quinquennial valuation list for the parish made in 1895, leaving a balance of 8*l.* 7*s.* 9*d.* unpaid, which the respondents contended they were not liable to pay for the reasons hereinafter appearing.

The appellants took out a summons to recover the above sum of 8*l.* 7*s.* 9*d.*, and upon the hearing of the summons the rate was produced, and it was proved or admitted that this sum of 8*l.* 7*s.* 9*d.* had been demanded, and that the respondents were in occupation of the premises in the parish.

The respondents proved that no notice of an alteration in value in accordance with sect. 9 of the Valuation (Metropolis) Act 1869 had been served on them by the appellants, and it was admitted by the appellants' witness, who was called in support of the summons, that no such notice as aforesaid of an increased assessment had been given to the respondents pursuant to that section, and that the respondents had no notice of the raising of the gross and rateable values of the premises until the 12th April 1901.

The respondents contended that they were not liable to pay the balance of 8*l.* 7*s.* 9*d.*, upon the ground that the rate was based upon the rateable value of the premises stated in the quinquennial valuation list made in 1900—namely, 24*l.*, being an increase of 6*l.* over the rateable value stated in the valuation list made in 1895—namely, 18*l.*; and the respondents contended that the entry in the quinquennial valuation list made in 1900 relating to the premises was not binding upon them, because no notice, as it was admitted, of the increase in the rateable value of the premises had been given to them by the overseers of the parish as required by sect. 9 (1) of the Valuation (Metropolis) Act 1869, and therefore the quinquennial valuation list of 1900 was not the list for the time being in force, nor was it duly made in accordance with the Act, and therefore that they, the respondents, were not liable to pay so much of the rate as was charged upon the increase in the rateable value as shown by the quinquennial valuation list made in 1900, over the rateable value appearing in the valuation list made in 1895, and that as they had paid so much of the rate—namely, the sum of 24*l.* 15*s.*—as was charged upon the rateable value stated in the valuation list made in 1895, they were not liable to pay the further sum of 8*l.* 7*s.* 9*d.*, which was charged upon the increase in the rateable value of the premises as shown by the quinquennial valuation list made in 1900. The respondents cited in support of these contentions the case of *Reg. v. Justices of Middlesex* (26 L. T. Rep. 902; L. Rep. 7 Q. B. 653).

The appellants contended that they were entitled to a distress warrant to recover the above

sum of 8*l.* 7*s.* 9*d.*, on the following grounds—namely: (1) That as the respondents had not appealed against the rate or the valuation list on which it was based, they were not entitled on the hearing of the summons to dispute the validity of the valuation list, and that the rate being good on the face of it and the respondents being admittedly in occupation of the premises for which they were rated, the duty of the magistrate was merely ministerial, and that the appellants were not bound to show that the notice required by sect. 9 (1) of the Valuation (Metropolis) Act 1869 had been duly given; and (2) that even if no such notice as is directed by the section had been given, the valuation list was not thereby rendered invalid.

The magistrate decided that the appellants' contentions upon both grounds were wrong, and that he ought not to issue a distress warrant to recover the sum of 8*l.* 7*s.* 9*d.*

The question for the opinion of the court was whether the magistrate was right in so deciding.

The Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67) provides:

Sect. 9. In each of the following cases—namely: (1) Where the overseers of the parish insert in the valuation list some hereditament not previously assessed, or raise the gross or rateable value of some hereditament above the value stated in the valuation list for the time being in force or (where there is no valuation list) in the then last assessment to the poor rate; or (2) where the assessment committee (otherwise than in determining an objection) alter a valuation list by inserting therein some hereditament, or by raising the gross or rateable value of some hereditament comprised therein, the overseers shall immediately after the deposit or re-deposit of the list (as the case may be) serve on the occupier of such hereditament a notice of the gross and rateable value thereof inserted in the valuation list.

Sect. 43. The valuation list as approved by the assessment committee, and, if altered on any appeal under this Act to any sessions or a superior court, as so altered, shall come into force at the beginning of the year (commencing on the sixth of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned.

Sect. 44. Notwithstanding any appeal under this Act which may be pending at the commencement of the year, the valuation list shall come into force unaltered, and every assessment, contribution, rate, and tax in respect of which the valuation list is conclusive shall be made, required, levied, and paid in accordance with such valuation list, &c.

Sect. 45. The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein, and of the fact that all hereditaments required to be inserted therein have been so inserted, &c.

Marshall, K.C. (W. C. Byde with him) for the appellants.—The question is whether the omission to give the notice required by sect. 9, sub-sect. 1, of the Valuation (Metropolis) Act 1869 invalidates the rate made in 1901, and based upon the valuation list made in 1900. The magistrate was wrong in holding that he ought not to issue the distress warrant. He had no jurisdiction to refuse to issue a distress warrant, and his duty was merely ministerial. The notice as to the increase in the valuation not having been given

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as required by sect. 9, the remedy of the respondents was by appeal, and, not having appealed, they were too late to take the objection upon the application for the distress warrant. If it can be shown that the authorities in making the rate acted in excess of their jurisdiction, then the objection may be taken before the justices on the application for a distress warrant; but if they have acted within their jurisdiction, however erroneously, then the objection cannot be so taken. The cases show that the only three grounds of objection which can be entertained by a magistrate upon an application for a distress warrant are (1) that the property rated is not in the parish; (2) that the party rated is not the occupier—that is, non-occupation; and (3) that the rate is, on the face of it, bad: (see the judgment of Wills, J. in *Bates v. Plumstead Overseers* (72 L. T. Rep. at pp. 394-5; 64 L. J. at p. 129, M. C.). Sect. 6 provides for the making of a valuation list, and sect. 9 for notice to the occupier of increase of value. Sects. 18 and 19 deal with appeals against the valuation list, and sect. 42 with the times within which certain things are to be done. Sect. 43 defines the duration of the list, and sect. 45 provides that the valuation list for the time being in force shall be deemed to have been duly made, and shall be conclusive evidence of the values. The provisions in sect. 42 as to times have been held to be directory only and not imperative:

Reg. v. Ingall, 35 L. T. Rep. 552; 2 Q. B. Div. 199;
Reg. v. Justices of London, 69 L. T. Rep. 682;
 (1893) 2 Q. B. 476.

So also are the provisions in sect. 9 as to giving notice. But even if this notice ought to have been given, the objection could not be taken before the magistrate; but the respondents ought to have taken it by way of appeal. They could also have appealed against the rate under sect. 4 of 17 Geo. 2, c. 38. The list having been approved by the assessment committee, by sect. 45 it must be deemed to have been duly made, and the other provisions are directory; but if the respondents were aggrieved they ought to have appealed against the valuation list under sect. 32, or have come to this court for a *mandamus*:

Bates v. Plumstead Overseers, 72 L. T. Rep. 393;
 64 L. J. 127, M. C.;
Churchwardens of Birmingham v. Shaw, 10 Q. B. 868, at p. 879;
Bavin v. Hutchinson, 6 L. T. Rep. 504; 31 L. J. 229, M. C.;
Reg. v. Justices of Middlesex, 26 L. T. Rep. 902;
 1 Rep. 7 Q. B. 653.

Bray, K.C. (E. Hilliard with him) for the respondents.—The respondents could have appealed against the valuation list if they had known of the alteration, but that is not conclusive against them. The question is, is this valuation list the valuation list which is in force against the respondents, because if it is the list in force against the respondents, they have no remedy, as they are met immediately by sect. 45, which says that it is to be deemed to be duly made and to be conclusive. The valuation list when, approved by the assessment committee comes into force, by sect. 43, at the beginning of the year (the 6th April) succeeding that in which it is made. Dealing with the matter in the first instance as if it were an appeal to quarter sessions instead of an application for a distress war-

rant, the respondents put the case in this way: Is the valuation list to be conclusive as soon as it is approved by the assessment committee, or may a ratepayer go behind it and say that he has received no notice of an alteration in his assessment? If it were conclusive without liberty to go behind it, there would be the grossest injustice to ratepayers. No doubt the object of these sections is to have a valuation list which shall be conclusive, but it is an element in that, and it is the essence of the whole proceeding, that a party should have notice (see sects. 9 to 13). The respondents had no notice of the alteration in their assessment until the 13th April, and it was then too late to go before the assessment committee, as the list had come into force on the 6th April. There was no proceeding under which they could have gone before the assessment committee after the committee had approved of the list. If the valuation list were in force against the respondents, they would have no appeal, but it is submitted that the valuation list, which in sect. 45 is made conclusive, means the valuation list which has been made with the due formalities (see the judgment of Bowen, L.J. in *Reg. v. Justices of London* (1893) 2 Q. B. at p. 491). Then, secondly, treating this as an application for a distress warrant, the valuation list, not having been made with all the necessary formalities, is not within sect. 45 "the valuation list for the time being in force" as against the respondents, and the overseers had no right or jurisdiction to make the rate in accordance with it, because under sect. 44, which is of universal application, they are bound to make the rate "in accordance with such valuation list"—that is, with the one for the time being in force. The true test is whether the overseers had jurisdiction to make the rate, and that comes back to the question whether this was a right or wrong valuation list. It is submitted that it was a wrong valuation list by reason of the formalities not having been complied with; that consequently the overseers had no jurisdiction to make the rate, and the objection that they had no jurisdiction can be taken on this summons.

Ryde in reply.—If the respondents' contention as to the meaning of sect. 45 is correct, it would follow that every new hereditament and every one which has been increased in value would escape being rated altogether for five years if there were any informality in the notices, as there could be no valuation list "in force" for that time, so far as these hereditaments were concerned. That result could not have been intended. Taking these notices together, the Legislature clearly intended in sect. 45 to make a defect in the service of the notice not fatal to the validity of the valuation list. This is made clear by sects. 65 and 66, which deal with the service and publication of individual notices. Sect. 65 provides that the service of any notice under the Act may be by post by a prepaid letter, and proof of the posting of the letter is sufficient. If the letter containing the notice were posted and lost, the service would be sufficient (sect. 65), but the hardship would be just the same as in the case where no notice at all were sent, as in this case. Sects. 43, 44, and 45 ought to be read together. The "list in force" appears for the first time in sect. 43; then it is used in sect. 44, which merely relates to pending

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appeals, and sect. 45 provides that the list "for the time being in force shall be deemed to have been duly made." The object of that was to cure all preliminary defects in the making of the list. The respondents could have appealed against any such defects in the valuation list under sects. 11 and 32, and, if they did not get notice of the alteration in time to appeal to the assessment committee, they could have come to this court for a *mandamus* to the assessment committee to hear the objection, in which case it would have been no answer to say that the applicant was out of time, as he himself would not be in fault:

Reg. v. Mayor of Rochester, 30 L. T. Rep. O. S. 73; 7 E. & B. 910.

The respondents might also have appealed against the rate under 17 Geo. 2, c. 38, s. 4. The right of appeal given there is general, and it exists in London unless it has been taken away by some statute, and sect. 45 does not take it away. The respondents are in this dilemma: If they are right on the merits, they can appeal to quarter sessions; if they are wrong, then *cadit quæstio*. The true way of putting the question is this: If the overseers have any jurisdiction—as they clearly had in this case—the respondents' only remedy is by appeal; if they have no jurisdiction at all, then the objection may be taken upon this application. He referred to

Churchwardens of Birmingham v. Shaw (ubi sup.);
Bates v. Plumstead Overseers (ubi sup.);
Poor Rate Assessment and Collection Act 1869
(32 & 33 Vict. c. 41), ss. 17, 18.

May 1.—Lord ALVERSTONE, C.J.—This is one of those troublesome cases which not infrequently arise under this class of Act of Parliament, where the difficulty is to trace out what is the effect of a particular omission of some apparent condition precedent. In the view I take in this case it is not necessary for us to decide any more than it was for Blackburn and Lush, J.J. to decide in the case of *Reg. v. Justices of Middlesex (ubi sup.)*, what is the actual effect of the omission to serve the notice under sect. 9. Personally I incline to the view that, for the purpose of making a rate, the omission is cured by sect. 45, because, if that were not so, nobody could safely make a rate without first ascertaining that all the notices had been given. But I think that the decision of this case really depends on other considerations. It is argued for the respondents that because no notice was given under sect. 9, the valuation list for the time being in force cannot be deemed to have been duly made. The result of that, I think, would be that it would give very little effect to sect. 45. Sect. 45 could scarcely mean that a valuation list, as to which all conditions have been fulfilled, shall be deemed to be in force. I think it probably has reference to the earlier section, sect. 43. That would not be conclusive against the respondents, because they would be entitled to say that, though it might save some conditions, it did not save this particular one, which was the omission of the personal notice under sect. 9. What may be the actual effect of the omission to give notice under sect. 9, if the point be raised upon an appeal where it is contended that the valuation list is to be conclusive and binding, is, to my mind, a difficult point. I have only expressed my opinion as far as I have formed it,

because, having heard arguments on the matter, I do not in any way want to avoid stating what my view is. But it seems to me that the respondents are in this difficulty. This application to the magistrate was for the issue of a distress warrant. If the overseers—the persons who made the rate—were justified in acting upon the valuation list, and making a rate, then the respondents must show that the point they raise is a point that they are entitled to raise in objection to the distress warrant being issued. Now, I think, for the reasons which have been very well put by Mr. Ryde in his reply, that a person is not entitled to raise in answer to the application for a distress warrant all points which he could possibly have raised upon appeal. I quite agree that there are points which he can raise on both proceedings, as, for instance, non-occupation, or certain other matters which might be raised; but I do not think that, because a matter may be raised on appeal, therefore it can be raised in answer to an application to issue a distress warrant. To a certain extent that principle was recognised in the case of *Churchwardens of Birmingham v. Shaw (ubi sup.)*, in which it was held "that a person exempt from poor rate, as the occupier of premises belonging to a scientific or literary society, must, if assessed for such premises, contest the liability by appeal, and cannot bring an action for a levy made to enforce such rate, not appealed against." I think that was practically repeated by my brother Wills in the case of *Bates v. Plumstead Overseers (ubi sup.)*, in which there was an application for a distress warrant, and in which he said: "The only objections, therefore, which can be entertained by a magistrate on an application for a distress warrant are the three following: that the property rated is not in the parish; that the party rated is not the occupier; and that the rate is, on the face of it, bad." I must not be taken as saying that I am clear that those are the only three objections which can be raised, but I do think that they point to the class of objections that can be raised on an application for a distress warrant. Lastly, in the very valuable judgment in *Overseers of Manchester v. Headlam* (21 Q. B. Div. 96), where Wills, J. again pointed out, in the considered judgment of the court delivered by him, how all these cases went back to the authority of *Crease v. Sawle* (2 Q. B. 862), which had decided that the rate, being good on the face of it, cannot be impugned in an action for trespass for levying distress in respect of the rate. Wills, J. said: "The objection being matter of appeal, the rate unappealed against ought to be enforced. It would be very unfortunate if it should be otherwise, and if by reason of an error, possibly of the most trifling kind, made by the overseers in the amount of property which they supposed to be in the occupation of a particular individual, he, after having foreborne to avail himself of an ample and satisfactory remedy for any error to his prejudice in the rate, could evade payment of the poor rate altogether. One cannot conceive a greater encouragement to improper litigation," and so on. Therefore, without saying that those cases absolutely enumerate every single point that can be taken, I think that they do lay down the substantial rules which show what points can be raised in

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answering a *prima facie* case on an application for a distress warrant, and that, *prima facie*, points which can be raised on an appeal ought not to be raised then. With reference to the opinion of Blackburn, J., which was cited from the case of *Reg. v. Justices of Middlesex (ubi sup.)*, I am by no means sure that he was not referring to the question of whether or not the valuation should be conclusive upon an appeal. I do not think he had at that time in his mind the question of the issue of a distress warrant. Now, had the respondents the right of appeal? I think they had both rights of appeal. I am not so clear in my own mind that they had the right to come for a *mandamus*. I admit that there is a very close analogy with those cases where a *mandamus* has gone, the time having gone by within which a statutory body had to perform a statutory duty; but, as that point may be raised hereafter, it seems to me not necessary to decide it now. I must say, however, that if the respondents are entitled to raise this objection and say that for the purposes of a rate this was not a good valuation list binding upon them, they ought to be able to raise that objection on appeal, and I think that that right of appeal, if it existed, has not been taken away. Of course, on the appeal, there would have to be arguments upon the merits, and a decision upon the merits, as to whether or not the failure to give notice under sect. 9 prevented the valuation list from being binding upon the respondents, but, if they can raise that point, I think it is one which ought to have been raised on appeal. I do not think it is the class of objection that the magistrate ought to entertain when application is made to him for the distress warrant, it being, as I have said, not something which falls within those objections named, or objections of the same kind, but something which goes to the validity of the right to assess or rate all the persons named in the assessment. For these reasons I think the appeal ought to succeed, and that the magistrate ought to have issued the distress warrant.

DARLING, J.—I am of the same opinion. It seems to me that the whole question really turns upon the point whether the respondents had lost, or been deprived by what took place of, not only their right to appeal, but their power of appealing. I think the argument has shown that they have not, and, that being so, injustice and hardship do not arise, and injustice and hardship were really the whole foundation of Mr. Bray's argument. If the case had been as unjust and as hard as he represented it to be, then I think we must have decided in his favour, but it seems to me he did omit to notice a remedy which was open to him, which has been pointed out to him very clearly by Mr. Ryde, and therefore the injustice which he apprehended does not occur.

CHANNELL, J.—This case is one of some little difficulty, but it really turns upon what is the true construction of this Act of 1869. The 45th section begins: "The valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act." Now, the first question is, what that means. It is suggested by Mr. Bray that "the valuation list for the time being in force" must mean a properly made valuation list, and that no other is in force. If it

meant that, the section would read thus: "A valuation list duly made shall be deemed to have been duly made," and that, of course, is a thing the Legislature would never have enacted, and could not possibly have enacted. It must mean something different from that. That being so, it seems to me that the valuation list for the time being in force is something different from that, and is something which, although not in fact duly made in accordance with the Act, is to be deemed to have been duly made in accordance with the Act. If so, what does it mean? It seems to me the valuation list for the time being in force—the importance is rather on the "time being," the "in force" is simply repeating the expression which had been used in sect. 43—in substance means this: after the time when the valuation list is to come into force according to the preceding section, and until the moment when the next valuation list has come into force, the valuation list shall be deemed to have been duly made, and so on. It is a case of time rather than anything else, and in substance it comes round to what was suggested some time ago, that it refers to a *de facto* valuation list in existence at a particular time, and then that *de facto* list is to be deemed to be made in accordance with the Act—that obviously is intended to cure for some purpose or another possible defects in it—and then it goes on to say that it shall be conclusive for certain matters. Now, if conclusive for certain purposes, is conclusive for all purposes whatever, of course it is obvious that this defect cannot be raised in answer to the application for the distress warrant. If, on the other hand, it is not conclusive for that purpose, it seems to me an *a fortiori* case that it would not be conclusive for the purpose of an appeal, so that either there is no remedy here and no answer to the distress warrant, because the list is conclusive for all possible purposes, or there exists an appeal. If there does exist an appeal, I think it is quite clear on the cases my Lord has referred to that this would come within the class of cases where, there being a possibility of appeal, there must be an appeal, and, if the point is not raised by appeal, it cannot be raised on the application for the distress warrant. As I have said, I think those cases all depend on whether there is jurisdiction in the rating authority to make the rate, and whether the rate is good on the face of it. If the rate is good on the face of it, and the rating authority had jurisdiction to make the rate, any other objection to the rate cannot be raised on the application for the distress warrant. Such a rate as that it is the duty of the magistrate to enforce, and all the cases where the objection can be taken upon the distress warrant—the well-known cases of non-occupation, property out of the parish, and so on—are merely instances of cases in which the rating authority had no jurisdiction to make a rate upon a person or upon the property, as the case may be. The result seems to me to be that the argument for the appellants prevails, and that the argument for the respondents does not. The appeal must therefore be allowed.

Appeal allowed without costs.

Solicitors for the appellants, *Allen and Son*.
Solicitors for the respondents, *Tyrrell Lewis, Lewis, and Broadbent*.

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CORPORATION OF BOOTLE (apps.) v. OWENS (resp.).

[K.B. Div.]

May 19, 1898.

(Before WILLS and KENNEDY, JJ.)

CORPORATION OF BOOTLE (apps.) v. OWENS (resp.). (a)

Local government—Provisional order—Sewer accommodation—Provision by owners—Appeal—Expenses of alterations—Justices to make such order “as to them may seem equitable.”

By the Bootle Provisional Order 1897, when a sewer and water supply sufficient for the purpose were reasonably available, the appellants could, by written notice to the owner of any building, require any existing closet accommodation provided at or in connection with the building to be altered so as to be converted into a water-closet complying with the bye-laws in force and communicating with the sewer. If the owner failed to comply with the notice, the appellants could do the work specified in the notice and recover the expenses from the owner. If any person deemed himself aggrieved by any of the requirements of the appellants, or as to the reasonableness of any expenses wholly or partially recoverable from him, he could appeal to the justices, and they might make such order in the matter as to them might seem equitable.

The respondent, the owner of certain houses, was served with a notice requiring him to alter the closet accommodation into water-closets.

On an appeal to justices they held that the requirements of the corporation as to the alterations in the closet accommodation were reasonable, and they ordered him to comply with the notice. They further ordered that the expense of doing the work should be borne in equal shares by the appellants and the respondent.

Held, that the justices had power to make any order as to the expenses that appeared to them reasonable.

CASE STATED.

By the Bootle Order 1897 (being a provisional order of the Local Government Board in pursuance of the powers contained in sect. 303 of the Public Health Act 1875) it is ordered by art. 4 as follows:

(1) When a sewer and water supply sufficient for the purpose are reasonably available the corporation may from time to time, by written notice to the owner or owners of any building, require any existing closet accommodation (other than a water-closet or a waste water-closet) provided at or in connection with such building to be altered so as to be converted into a water-closet or waste water-closet which shall comply with the bye-laws for the time being in force, and shall communicate with a sewer, and they may also require a separate receptacle for ashes and house refuse to be provided at or in connection with such building. (2) If the owner or owners of any such building fail in any respect to comply with a notice from the corporation under sub-sect. (1) of this article the corporation may at the expiration of a time to be specified in the notice (not being less than fourteen days after the service of the notice) do the work specified in such notice, and may recover in a summary manner from the owner or owners the expenses incurred by the corporation in so doing. Provided that if in any case such alteration shall be required in respect of any existing closet accommodation which prior to the service of the notice under sub-sect. (1) of this article shall not have been certified by the medical officer of health to be insufficient

for the necessities of the inhabitants of the building, or to be in such state as to create a nuisance or be injurious to health, then one-half of the said expenses shall be borne by the corporation and the remainder of the said expenses shall be borne by the owner, and shall be recoverable from him in a summary manner. (3) The corporation may contribute towards the expenses incurred in making any alteration of any closet accommodation in pursuance of this article in any case in which they may not be required to bear any part of such expense. (4) The notice under the provisions of sub-division (1) of this article shall state the effect of the provisions of this article.

By art. 9 of the order it is ordered as follows:

(i.) Where any person deems himself aggrieved by any requirements of the corporation under sub-sect. (1) or (2) of art. 2, sub-division (1) of art. 3 or sub-division (1) of art. 4 of this order, or as to the reasonableness of any expenses wholly or partially recoverable from him under this order, such person may within fourteen days after the service of notice of the requirement or of a demand for payment of the expenses appeal to a court of summary jurisdiction, and the court may make such order in the matter as to them may seem equitable, and the order so made shall be binding and conclusive on all parties: Provided, nevertheless, that the right of appeal subsequent to the service of a demand for payment shall be restricted to the ground of the reasonableness of the amount of the expenses, and the appellant shall be precluded from raising at that stage any other question. (ii.) Pending the decision of the court upon such appeal the corporation shall not be empowered to execute any works included in the notice, and any proceedings which may have been commenced for the recovery of such expenses shall be stayed.

On the 13th Sept. 1897 Robert John Sprakeling, the medical officer of health of the corporation, duly made and signed a certificate referring to certain premises, being Nos. 30, 34, 36, 38, and 40 in Canal-street in the borough, of which the respondent is the owner. The following is a copy of the certificate:

I hereby certify, pursuant to the provisions of the Bootle Order 1897, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 16) Act 1897, that the existing closet accommodation provided at or in connection with the buildings (30 and 32) (34 and 36) (38 and 40) (42 and 44) (46 and 48) Canal-street, Bootle, is in such a state as to create a nuisance and is injurious to health.

On the 15th Sept. 1897 William Daley, the inspector of nuisances of the corporation, acting under instructions from the corporation, served a notice on the respondent as follows:

Whereas it is provided by art. 4 of the Bootle Order 1897, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 16) Act 1897, as follows: [Art. 4 was set out as above.]

And whereas the existing closet accommodation provided at or in connection with the buildings Nos. 32, 34, 36, 38, and 40, Canal-street, has been certified by the medical officer of health to be in such state as to create a nuisance and to be injurious to health: Notice is hereby given to you, as the owner of the said buildings, that the corporation require the existing closet accommodation aforesaid to be altered so as to be converted into water-closets which shall comply with the bye-laws for the time being in force and shall communicate with a sewer. The corporation also require separate receptacles for ashes and house refuse to be provided at or in connection with such buildings. Further notice is hereby given that if you fail in any respect to comply with this notice the corporation will, at the expiration of fourteen days after the service hereof, do the work specified herein

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

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and recover from you the expenses incurred by them in so doing. A general plan and specification for this class of work approved by the health committee may be inspected at the borough surveyor's office.—By order of the Health Committee.—WM. DALEY, Inspector of Nuisances.

The following conditions were indorsed upon the notice :

N.B.—An ashpit is a receptacle within the meaning of the notice. In altering the same the ashpit floors must be raised above the level of the adjoining ground and properly paved with hard bricks covered and grouted with good cement, the inside walls of the ashpit must be covered with a layer of good cement half-an-inch in thickness to a height of at least two feet above the floor of the ashpit, the ashpit must be properly roofed over so as to prevent rainwater from entering the same, and furnished with a suitable door to admit of the convenient removal of the contents, and of being securely closed and fastened. No part of any ashpit shall communicate with a drain. The work must be done to the satisfaction of the borough surveyor, to whom notice must be given before the work is commenced. The drain must not be covered before the same has been inspected. When a connection must be made between pipes of different diameters a proper diminishing pipe must be used. All connections with sewers must be made by the workmen of the council, and before such connections are made the sum of one shilling for each connection must be deposited with the borough cashier. If you so desire the council will undertake this work on your behalf on your previously signing an agreement to repay the costs as follows: One-fourth within six months after completion of the work, one-fourth within a year after the expiration of such six months, one-fourth within a year of the second instalment becoming due, the remainder within a year of the third instalment becoming due. Interest at 5l. per cent. per annum will be charged from the date of the account being rendered and payment demanded, but no charge will be made for supervision and other expenses incurred by the council beyond the actual cost of the work. Any inquiry regarding this notice should be made at the inspector of nuisances' office, and, if possible, between the hours of nine and ten in the morning.

On the 28th Sept. 1897 the respondent, by his solicitors, made a complaint before the justices as follows :

(1) The appellant is the owner within the meaning of the Public Health Acts of the houses Nos. 30, 32, 34, 36, 38, and 40, Canal-street, in the borough of Bootle. (2) By art. 3 of the Bootle Order 1897 (duly confirmed) it is enacted that if on the report of the medical officer of health or inspector of nuisances the corporation are satisfied that any house has not sufficient closet accommodation provided thereat, or in connection therewith, the corporation may by written notice under certain circumstances therein mentioned require that such building shall be provided with water-closets. (3) By art. 4 of the said order it is enacted that the corporation may by written notice under certain circumstances therein mentioned require any existing closet accommodation to be altered so as to be converted into a water-closet. Provided that if in any case such alteration shall be required in respect of any closet accommodation which shall not have been certified by the medical officer of health to be insufficient or to be in such a state as to create a nuisance or to be injurious to health, then one-half of the expenses of the conversion shall be borne by the corporation. (4) By art. 9 of the said order it is provided that where any person deems himself aggrieved by any requirements of the corporation under the articles above referred to such person may either within fourteen days after the service of notice of the requirement appeal to a court of summary jurisdiction,

and the court may make such orders in the matter as to them may seem equitable. (5) On the 15th Sept. instant the appellant was served with a written notice dated the 14th Sept. 1897 and signed by the inspector of nuisances requiring the existing closet accommodation at the said houses to be converted into water-closets, and it was stated in such notice that the existing closet accommodation had been certified by the medical officer of health to be in such a state as to create a nuisance and to be injurious to health. (6) The appellant deems himself aggrieved by the requirements of the said notice upon the following grounds: (a) That the existing closet accommodation provided at or in connection with the said houses is sufficient, and that no report contrary has been made by the medical officer of health; (b) that the existing closet accommodation is not in such state as to create a nuisance or to be injurious to health; (c) that prior to the service of the said notice the existing closet accommodation had not been certified by the medical officer of health to be insufficient or to be in such a state as to create a nuisance or to be injurious to health, and that the said notice is *ultra vires*; (d) that if the medical officer of health had made any certificate with regard to the said closet accommodation he had made the same improperly and in pursuance of a policy of general conversion of privies into water-closets formulated by the corporation in direct contravention of the law as laid down in the case of *Tynckler v. Wandsworth District Board of Works* (27 L. J. 342, Ch.); (e) that in pursuance of such a policy the corporation recently served about 2000 notices, some hundreds of which were the subject of a local inquiry, and that upon the result of such inquiry the Local Government Board made an order directing the corporation to pay one-half of the cost of the conversion of the privies then in question, although upon the said inquiry the medical officer of health alleged that all of such privies were in such a state as to create a nuisance. The appellant therefore complains and appeals to your court of summary jurisdiction under art. 9 of the said order against the requirements of the said notice.

The complaint and appeal were heard before the justices on the 26th Jan. 1898, when it was proved that the medical officer of health had given the aforesaid certificate, and after hearing the solicitor for the respondent and the witnesses called by him and the solicitor for the appellants and the witnesses called by him they found that: (1) The existing closet accommodation at the premises in question was in such state as to create a nuisance and was injurious to health. (2) The requirements of the corporation contained in the notice of the 14th Sept. 1897 were reasonable, and that the requirements had not been made and the notice served in pursuance of a general policy of conversion of privies into water-closets formulated by the corporation.

They ordered that the respondent should within twenty-eight days comply with the requirements of the corporation as contained in the notice of the 14th Sept. 1897, and they further ordered that the expenses of carrying out the requirements of the corporation should be borne in equal shares by the respondent and the appellants, and that the costs of the complaint, hearing, and order, being the costs incurred in obtaining the order, should be borne by the respondent and the appellants in equal shares.

It was contended on behalf of the appellants that the justices had no jurisdiction to inquire into or receive evidence as to whether the state of the existing closet accommodation at the premises in question constituted a nuisance or was injurious to health, but that the jurisdiction of

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the justices was limited to the requirements of the corporation as set out in the notice of the 14th Sept. 1897.

Having regard, however, to the equitable jurisdiction conferred on the justices by art. 9 of the Bootle Order 1897, they were of opinion that for the purpose of making an equitable order in the matter it was intended and necessary that such evidence should be heard, and they accordingly admitted the same.

The respondent called witnesses to prove that the state of the closet accommodation did not create a nuisance nor was injurious to health and on behalf of the appellants witnesses were called to prove the reverse, and evidence was called by the respondent to prove that the closet accommodation had been provided some time previously in accordance with the bye-laws of the corporation then in force and they decided as above stated.

It was further contended on behalf of the appellants that having regard to order 9 of the Bootle Order 1897, and to the fact that the medical officer of health had certified that the state of the existing accommodation was such as to create a nuisance and be injurious, and that the justices had adopted the same view and had found accordingly, there was no jurisdiction for the justices to make any order on the corporation to pay any share of carrying out the said requirements.

In their opinion, however, the justices held that they had such jurisdiction under art. 9 of the Bootle Order 1897, and made the order as stated.

The questions for the opinion of the court were: (1) Had the justices jurisdiction to inquire as to whether the state of the existing closet accommodation at the premises in question was such as to create a nuisance and be injurious to health? (2) Or were they bound by the certificate of the medical officer of health and so precluded from admitting evidence with regard thereto? (3) Had the justices power to order the appellants to pay any portion of the expenses incurred in carrying out the requirements of the corporation as set out in the notice of the 14th Sept. 1897? (4) Or were they precluded by the provisions of the Bootle Order 1897 from so doing?

Horridge for the appellants.

R. Cunningham Glen for the respondent.

WILLS, J.—This is another of those unhappy illustrations of how completely one's work in this court is taken up by supplementing the extremely imperfect work of the draughtsman, and really the mass of imperfect statute law of one sort or another which has to be interpreted is becoming a rather serious thing, but one must make the best one can of it. This is a very imperfect piece of legislation. The scheme in the outset is that the corporation shall specify what works are to be done in order to convert places from privies into water-closets, and that upon failure to comply with such notice, the whole of the expenses, if there has been a state of things existing which, to put it popularly, is owing to the fault of the owner, must be borne by him, with a proviso that where the state of things is such that you cannot say he is very much to blame in the matter, then the expenses shall be borne half and half—half by the corporation and half by the owner—that proviso, of course, being engrafted upon the previous enactment, and not extending its opera-

tion. That is the outline of the scheme. But then it was felt that it was quite possible there might be very serious questions arising between the owners of property and the corporation as to whether the requirements of the corporation were reasonable and proper, and also as to the—I want to use a very general word—matters connected with the way in which the expenses were to be borne, and a clause has been put in which says that where any person is aggrieved by the requirements of the corporation under a number of subsections, including this one in particular (subdivision (1) of art. 4 of this order), “as to the reasonableness of any of the expenses wholly or partially recoverable from him under this order”—in other words, under this enactment—“such person may appeal to the court of summary jurisdiction, and they are to make such order in the matter as to them may seem equitable, and that order shall be final and conclusive upon all parties.” Then it goes on to provide a very reasonable provision, I think, that where there has been no objection raised antecedent to the demand for payment of the expenses—that must cover this case where there has been no objection made up to the point where the corporation have actually done the work, and it is only a question as to payment for it—then nothing is to be considered except whether the actual cost put upon the works which have been executed is reasonable or not. That seems to me to be perfectly right, but I cannot think that that limits the magistrates' jurisdiction up till the time when it is ascertained that there is any complaint as to the requirements or as to the reasonableness of the expenses which would be wholly or partially recoverable if nothing more were done. The court is to make such order as it may deem equitable. It is a very large jurisdiction, as was pointed out in a case that was cited, which arose under an analogous, but by no means identical, section of the Public Health Act. I am making no mistake as to the two sections being identical, but *consimile in materiâ* at all events. There, however, it was pointed out, this gave very wide jurisdiction to the tribunal in respect of the subject-matter into which it might inquire. It also follows that there must be a very wide discretion also as to the nature of the remedy which is to be applied. It is quite true the jurisdiction only arises where the person feels himself aggrieved either by the requirements or any of them, or as to the reasonableness of the expenses. It is a curious expression, “feeling himself aggrieved as to the reasonableness of the expenses.” It only shows how rough the drafting is, but still I think it is intelligible, and when that jurisdiction once has arisen I cannot see anything to limit the remedy. We have got good plain English words which say that the magistrates are to be the judges of such order as they may think equitable in the matter. It may very well happen that they may think the requirements, as requirements, are very good things, and they might be very loth to interfere with them, but they may also think there are circumstances which make it reasonable that a portion of the expenditure should fall upon the corporation—in one proportion or another—or upon the appellant; then they make such order which is to be final and conclusive as to all matters which they deem to be within the scope of what is equitable in the

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case. As it seems to me that really does supersede the earlier provisions, or rather, I should say, the earlier provisions cease then to have any operation, because, as my brother has pointed out—and in this respect I am making use of materials which I owe to him, and I cannot very well deal with the case without adopting the observation myself—the right of the corporation to avail themselves of sub-division (2) of this art. 4 arises only upon a failure to comply with a notice from the corporation. If the magistrates have altered the requirements and made an order altering them, there is no failure to comply with the notice of the corporation. The notice of the corporation has been superseded; it may be superseded in everything. I think myself the true construction is, under these circumstances, sub-division (2) does not apply at all, and that really what is to apply is the order which is made conclusive for all purposes upon the parties. I do not stop now to inquire how it is to be enforced; no doubt there are means for enforcing it, just as there were means under the Public Health Act for enforcing the duty of the Local Government Board, and, of course, in ninety-nine cases out of 100, or probably 999 out of 1000, where an order has once been made there is no occasion to enforce it, because it will operate for itself. It seems to me under these circumstances neither sub-division (2) nor its proviso attaches, but you are remitted to the order, and the order speaks for itself, and the justices were, I think, perfectly within their jurisdiction in saying—I do not know why, nor is it anything to the parties to inquire why; I assume they had good grounds for making the order—"We think our notion of fair play between the parties is that each party should pay half." They were entitled to do so. To my mind the expression "equitable" is very significant because the notion of confining the operation of the word equitable to such matters as a distinction between a 4½ in. or 5 in. or 6 in. pipe is an abuse of the word. It is ridiculous to speak of "equitable" as relating to matters of simple construction. It is extremely applicable to the incidence of expenditure, and let me observe further—and this is the last remark I wish to make—that unless this construction be given, and unless we say that the order to be made by the magistrates may deal with subject-matters which have already, in default of an order, been provided for by the enactment, there is practically nothing for this art. 9 to operate on in respect of matters which come under art. 4, sub-division (1) of this order. If it be true that all constructional matters are settled by the bye-laws, and that the incidence of costs is provided for by the article, there is absolutely nothing left for this jurisdiction to be exercised upon, and it does not seem to me to be anything to the parties to say that there are other sections and other parts of this enactment to which that art. 9 might apply without giving it the meaning and scope I am giving to it in respect of this art. 4, because in respect of art. 4, as it seems to me, there would be practically—I do not say that theoretically you might not grope about and find something to which it might apply—nothing to operate upon unless the magistrates had power to deal with the expense and dispose of costs as well as of other matters, the matters to which the expression would seem peculiarly attached. For

these reasons I think the magistrates were within their jurisdiction, and this appeal must be dismissed.

KENNEDY, J.—I am of the same opinion. It seems to me this difficulty might have been settled by adding a few words to sect. 1, either "subject to any order made by the magistrates as hereinafter mentioned," or, in art. 9, "notwithstanding anything hereinafter provided may make such order as may seem equitable," or simply adding the words "including the expenses" to the word "equitable." If that had been done one cannot help feeling that a great deal of time might have been spared, and presumably more usefully employed; but, having now had the advantage of hearing the very full argument on both sides, I confess I do not find any reasonable doubt about the construction which has been so fully explained by my brother.

Appeal dismissed.

Solicitors: for the appellant, J. H. Farmer, Bootle; for the respondent, Sharpe, Parker, Pritchards, and Barham, for E. L. Lewis, Bootle.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Tuesday, June 10, 1902.

(Before Sir F. JEUNE, President, and BARNES, J.)

PIPER v. PIPER. (a)

Matrimonial cause—Appeal from justices—Desertion—Parties living apart—Deed of separation—Bar—Summary Jurisdiction (Married Women) Act 1895 (58 & 59 Vict. c. 39), ss. 4, 5.

A husband and wife executed a deed of separation in 1896, by which the husband agreed to pay an allowance to his wife. No payment was made under the deed for nine months. Subsequently the wife received a portion of the arrears by means of legal proceedings, but for more than two years before April 1902 the husband paid nothing at all under the deed. In April 1902 she took out a summons against him under the Summary Jurisdiction (Married Women) Act 1895, and the justices granted her a separation order, the custody of her child, and an allowance of 15s. a week.

Held, that the deed of separation of 1896 was a bar to the jurisdiction of the justices on the ground of desertion.

THIS was an appeal by a husband from the justices of the petty sessional division of Romsey, Hants.

The parties were married in 1877, and there were two children issue of the marriage, the younger of whom, a daughter, was born in 1893. After the birth of this daughter differences arose between the husband and wife, and as a result from February to April 1896, although the parties were living under the same roof, there was no marital intercourse between them. During that time the husband made no allowance to his wife for housekeeping expenses, and on the 16th April 1896 he left her.

Two months later, on the 3rd June, a deed of

(a) Reported by J. A. SLATER, Esq., Barrister-at-Law.

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separation was executed by the parties, under which the husband undertook to make an allowance to his wife. For nine months, however, he paid nothing at all.

Eventually the wife recovered a small portion of the arrears due to her by means of legal proceedings, but for more than two years before April 1902, when the summons was taken out which was now appealed against, nothing whatever had been paid by the husband to his wife.

On the 4th April 1902 she took out a summons against him before the justices of Romsey, and on the 25th April the justices found that he had deserted his wife, and on that ground granted her a separation order, gave her the custody of the younger child, and awarded her a weekly allowance of 15s. It was against this order the husband now appealed.

Franks for the appellant.—There was no jurisdiction for the justices to grant an order for desertion in view of the deed of separation between the parties. The deed was a bar:

Reg. v. Leresche, 65 L. T. Rep. 602; (1891) 2 Q. B. 418.

[He was stopped by the Court.]

Frampton for the respondent.—There could be no doubt that the justices distinguished the present case from that just cited on behalf of the husband. The solicitor who appeared on behalf of the wife before the justices had contended, and apparently successfully contended, that there had been a fraud on the part of the husband in inducing his wife to enter into the deed of separation. At the time of its execution she was contemplating taking proceedings against him, and it was to avoid the publicity of appearing in court that he had promised to grant her an allowance. When he made that promise he had not the slightest intention of carrying it out, as was shown by the fact that for the first nine months he never paid one single penny under the deed. And afterwards he never paid anything except under legal compulsion. The justices were therefore entitled to draw inferences from his conduct:

Edgington v. Fitzmaurice, 53 L. T. Rep. 369; 29 Ch. Div. 459.

There is authority for the proposition that the deed is no bar:

Nott v. Nott, 15 L. T. Rep. 299; L. Rep. 1 P. & M. 251.

[The PRESIDENT.—In the subsequent case of *Parkinson v. Parkinson* (21 L. T. Rep. 732; L. Rep. 2 P. & M. 25), Lord Penzance stated the reasons which had guided his decision in *Nott v. Nott*. He says that in that case the wife never agreed to live apart from her husband, and that the trustee who covenanted on her behalf never signed the deed, which was therefore never completed. It was on that ground that Lord Penzance distinguished the two cases, and held that in the case of *Parkinson v. Parkinson* the wife had bargained away her right to relief.] *Dagg v. Dagg and Speake* (47 L. T. Rep. 132; 7 P. Div. 17) is another case in which a husband induced his wife to execute a deed of separation upon improper grounds. [The PRESIDENT.—The deed in that case was wicked and abominable on the face of it.] The court ought to reject this deed, on the ground that it was a false transaction, the real object of its execution being the husband's desire

to avoid the publicity of the proceedings threatened by his wife:

Crabb v. Crabb, 18 L. T. Rep. 153; L. Rep. 1 P. & M. 601.

[BAENES, J.—Even if your contention is correct, has not the wife approved the deed by suing upon it?]

The PRESIDENT.—In this appeal the respondent is met by the insuperable difficulty of this deed. Even assuming in her favour that there was a desertion in April 1896, there comes the deed of separation in the following June. Her counsel has endeavoured to get out of the difficulty by suggesting that the deed was procured by fraud on the part of the appellant, and that it ought, on that account, to be treated as null and void. He says that this point was taken when the case was heard before the justices. There is not, however, any evidence at all to support that contention. The most that can be said—though I do not think even that is proved—is that there never was any intention on the part of the husband to keep the terms of the deed when he entered into it. I doubt very much whether evidence of such a fact could be received as impugning a deed; but, even if it were, it would fall very far short of showing that any fraud had been committed. In the present case it appears that the wife, at the time when she entered into the deed, was represented by a solicitor, and that goes a very long way towards negating fraud. The fact that the husband did not pay the allowance provided by the deed does not prove that he entered into it with a fraudulent intent. No doubt there is authority for the proposition, in the case of *Crabb v. Crabb*, that if a deed were merely a fraudulent transaction on the part of one of the contracting parties, it may be rejected, for there are the following words at the end of the judgment in that case: "If a man, determining to abandon his wife were to set about fraudulently, by the show of an agreement, which he never intended to fulfil, to induce or extort her consent to their mutual separation, covering his true purpose under delusive covenants, and seeking a shield for his design in a consent bought by treachery, the court might well be asked to reject the false face of the transaction and regard the real object that lay underneath." But it must be shown, in the first instance, by the party alleging the fraud that there was the extortion of consent; and, in the present case, the only evidence adduced is that the husband did not fulfil his bargain. Under the circumstances, therefore, it would be improper to hold, or even to guess, that this deed was procured by fraud, and there is, moreover, no evidence at all before us to show that the justices ought to have thought, or did think, that the deed was bad, and should therefore be set aside. If, then, the deed is valid, there is, in my opinion, an end of the case, for the effect of the deed is to put an end to the desertion, which I am assuming, in favour of the wife, to have previously commenced. If there was, in fact, desertion in April 1896, it was clearly put an end to in June 1896 by the execution of the deed. By the execution of that document the wife bargained away whatever rights she possessed in return for what was apparently a good consideration, which, moreover, later on she appears to have enforced to some small extent. The effect of putting an end to the

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desertion was to make it a wrong done only in 1896, that is, long before the jurisdiction of the justices who made the order was invoked. It is quite true that justices have power, under the Act of 1895, to make orders in respect of desertion irrespective of any definite period—not, as under the Matrimonial Causes Acts, in suits instituted in this court, only if the desertion has continued for two years and upwards. But under the Summary Jurisdiction (Married Women) Act the desertion alleged must, in order that the justices may have jurisdiction, have continued until within six months before the parties come before the court in the first instance. Consequently, although the jurisdiction of the justices might probably have been invoked at an earlier period, still that could in any event only have been done within six months from the date when the desertion was put an end to. The present appeal must be allowed, but inasmuch as the respondent came here with the object of supporting the order which had been made in her favour, she is entitled to her costs in this court.

BARNES, J.—It is unfortunate in this case that the justices and their clerk have not followed the suggestion which we have so often made in these appeals, that the reasons which induced the decision of the justices should be stated and should be shown upon the notes. We do not find any reason stated for the decision arrived at, and the only suggestion put forward by counsel for the respondent is that the justices may have based their decision upon the alleged ground that the deed was fraudulently obtained. But if that was the ground upon which the decision rested it appears to me that the order cannot stand, because there is no evidence of fraud. We are told by counsel for the appellant that the deed was arranged between the husband's solicitor on the one side, and the wife's solicitor on the other. But, be that as it may, there is no evidence at all to impugn its validity. It is merely stated by counsel for the respondent that the solicitor who appeared for her before the justices argued that there had been fraud in obtaining the assent of the wife to the deed, and it is impossible to imagine on what other ground the justices can have based their decision. But when any question as to the validity of the deed is removed, the wife by entering into it has clearly put an end to any desertion which may have existed at an earlier time, and from the date of the deed the parties must be treated as living apart by mutual agreement. That being so, I fail to see how the justices had any jurisdiction to entertain the summons. I agree, therefore, that the appeal must be allowed.

Solicitors for the appellant, *Robbins, Billing, and Co.*, for *Emanuel and Emanuel*, Southampton.

Solicitors for the respondent, *W. and W. Stocken*, for *E. D. Godwin*, Southampton.

Supreme Court of Judicature.

COURT OF APPEAL.

July 9 and 11, 1902.

(Before WILLIAMS, ROMER, and STIRLING, L.JJ.)

Re EDGCOMB; *Ex parte* EDGCOMB. (a)

APPEAL FROM THE REGISTRAR IN BANKRUPTCY.

Attachment—Committal for nonpayment of rates—Receiving order against debtor—Release—Jurisdiction—Legal process—Punitive order—Distress for Rates Act 1849 (12 & 13 Vict. c. 14), s. 2—Debtors Act 1869 (32 & 33 Vict. c. 62), s. 4, sub-s. 2—Bankruptcy Act 1883 (46 & 47 Vict. c. 52), s. 10, sub-s. 2.

A warrant of commitment for nonpayment of rates, in default of distress, issued under the Distress for Rates Act 1849, being of a punitive character, the debtor is not entitled to his release by reason of a receiving order being subsequently made upon his petition, notwithstanding that he can at any time, by paying the debt and costs, determine his imprisonment; and therefore the Bankruptcy Court has no jurisdiction to interfere under sect. 10, sub-sect. 2, of the Bankruptcy Act 1883.

Cobham v. Dalton (L. Rep. 10 Ch. App. 655), Middleton v. Chichester (24 L. T. Rep. 173; L. Rep. 6 Ch. App. 152), and Re Smith; Hands v. Andrews (68 L. T. Rep. 337; (1893) 2 Ch. 1) considered.

Decision of Mr. Registrar Hope affirmed.

JAMES EDGCOMB was the rated occupier of No. 12, St. James'-square, in the city of Westminster, and as such occupier he became liable to pay the sum of 174*l.* odd under a general rate made in April 1901.

Having made default in payment, a distress warrant was issued by a police magistrate, on the 19th Sept. 1901, to levy the amount on his goods.

A return of *nulla bona* was made, and on the 10th March 1902 a warrant of commitment in default of distress was issued under the Distress for Rates Act 1849 by the magistrate, directing that Edgcomb should be imprisoned for one month unless the debt and costs should be sooner paid.

The warrant was directed to be held over for a month, and was eventually executed on the 1st July 1902, when Edgcomb was arrested and lodged in prison.

On the following day Edgcomb presented a bankruptcy petition, and a receiving order was at once made against him on that petition.

On the 4th July 1902 he applied to Mr. Registrar Hope sitting in Bankruptcy for an order that he should be released from prison under sect. 10, sub-sect. 2, of the Bankruptcy Act 1883, which gives the Court of Bankruptcy power to stay legal process against the property or person of the debtor. The application was made on the ground that the committal was a legal process against Edgcomb's property or person and ought to be stayed, the Court of Bankruptcy having jurisdiction to prohibit the continuance of the proceedings.

(a) Reported by E. A. SORATCHLEY, Esq., Barrister-at-Law.

On the 5th July 1902 the following considered judgment was delivered by

Mr. Registrar HOPE.—An order for commitment in default of distress has been made by a metropolitan magistrate, and the debtor was arrested prior to a receiving order on his own petition. The commitment order was made in the form in the schedule to 12 Vict. c. 14, which Act recites previous Acts making provision "for the recovery of the sum or sums at which any person is rated . . . by distress and sale of his goods and chattels, and, in default of such distress, by commitment to prison until the same shall be paid." By sect. 2, by repeal and re-enactment, the Act provides for a limit to the time of imprisonment, and for the form of warrant. On the principle of *Reg. v. Pratt*; *Ex parte Cole* (21 L. T. Rep. 750; L. Rep. 5 Q. B. 176), the sum in respect of which the commitment was made was a sum within the exception in the Debtors Act 1869, s. 4 (2). [The registrar read the exception and referred to the case.] By *Morris v. Ingram* (41 L. T. Rep. 613; 13 Ch. Div. 338), imprisonment for nonpayment of such a sum is punitive. By *Re Smith*; *Hands v. Andrews* (68 L. T. Rep. 337; (1893) 2 Ch. 1), a punitive order for commitment can be made under the Debtors Act 1869, s. 4 (3), in a proper case notwithstanding a prior receiving order in bankruptcy; and the reasoning of the court in that case would, I think, apply to all applications for commitment within any of the exceptions in sect. 4. If that is so, the Bankruptcy Act 1883, s. 9, would not have protected the debtor if an application had been made for commitment after receiving order, and the magistrate had thought fit in his discretion to issue the warrant. Can I help the debtor under sect. 10 (2)? The proper tribunal has made this punitive order. If I am right in my view of the nature of the magistrate's order, and assuming (without holding) that I have jurisdiction to do so, ought I to interfere with that order? I think not. A competent tribunal has imposed a certain punishment, and the debtor by his own act in filing his petition has removed such means, if any, as he had for terminating that punishment by a money payment. I have nothing whatever before me as to the circumstances under which the order was pronounced—and it would, I think, be dangerous to act, as I am asked to do in that state of things, assuming without deciding that I have power to do so. As to the unreported case of *Re Eayres* (No. 981 of 1888), the registrar in 1889 had restrained the vestry and their clerk from executing any warrant of commitment against the debtor. This was all after the receiving order. The vestry clerk acted in defiance of that order. The debtor was released, and the vestry clerk was committed for contempt. That case was before *Re Smith*; *Hands v. Andrews* (*ubi sup.*), and while *Cobham v. Dalton* (L. Rep. 10 Ch. App. 655) was undisturbed. As regards debtors arrested under committal orders in the High Court made under the Debtors Act 1869, s. 5, Bankruptcy Rule 361 incorporates County Court Order XXV., and releases in those cases are made under that: (see *Re Nuttall*, 8 Morr. 106).

From that decision the debtor now appealed.

Haldinstein for the appellant.—The debtor applied to be released from prison on the ground that the rates are provable in his bankruptcy; and that under sect. 9 and sect. 10, sub-sect. 2, of the Bankruptcy Act 1883 there is power to release him. Having regard to *Re Wray* (57 L. T. Rep. 47; 36 Ch. Div. 138) and *Re Berry*; *Duffield v. Williams* (74 L. T. Rep. 306; (1896) 1 Ch. 939), I cannot contend that sect. 9 applies; but under sect. 10 the Court of Bankruptcy has power to stay legal process against the property or person of a debtor, and to order his release from prison. The proceedings were taken under sect. 4 of the Debtors Act 1869. That is the only

section under which the proceedings could be taken. All the reported cases upon that are as to defaulting trustees and solicitors, excepting *Reg. v. Pratt*; *Ex parte Cole* (21 L. T. Rep. 750; L. Rep. 5 Q. B. 176). That case influenced the learned registrar in refusing to release the debtor in the present case. The question of the jurisdiction of the County Court was dealt with in

Stonor v. Fowle, 58 L. T. Rep. 1; 13 App. Cas. 20.

Contempt for refusing to pay when able to pay renders the debtor liable to imprisonment. Here, however, the imprisonment was not because the debtor would not pay. No evidence of ability to pay was given. Sect. 10, sub-sect. 2, of the Bankruptcy Act 1883 covers the case, for this is either execution or legal process against the person of a debtor. He referred also to

Jones v. Williams, 46 L. J. 270, M. C.;

Distress for Rates Act 1849, s. 2.

Muir Mackenzie for the respondents.—The learned registrar was of opinion that sect. 10, sub-sect. 2, of the Bankruptcy Act 1883 does not apply to a case in which the warrant of commitment is in the nature of a punitive order, and he considered that in the present case it was of a punitive character. He followed the case of

Re Smith; *Hands v. Andrews*, 68 L. T. Rep. 337; (1893) 2 Ch. 1.

Then, assuming that he had jurisdiction to release the debtor, he did not consider that in the exercise of his discretion he ought to accede to the debtor's application. As to the point of jurisdiction, the magistrate's order is not execution, but punishment. This point was dealt with and all the authorities were reviewed in

Re Smith; *Hands v. Andrews* (*ubi sup.*).

In *Cobham v. Dalton* (L. Rep. 10 Ch. App. 655) Mellish, L.J. said that arrest for debt is intended as a means of enforcing payment, not as a punishment. *Stonor v. Fowle* (*ubi sup.*) was afterwards referred to by the Court of Appeal in *Re Nuttall* (8 Morr. 106).

Haldinstein, in reply, referred to

Middleton v. Chichester, 24 L. T. Rep. 173; L. Rep. 6 Ch. App. 152.

Cur. adv. vult.

July 11.—The following judgments were delivered:—

WILLIAMS, L.J.—In this case we think that the appeal from Mr. Registrar Hope must fail. I confess that I have arrived at that conclusion with some reluctance, and my reluctance is based upon this: In the application of the Debtors Act 1869, and the effect of the making of a receiving order, it does not seem to me that the decisions of the courts and the rules that have been made with reference thereto all follow the same principle. But that is not what we have to consider. We have to consider here whether this case is really covered by authorities, and whether or not those authorities are right and consistent with the view that has been taken in other cases on the Debtors Act 1869. It is our duty, if this case is covered by any authority, to act upon that authority. The facts of this case are very short and very simple: James Edgcomb was the occupier of No. 12, St. James's-square, and as such occupier became liable to pay certain rates. He did not pay those rates, and, after proper proceedings had been

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taken, an order was made by the magistrate at the Great Marlborough-street Police-court that he should pay those rates. When he made default in that payment, the magistrate committed him to prison for a month. Since that time a bankruptcy petition has been presented by James Edgcombe himself, and on his petition a receiving order was made; and the suggestion is that he is entitled to be discharged from prison, where he now is, by reason of that receiving order having been made. Mr. Registrar Hope dismissed his application, and he appeals. The section upon which he relies is sect. 10, sub-sect. 2, of the Bankruptcy Act 1883, which says: "The court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just." It is contended that the process which has resulted in this order for imprisonment for one month is legal process against the property or person of the debtor for the purpose of enforcing payment of the rates, and that therefore the Court in Bankruptcy has jurisdiction either to allow or to prohibit the continuance of the process. Whether that is so or not depends really upon this: Whether the imprisonment which has been ordered is imprisonment intended as a means of enforcing payment or whether it is intended as a punishment. If it is intended as a punishment, there would be no jurisdiction under sect. 10 to order the discharge of the bankrupt from his imprisonment. Well, now, there can be no doubt that if the law, as it was expressed by Mellish, L.J. in *Cobham v. Dalton* (L. Rep. 10 Ch. App. 655, at p. 657), is still to be regarded as good law, we should have to treat this order for imprisonment merely as process instituted for the purpose of enforcing payment of a debt, because Mellish, L.J. says, speaking generally of the arrest for debt, that it "is intended as a means of enforcing payment, not as a punishment." And he gives as a proof of that this fact, "for if the party pays the debt he is entitled to be discharged." When one looks at the Act of Parliament, 12 & 13 Vict. c. 14, s. 2, which gives the power of committal to prison for nonpayment of rates, one finds first, from a recital at the beginning of the Act, that by the statute of Elizabeth the same power of imprisonment was given, although there it was not for a limited time, but a power to commit the party "there to remain without bail or mainprize until payment." After that recital this Act of Parliament goes on to authorise a person in default of payment "to be imprisoned in the common gaol or house of correction for any time not exceeding three calendar months unless the sum or sums therein mentioned shall be sooner paid." If one could apply the observations of Mellish, L.J. and the reasons which he gives for treating the arrest as a mere means of enforcing payment, it would follow that in this case we should have to treat the order as a mere means of enforcing payment, for undoubtedly on the terms of the section and on the face of the warrant the debtor is entitled to his discharge on payment of the debt. But if one looks at the

authorities, it seems that one must not regard that observation of Mellish, L.J. as still being law. The first case I will refer to with regard to this matter is the judgment of Lord Hatherley in *Middleton v. Chichester* (24 L. T. Rep. 173; L. Rep. 6 Ch. App. 152). Before, however, calling attention to that decision, I wish to say a word as to the Debtors Act 1869 itself and the general effect of that Act. Sect. 4 says: "With the exceptions hereinafter mentioned, no person shall after the commencement of this Act be arrested or imprisoned for making default in payment of a sum of money." There is a general abolition of imprisonment for debt, subject only to the exceptions which follow, which are (1) default in payment of a penalty; (2) "default in payment of any sum recoverable summarily before a justice or justices of the peace." That is this case. (3) Default by a trustee or person acting in a fiduciary capacity. I do not know that I need read them all, but here is a list of the exceptions as to which the liability to imprisonment is continued notwithstanding the general abolition of imprisonment for debt. It is, however, right to observe in passing that there is another saving on this general abolition of imprisonment, and that is under the 5th section, which provides that "Subject to the provisions hereinafter mentioned and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court." And, when one looks at the condition under which that order may be made, one finds in sub-sect. 2 "that such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default and has refused or neglected or refuses or neglects to pay the same." Lord Hatherley in *Middleton v. Chichester* (*ubi sup.*) considers the exceptions in sect. 4, the exceptions under which the liability to imprisonment still continues. He says this at p. 156 of L. Rep. 6 Ch. App.: "Now, the first exception is the case of a penalty, and that makes the distinction I have pointed out extremely clear, because if it is merely a penalty in respect of a contract, that is not to deprive the person who has incurred it of the benefit of the section; but if it is any other sort of penalty, by which is meant a penalty for non-observance of a positive law, then he is to be exempted from the benefit of the section. The second exception is default in payment of any sum recoverable summarily before a justice or justices of the peace. That, again, would be something in the nature of a penalty, and not in the nature of a simple debt." He goes on to do deal with the other exceptions—I need not read what he says at length, but he mentions the case of default by a trustee and misconduct by a solicitor—and at p. 157 he says: "Therefore in every case there is something of the character of delinquency pointed out, and one cannot see that it makes a shadow of difference, with reference to the question of delinquency, whether a person has the money in his possession at the time the order is made or had parted with it some short time before the

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making of the order." The view of Lord Hatherley undoubtedly was that, taking all the exceptions in sect. 4, each one of those exceptions retains imprisonment, because the Legislature treats each one of the cases as one in which there was a delinquency, and the imprisonment is therefore a punishment and therefore differs from a mere process for the recovery of a debt. Later on in 1893 this question had to be considered again in the Court of Appeal in *Re Smith*; *Hands v. Andrews* (68 L. T. Rep. 337; (1893) 2 Ch. 1, at p. 17), where Lindley, L.J. says: "Although *Cobham v. Dalton* (*ubi sup.*) was decided in 1875 and *Middleton v. Chichester* (*ubi sup.*) was decided in 1871, and the Lords Justices who decided *Cobham v. Dalton* (*ubi sup.*) were members of the court which decided *Middleton v. Chichester* (*ubi sup.*), the view there taken and expressed with reference to the punitive character of sect. 4 of the Debtors Act 1869 seems to have been overlooked by them." It will be observed that he is not there speaking of any particular sub-section, but generally of sect. 4. He continues: James, L.J. does not allude to it; Mellish, L.J. said: 'Now, arrest for debt is intended as a means of enforcing payment, not as a punishment, for if the party pays the debt he is entitled to be discharged.' This observation was true of ordinary debts (*Re M'Williams*, 1 Sch. & Lef. 169; *Lees v. Newton*, L. Rep. 1 C. P. 658), but not of obligations to pay under orders made under sect. 4, sub-sect. 3, of the Debtors Act 1869. The punitive character of sect. 4 of the Debtors Act 1869 which was pointed out in *Middleton v. Chichester* (*ubi sup.*) has been since so often recognised that it cannot now be questioned." He cites some cases and goes on to say: "In these cases, however, the fact that a commitment under that section is not to be regarded simply as a form of civil process, but as punitive, is distinctly recognised. Having regard to the Debtors Act 1878 and to the decisions to which we have referred, it would be clearly wrong now to apply Mellish, L.J.'s observation in *Cobham v. Dalton* (*ubi sup.*) above quoted to obligations to pay money in obedience to orders made under the Debtors Act 1869, s. 4, sub-s. 3." It is quite true that, when he goes on to say what they should do with the case then before the court, he speaks only of sect. 4, sub-sect. 3, that being the one which deals with trustees who have had trust funds in their possession. But I have read the whole passage in order that it may be seen clearly that, although the words only apply to sub-sect. 3, the principle in terms applies to the whole of the exceptions in sect. 4, and not only to sub-sect. 3. In other words, he does what Lord Hatherley had so carefully and plainly done in *Middleton v. Chichester* (*ubi sup.*) He goes through, one by one, every one of the exceptions to sect. 4 and points out that they are all punitive, and not to be treated as process for enforcing payment of the debt. Under these circumstances I think that we have no choice now but to treat this order which was made by the magistrate at Great Marlborough-street as a punitive order, and one from the stringency of which James Edgcome cannot obtain relief under sect. 10 of the Bankruptcy Act 1883. I said, when beginning my judgment, that I thought that this was not satisfactory, because it is plain that the practice as to non-application of relief under the Bankruptcy Act 1883 to this

case, as to which imprisonment has been continued by the Debtors Act, has not been consistently followed. If you go on to sect. 5, it is obvious that that is just as much an exception from the general abolition of imprisonment for debt as this in sect. 4. It is put in a different section for this reason, that it is a section which deals with the power of the court to commit a debtor to prison for nonpayment of a judgment debt; and when one looks at the conditions—the only conditions under which such an order is allowed to be made—it is perfectly plain that the orders can only be made when you have got a contumacious debtor who has the means or has had the means to pay the debt, and his conduct is in the nature of contempt. His imprisonment is for a fixed time not exceeding six weeks and is a punishment, for the contempt and the suffering of that imprisonment in no way discharges the debt. One would have thought that, if the principles I have been dealing with had been applied consistently, the result would be that no relief could have been given under sects. 9 and 10 of the Bankruptcy Act 1883 after a receiving order had been made. That is not the case. So far from that being the case, under the County Court Rules 1889—which have been made applicable to all courts with jurisdiction in respect of judgment debtors' summonses by Order XXV., r. 29—"Where a judgment debtor shall upon the return day of a judgment summons satisfy the judge that a receiving order has been made for the protection of his estate or that he has been adjudicated bankrupt, and that the debt was provable in the bankruptcy . . . no order of commitment shall be made except in accordance with the provisions of the last-mentioned section" (i.e., sect. 122 of the Bankruptcy Act 1883). Under these circumstances it does seem to me a little unfortunate that the same principle has not been acted on with regard to exceptions under sect. 5 that has been acted on with regard to exceptions under sect. 4, although one would have said that if any of these exceptions were in respect of the conduct of the debtor being such as merited punishment they would have been those under sect. 5. However, as I have said before, we have not to deal with that here. The result of it is that in respect of this particular debt, a debt for rates, the getting of a receiving order will not entitle the debtor to come and ask for relief under these sections of the Bankruptcy Act 1883, notwithstanding the fact that at any time during the imprisonment he could get rid of the imprisonment by payment of the debt. Notwithstanding that, it seems to me that, unless we disregard *Middleton v. Chichester* (*ubi sup.*) and *Re Smith*; *Hands v. Andrews* (*ubi sup.*), we are bound to say, with regard to the exceptions in each one of the sub-sections of sect. 4, that the orders are punitive orders. The appeal must therefore be dismissed.

ROMER, L.J.—I also think that this appeal fails. It is true that a committal under an order of a magistrate if and when made under the statute 12 & 13 Vict. c. 14 terminates on payment by the debtor, but the committal nevertheless is of a punitive character, and not merely a legal process to compel payment. That is made clear by the express provision of the Act; for by the Act a discretion is given to the magistrate as to whether he will or will not commit, and, if he

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does commit, a discretion as to the period for which he will commit not exceeding three months. To my mind, in making an order under the Act the magistrate is bound to exercise his discretion, and in so doing he must have regard to the existing circumstances, and must consider what under those circumstances, if the money is not paid, the duration of the imprisonment ought to be. That shows that it is something in the nature of a punishment apart from legal process to procure payment. If the order is punitive, the Court of Bankruptcy has no power to interfere. The same view is arrived at by a consideration of sect. 4 of the Debtors Act 1869. The exceptions there mentioned from the general rule that there shall be no imprisonment for debt form a class of cases standing on the same footing; and they were excepted because imprisonment under them all was meant to be a punishment. That was the view expressed by Lord Hatherley in *Middleton v. Chichester* (*ubi sup.*) and by Lindley, L.J. in *Re Smith*; *Hands v. Andrews* (*ubi sup.*), and it was also expressed by Jessel, M.R. in *Morris v. Ingram* (41 L. T. Rep. 613; 13 Ch. Div. 338).

STIRLING, L.J.—I am of the same opinion, and for the same reasons; but I should like to add this: This case is one of rates, and depends on particular statutes. If it were an isolated case, one might have supposed that it had escaped the notice of the persons who framed the Debtors Act 1869, but in truth there must be a large class of orders of the same kind made by magistrates; for instance, orders for imprisonment for non-payment of costs under sect. 18 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), under 23 & 24 Vict. c. 32 for rioting in church, and under 62 & 63 Vict. c. 32 for enforcing attendance at school. I think that this is not an isolated case, and that the appeal must fail.

Appeal dismissed.

Solicitor for the appellant, *Reginald G. Davis*.
Solicitors for the respondents, *Caprons, Hitchins, Brabant, and Hitchins*.

May 5 and 6, 1902.

(Before WILLIAMS, ROMEE, and
MATHEW, L.JJ.)

LENNOX v. STODDART; DAVIS v. STODDART. (a)

APPLICATIONS FOR A NEW TRIAL.

Gaming—House used for betting—Coupon competitions—Receipt of money elsewhere than at house—Recovery of money paid in respect of bets—Betting Act 1853 (16 & 17 Vict. c. 119), ss. 1, 5—Gaming Act 1892 (55 & 56 Vict. c. 9), s. 1.

Competitions on the results of horse races and games were advertised in, and competition coupons were issued with, a newspaper belonging to the defendant, the business of which was carried on at a house in London of which he was the occupier; but the money and coupons of competitors had to be and were sent to an office abroad, the money eventually coming to the hands of the defendant.

Held, that the house was kept for the purpose of money being received by the defendant, contrary to sect. 1 of the Betting Act 1853.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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Stoddart v. Hawke (*ante*, p. 354; 85 L. T. Rep. 687; (1902) 1 K. B. 353) approved.

Sect. 1 of the Gaming Act 1892 has not repealed sect. 5 of the Betting Act 1853, which enables a person who has paid money to the keeper of a betting house to recover the same as money had and received to his use.

APPLICATIONS by the defendant in each action for judgment or for a new trial on appeal from the verdict and judgment at the trial before Wills, J. and a jury in the first action, and at the trial before Darling, J. and a jury in the second action.

LENNOX v. GORDON.

The plaintiff brought this action, under sect. 5 of the Betting Act 1853, to recover money which he had paid to the defendant's firm, J. Stoddart and Son, carrying on business at Middelburg, in Holland.

The money was paid by the plaintiff in respect of certain coupon competitions advertised by the defendant in his newspaper, *Sporting Luck*.

The plaintiff purchased a copy of *Sporting Luck* for the 11th Jan. 1901 from a newsagent, and entered the competition therein advertised by sending to J. Stoddart and Son at Middelburg, on the 14th Jan., his selections for that competition, together with 6l 8s. as required by the conditions of the competition.

The plaintiff also sent other sums to the defendant's firm at Middelburg in respect of other competitions advertised in subsequent issues of *Sporting Luck*.

All the sums sent by the plaintiff, and claimed in this action, were sent in respect of competitions on the results of horse races, except one sum which was sent in respect of a competition on the results of football matches.

From the commencement of Jan. 1901 to the 14th March 1901 the firm of J. Stoddart and Son, which consisted of the defendant and his son George Stoddart, carried on these competitions, which were known as "sporting coupon competitions," at Middelburg.

Except as hereinafter stated, the business of the competitions was entirely conducted by George Stoddart at Middelburg. The defendant was engaged in carrying on the business of *Sporting Luck*, of which he was the sole proprietor, at No. 10, Red Lion-court, London; he was the registered proprietor of the newspaper, and the occupier of No. 10, Red Lion-court, at which office the newspaper was edited and published. George Stoddart had no interest in the newspaper nor any interest in No. 10, Red Lion-court.

Sporting Luck was printed, under a contract, for the defendant, and was chiefly devoted to racing and athletic topics, and as such had a large circulation apart from its connection with the competitions.

The contract for printing the newspaper was adjudicated upon in the action of *Stoddart v. Argus Printing Company* (*ante*, p. 277; 85 L. T. Rep. 110; (1901) 2 K. B. 470).

All the said sporting coupon competitions were advertised in *Sporting Luck*, and the conditions governing the competitions were fully set out in the advertisements. Some of the competitions

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were in respect of horse races, and the remainder in respect of football matches.

A certain sum was advertised in respect of each competition as the amount of a prize to be given to the successful competitor, or among the successful competitors if more than one, in a guessing competition as to the results of specified horse races or football matches.

Each copy of *Sporting Luck* provided a coupon sheet for each competition advertised, on which each competitor might fill in his selections. The coupon sheet was either printed on the newspaper itself, or was on a detached slip with the conditions printed on the back which was called the International Supplement.

It was not obligatory on competitors to fill in their selections on the coupon sheets; but they might fill them in on plain paper, if they chose, and the plaintiff did this on two occasions.

The purchase of the newspaper was not necessary to enable any person to enter any competition, nor did it give the purchaser a right to enter, as the defendant's firm reserved the right, which was often exercised, of declining the selections and money of any particular person to whom they had an objection.

Orders for large quantities of *Sporting Luck*, which were required by wholesale newagents, were forwarded to the printers and executed by them from their own offices, and in this way the largest part of the sale and distribution of the newspaper and coupon sheets was effected. The smaller orders for *Sporting Luck* from newagents were executed at or from No. 10, Red Lion-court, either on personal application or by post. In the case of a person other than a newagent (of which there were very few each week) calling and purchasing or ordering the newspaper, although each copy contained a competition coupon, it was not known whether such person intended to or would become a competitor, or simply bought the newspaper to read.

In all cases the price charged for the newspaper containing the coupon sheet, whether detached or not, was one penny, whether the newspaper contained a competition advertisement or not.

The detached coupon sheet could be obtained apart from the newspaper at No. 10, Red Lion-court, either personally or by post, and also printed envelopes for the transmission of competition coupons to the firm at Middelburg, but no charge was made for them. The number of coupon sheets distributed in this way formed a very small proportion of the total issued, scarcely 2 per cent.

The only communications actually received at No. 10, Red Lion-court during the continuance of the said firm, which contained any reference to the competitions, were such as were, according to the practice customary with many newspapers, to be answered among other communications in the "Answers to Correspondents" column of *Sporting Luck*.

Except as otherwise herein stated, the whole of the business of the competitions was conducted by George Stoddart at Middelburg, and not at No. 10, Red Lion-court.

By the conditions of each competition the competitor was required to remit to Middelburg, to the firm of J. Stoddart and Son, the sum of one penny in the authorised way in respect of each one of his selections. Remittances could not be

made otherwise than to the firm at Middelburg. Competitors were not allowed to remit larger sums than were required for their selections, and the firm never opened accounts with competitors in respect of future competitions.

All the money was sent by post direct to Middelburg, and was received there by George Stoddart. No such money was or would have been received at No. 10, Red Lion-court, or elsewhere than at Middelburg.

On receipt by George Stoddart, at Middelburg, within the prescribed time, of the money and selection sent by any person in respect of any competition, the contract between the firm and that person was complete, and he at once became a competitor in that competition and entitled to a share in the sum offered, if his selection proved successful, except when the intending competitor was refused, in which case his money was returned to him.

All English postal orders and cheques received at Middelburg during January and up to the 18th Feb. 1901 were sent from Middelburg to England direct to the defendant's bankers in London and were by them placed to his credit; but they were never transmitted to this country until long after the events, the subjects of the competitions, had been decided. None of the said postal orders, nor any other remittances in any form whatever, were ever sent to No. 10, Red Lion-court, or received by the defendant personally in this country.

The practice was slightly altered after the 18th Feb. 1901, and English postal orders and cheques received at Middelburg were taken by George Stoddart to bankers at Flushing, where the defendant's firm had opened an account in the name of A. J. Stoddart, and were not sent back to this country by George Stoddart or anyone else connected with the defendant. The bankers purchased the postal orders and cheques from the firm, and gave the firm immediate credit for the price, and the bankers then remitted them to their London agents for collection.

The English stamps received from competitors were attached at Middelburg to the postal orders and realised along with them. Bank notes received at Middelburg were used for paying successful competitors. Other money required for paying competitors was obtained from the firm's bankers at Middelburg. All postal orders and cheques requiring signature were signed at Middelburg by a person (usually George Stoddart) authorised to do so by the firm.

Prior to the 14th March 1901 successful competitors got payment of the money payable to them by sending registered envelopes, addressed by and to themselves, to No. 10, Red Lion-court. The envelopes were then sent in one parcel to Middelburg, and remittances were then inclosed, and they were taken by a messenger to the General Post Office, London, where they were registered and posted.

The firm of J. Stoddart and Son was dissolved on the 14th March 1901, and the dissolution was published in the *London Gazette*. The last transaction into which the plaintiff entered was on the 11th March 1901. After the dissolution the business was carried on by George Stoddart.

Throughout the year 1901 down to the 14th March no money paid in respect of the compe-

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titions was received by the firm elsewhere than at Middelburg, and, except as expressly stated above, nothing connected therewith was done at No. 10, Red Lion-court.

Upon the above facts, which were agreed, Wills, J. at the trial directed the jury to find a verdict for the plaintiff, and gave judgment accordingly.

DAVIS v. STODDART.

In *Davis v. Stoddart* the plaintiff sued the defendant, Ada Jane Stoddart, under sect. 5 of the Betting Act 1853, to recover money paid in respect of coupon competitions in *Sporting Luck*.

The defendant was from Oct. 1899 to Nov. 1900 the proprietor of *Sporting Luck*, which was published at an office, No. 10, Red Lion-court, London, of which the defendant was the occupier.

During that period a system of coupon competitions, similar to those in the action of *Lennox v. Stoddart*, was carried out by means of *Sporting Luck*; but the money in respect of these competitions was received from the competitors at the office in Red Lion-court by the defendant.

The money sought to be recovered by the plaintiff was paid by him in respect of those competitions.

The defendant pleaded that the plaintiff's claim was barred by sect. 1 of the Gaming Act 1882.

At the trial before Darling, J. and a jury, the jury found the facts to be as above stated, and the learned judge upon further consideration gave judgment for the plaintiff.

The Betting Act 1853 (16 & 17 Vict. c. 119) provides:

Sect. 1. No house, office, room, or other place shall be opened, kept, or used for the purposes of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.

Sect. 5. Any money or valuable thing received by any such person aforesaid as a deposit on any bet, or as or for the consideration for any such assurance, undertaking, promise, or agreement as aforesaid, shall be deemed to have been received to or for the use of the person from whom the same was received, and such money or valuable thing, or the value thereof, may be recovered accordingly, with full costs of suit, in any court of competent jurisdiction.

The Gaming Act 1892 (55 & 56 Vict. c. 9) provides:

Sect. 1. Any promise, express or implied, to pay any person any sum of money paid by him under or in respect

of any contract or agreement rendered null and void by the Act of the eighth and ninth Victoria, chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise, in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money.

The defendant in each action appealed.

Danckwerts, K.O. and G. H. Stutfield for the appellant in the first action.—This case was governed in the court below by the decision in *Stoddart v. Hawke* (*ante*, p. 354; 85 L. T. Rep. 687; (1902) 1 K. B. 353). That case was wrongly decided and ought to be overruled. Sect. 1 of the Betting Act 1853 applies only to the case of a house or office which is kept for the purpose of betting at that house or office with persons resorting thereto, or for the purpose of there receiving money, &c., as the consideration for a promise to pay on any event, &c.:

Reg. v. Brown, 72 L. T. Rep. 22; (1895) 1 Q. B. 119;

Powell v. Kempton Park Racecourse Company, 80 L. T. Rep. 538; (1899) A. C. 143.

In the present case persons did not resort to the house in question for the purpose of betting, and no money was received there in respect of bets. The bets were made, and the money was received, in Holland. It is clear upon reading the whole of sect. 1 that the second part of that section must be read as if the words "at that house," &c., or the word "there," were inserted after the words "for the purpose of any money or valuable thing being received." A house or office kept by a betting man to which no persons resort for the purpose of betting, and at which no money is received in respect of bets, cannot be a house or office within sect. 1:

Reg. v. Brown (*ubi sup.*).

They cited also

Davis v. Stephenson, 62 L. T. Rep. 436 24 Q. B. Div. 529;

Cox v. Andrews, 12 Q. B. Div. 126.

Cohen, K.O. and B. W. Turner for the respondent in the first action.—The case of *Stoddart v. Hawke* (*ubi sup.*) was rightly decided. This case clearly comes within the second part of sect. 1 of the Act. That part of the section does not say that the house or office must be kept for the purpose of money being received there in respect of bets, and there is no reason why the word "there," or the words "at that house," &c., should be read into the section. If the section were to be so construed, it is obvious that it could be in all cases evaded. The whole business of these competitions, which were in substance betting transactions, was really carried on from the house in London, and that house was kept for the purpose of enabling the appellant to receive money in respect of those betting transactions. It is quite immaterial that arrangements were made for the actual receipt of the money by the appellant or his agent in some other place. The section provides for the case where the money is received "on behalf of such owner, occupier, keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof," and that clearly contemplates the case where the money is received at some other place by an

agent. If this money was received by the appellant within the terms of sect. 1, then the case is within sect. 5, and the person from whom it was received has a right to recover it back.

M. Shearman and G. H. Stutfield for the appellant in the second action.—The provisions of sect. 1 of the Betting Act 1853 only apply to transactions which can properly be described as bets. These competitions were not bets in any sense, but were trials of skill and knowledge in respect of which prizes could be won. The intention and purview of the Act was the suppression of betting houses at which bets properly so-called were made, and the construction of the provisions of sect. 1 ought to be so limited. The decision in *Reg. v. Stoddart* (*ante*, p. 48; 83 L. T. Rep. 538; (1901) 1 K. B. 177) was wrong and ought to be overruled; it is inconsistent with the decisions in

Stoddart v. Sagar, 73 L. T. Rep. 215; (1895) 2 Q. B. 474;

Reg. v. Hobbs, 79 L. T. Rep. 160; (1898) 2 Q. B. 647.

This action cannot now be maintained under sect. 5 of the Act of 1853, because the provisions of that section have been impliedly repealed by the provisions of sect. 1 of the Gaming Act 1892. The action under sect. 5 of the former Act is an action for money had and received to the use of the person who paid the money, and that is an action upon an implied promise to pay. Sect. 1 of the later Act provides that a promise, whether express or implied, to pay any person any money paid by him under a wagering or gaming contract shall be null and void, and that no action shall be maintained to recover any such money. Therefore the action under sect. 5 of the Act of 1853 is clearly an action within the terms of sect. 1 of the Act of 1892, and is not now maintainable.

Avory, K.C. and R. Nevill, for the respondent in the second action, were not called upon to argue.

WILLIAMS, L.J.—In the first case of *Lennox v. Stoddart*, in my judgment, this appeal must fail. Really all that I have to say in the matter will be to paraphrase that which was said in the Divisional Court in *Stoddart v. Hawke* (*ante*, p. 354; 85 L. T. Rep. 687; (1902) 1 K. B. 353). The real question which is raised in this case arises upon the consideration of sect. 1 of the Betting Act 1853 (16 & 17 Vict. c. 119), and, in particular, of what I call the second portion of that section, in regard to which it is said that the words "for the purpose of any money being received," must be read as though the words "being received" had been followed by the words "there" or "at such office." I cannot agree with that contention. I agree with the view that was taken in the King's Bench Division upon the construction of the same section. Lord Alverstone, C.J. said: "I think that, having regard to the preamble of the Act and the judgments in *Powell v. Kempton Park Racecourse Company* (80 L. T. Rep. 538; (1899) A. C. 143), the section is to be understood as prohibiting the keeping of a house for the purpose of the receipt of money wherever that receipt may be, and that it would defeat the obvious intention of the Legislature if after the words 'for the purpose of any money or valuable thing being received' we were to read in the words 'at that house.'" Then Darling, J. says the same thing. Channell, J., whose words I pro-

pose to read, seems to me to state the point in a very short and forcible manner. He said: "Now, it has already been decided in *Reg. v. Stoddart* (*ante*, p. 48; 83 L. T. Rep. 538; (1901) 1 K. B. 177) that this coupon system is a system whereby the owner of the premises receives money as the consideration for a promise to pay thereafter money in certain events. But that does not conclude the question whether the present case comes within the statute, because what has to be determined is whether the business conducted by the defendant is localised, and for that reason rendered illegal. What is done here is that there is an office in this country from which are issued newspapers with an appendix to them called coupons. In my opinion those documents are an essential part of the system, and without them the money cannot be received. I do not think it is necessary that the actual receipt of the money should take place in the office. What is forbidden is the use of the house for 'the purpose' of money being received, and I think the house is used for that purpose when there is done in it the thing which is the foundation of the whole transaction resulting in the receipt of the money." Now, in this particular case I do not propose to deal at length with the various statements in the agreed statement of facts, but the result may be very plainly stated. In my judgment Mr. Stoddart really kept this office for the purpose of the receipt of the deposits upon bets which he was about to make with depositors residing in England. He desired to get the deposits before, and to hold them at the time when he made the bet. For that purpose he invented the *Sporting Luck Racing Coupon Competition*, and the *Skill Coupon Competition*, and the *Combination System*, and the *Combination Coupon*. The coupons were issued from the newspaper office by Stoddart, for the newspaper office was the mere name with which Messrs. George and Joseph Stoddart chose to clothe the office kept by them for the purpose of carrying out these transactions. The Stoddarts were the persons making the bets and taking the risk of the sporting contingencies. The Stoddarts did not wish to receive the filled in coupon, containing the selection of the competitor together with the money, at their offices in Red Lion-court. They therefore told the would-be competitor that he must as part of the system get one of the coupons which were issued from the office, and, having got that coupon, must send it, with the proper amount of money proportioned to the selection which he has made, to Middelburg; that they will thereupon bet with him, and will retain the money which he has thus sent, it being in the first instance lodged with foreign bankers, and through those foreign bankers remitted to them. Such being the manifest facts of this case, it seems to me perfectly plain that the issue of the coupons from this office was a material and necessary step in the receipt of this money by these people, falling within sect. 1 of this Act. It seems to me that, if we were to say that because the money was paid in the first instance at Middelburg the case did not come within this Act, we should be equally bound to say that if the coupons had been issued telling the person who received the coupon to pay the money to anybody other than the Stoddarts at any place they chose to select, that that case would not

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come within the statute, although the person to whom the money was thus sent in pursuance of the coupon might be the agent of the Stoddarts to receive it, and to receive it for the express purpose that it should be sent on to them. In my judgment, for the reasons given by the learned judges in *Stoddart v. Hawke* (*ubi sup.*), this case does fall within the section. It is suggested that I should give the judgment in the other case at the same moment, and I will do so. It is an action against Mrs. Stoddart. By the notice of motion the appellant asks for judgment or a new trial upon the grounds that certain evidence was improperly admitted, that there was no sufficient evidence that the defendant was the occupier of the premises, and that the learned judge misdirected the jury in certain particulars. In my opinion the appellant fails upon all those grounds. Now, I am going to deal very shortly indeed with the general observations made by counsel for the appellant. To begin with, they said that this transaction was not a bet at all, and that the Act of Parliament only deals with bets properly so called. But at the same time they admitted that this particular transaction, assuming it to be one for which Mrs. Stoddart was responsible, was a transaction which fell within the literal words of the Act of Parliament. Under those circumstances nothing has been urged before us to-day which could induce me to say that we ought to limit those words in any way. There is only one other matter with which I have to deal. It was suggested that the effect of the Gaming Act 1892 was to repeal sect. 5 of the Betting Act 1853. It was put in this way. It was said that betting is a contract by way of gaming and wagering, and that the effect of the Act of 1892 is to render it no longer possible for a party to a transaction of that sort to recover back the moneys paid as moneys received to his use. Then it was argued that in effect sect. 5 of the Act of 1853 is merely a section which enables persons to recover money as being money received to their use. The answer to that seems to me quite plain. The action, which is brought under sect. 5, is not an action which is brought as the result of any contract, express or implied. It is an action which can be brought under the very terms of the section. It is a statutory action which enables a person to recover this money under the statute as if it had been an action for a penalty created by the statute, and under those circumstances it seems to me to be impossible to say that the effect of the Act of 1892 is to repeal sect. 5 of the Act of 1853, or to prevent the action which is sanctioned by that section being brought. Under those circumstances I think the appeal must fail in this case also.

ROMER, L.J.—I am of the same opinion. In the first place it is contended on behalf of the appellant in the first case that the coupon transactions which we have to consider do not constitute any transactions which come within the scope or view of the Act of 1853 at all. It is said that these transactions do not constitute betting. But, even if they could not be described as constituting betting in the strict sense of the term, they clearly come within the very words of sect. 1 of the Act of 1853. They are transactions under which money or valuable things are received "as

taking, promise, or agreement, express or implied, to pay or give thereafter money on any event or contingency of or relating to any horse race or other race." They come within the very words of the second part of sect. 1 of the Act of 1853, and they are, to my mind, clearly within the mischief which the Act was intended to meet. That being so, there remains to see whether, according to a careful consideration of the second part of sect. 1, the defendant in this case did not bring himself within the provisions of that part of the section. To my mind he clearly did. When we look at the nature and contents of the paper, *Sporting Luck*, and of the coupons issued with it, and the other circumstances in this case, it appears to me clear that the defendant was using his office at 10, Red Lion-court, for the purpose of carrying on there this business of the coupon competitions. The chief business of the competition, to my mind, was carried on at that office, though no doubt there was some part of the machinery of the business transacted abroad. This place, No. 10, Red Lion-Court, was undoubtedly an office; undoubtedly it was used by the defendant, who was the occupier of it, and, within the very words of the second part of sect. 1 of the Act of 1853, it was used by him for the purpose of money or valuable things being received by him as and for the consideration for an assurance, &c., within the very words of the section, so that he comes within the express provisions of that section. It is said that he is not within the section, because it ought to be implied in the words I have mentioned that the receipt must have been by him at the office. Now, the section does not say so, and to my mind there is no reason why this court should insert in the section words which are not there. Such a limitation is not necessary for the protection of the public, and is not necessary in order to prevent the operation of the section being too wide, because the operation of the section is restricted by the wording of it, and in particular by the provision that the receipt of the money must be "by or on behalf of the owner, occupier, keeper, or other person," referred to in the section. On the other hand to insert those words would, to my mind, be going a long way to render the operation of the section nugatory. It would afford an obvious and open method of enabling a person who chooses to do so, to escape from the operation of the section. The words are not there. It is not necessary to infer the meaning which the appellants insist on, and we ought not to infer it; and to infer it would be going a long way to repeal the section altogether. That being so, we then come to sect. 5, and undoubtedly, the defendant here is within the words "such person aforesaid," and he is an owner receiving money or valuable things as and for the consideration "for such assurance, undertaking, promise, or agreement as aforesaid," within the words of this section. That being so, the plaintiff here is clearly entitled under the very words of the section, to recover from the defendant the moneys that the defendant has received, because it is admitted that the defendant has received the moneys by his agent abroad. That really disposes of this action, and it only remains for me to say a word with regard to the second action. That to a great extent is covered by what I have already said with regard to the first action. I

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need only add this to what the Master of the Rolls has said. To my mind sect. 5 of the Act of 1853 has not been repealed by the Act of 1892, on this ground, that the plaintiff who sues under sect. 5 of the Act of 1853 is not in any sense suing on the gaming contract, or on any terms of it, expressed or implied, but is suing on a statutory right conferred by sect. 5, and it is clear to my mind that the statutory right was never intended to be abrogated by the general provisions of the Act of 1892. I have nothing to add in this case except to say that there has been no misdirection, or improper admission of evidence. I think that the appeal in this case also therefore fails.

MATHEW, L.J.—I am of the same opinion. The Act of 1853 was directed against the occupying of houses or offices for the purpose of betting, and some little difficulty is sought to be created in construing sect. 1 because of the absence of the word "bet." The first argument addressed to us was that this was not a betting transaction in any sense, but something of a totally different character. Now, the argument on that point seems to me out of all proportion to the difficulty of the matter discussed. I have been unable to follow the distinction made between what was done in this case and the keeping of a place for the purpose of betting. The way in which the transactions were carried out was this. A fund was created here for the purpose of these operations. The existence of that fund was advertised here. The events upon which the fund might be drawn on were stated here by public advertisement, and the arrangement made that a coupon should be issued and upon that coupon the event should be indicated in respect of which the person applying was willing to bet. How does the transaction work out? The money is transmitted abroad, and in due time comes back to this country. It is received abroad by the agent of the appellant, in fact by the appellant himself. The transaction is plainly betting on the footing that a share should be obtained from this fund if the winning horses, or the events, were properly anticipated. The transaction is in reality a bet that the horses or events will not be named. It is plainly a bet, when stripped of all the details, which were intended to mystify. If all had been done here, as it was done in the second case, with which I shall have to deal, it seems to me impossible for any reasonable person to come to any other conclusion than that this office was open for the purpose of betting in the way I have described. But, in the first place, it is said that we cannot give that interpretation to the language of the Act. It was said that this particular transaction was intended to be excluded from the operations of the Act, and the argument was that the words being "for the purpose of money being received by or on behalf of the owner," they ought to be construed to mean by or on behalf of the owner, at such office. Now, we must suppose that the framers of the Act were persons of ordinary intelligence, and if it had ever occurred or been suggested to them to insert any such words, it would have been manifest to them that the Act could be evaded at once. Therefore those words are omitted, and there are added the words "received by or on behalf of such owner," indicating, therefore, the possibility of receipt elsewhere than at the office and by some other

person than the owner. Now we are asked to insert those words for the purpose of defeating the Act, and to do what the Legislature carefully abstained from doing for obvious reasons. Here it seems to me the intention of the Legislature shines throughout the whole Act, and it would be obscuring the Act most unnecessarily if any such alteration of phraseology was made as is suggested by the appellant. This is clearly a case of money being received on behalf of the owner in consideration of the promise mentioned in the section, and that being the state of things, the first appeal clearly fails. No other ground is suggested than that this transaction is not one properly described in the section. It is unfortunate perhaps, that a paraphrase was attempted of the word "bet," but the paraphrase is clearly applicable to this case, and in every word of it covers this transaction. As to the second case, the observations I have made as to the meaning of the section are applicable, and need not be repeated. A further point was made with reference to the second case—namely, that sect. 5 of the Act of 1853 was impliedly repealed by sect. 1 of the Gaming Act 1892. Now, sect. 5 imposed a penalty, or a mulct in the nature of a penalty, for a violation of the terms of the Act of Parliament. Many years after, and after the decision in the case of *Bead v. Anderson* (51 L. T. Rep. 55; 13 Q. B. Div. 779) the Gaming Act 1892 was passed. That Act simply declared that the law would not assist a person to recover any sum in respect of a bet. How can that possibly be treated as a repeal of sect. 5, which was enacted for a totally different purpose, and imposes something in the nature of a penalty for a violation of this Act? The other objections as to what took place at the trial seem to me to entirely fail, and, therefore the whole appeal must fail.

Appeals dismissed.

Solicitor for the appellant in the first case, *C. B. Peachey*.

Solicitors for respondent in the first case, *Alpe and Ward*.

Solicitor for the appellant in the second case, *W. B. Glaster*.

Solicitors for the respondent in the second case, *Malkin and Co.*

July 14 and 15, 1902.

(Before WILLIAMS, ROMER, and STIRLING, L.JJ.)

ATTORNEY-GENERAL v. MAYOR, &C., OF BOURNEMOUTH. (a)

APPEAL FROM THE CHANCERY DIVISION.

Tramway — Construction — Provisional order — "Works substantially commenced" — Cesser of powers — Evidence of non-commencement — Tramways Act 1870 (33 & 34 Vict. c. 78), s. 18.

On the 6th Aug. 1900 the defendants were empowered by Act of Parliament to construct in their borough certain tramways which had been authorised by their provisional order under the Tramways Act 1870. Thereupon the defendants acquired a site for the necessary works and offices, executed an agreement dated the 18th April 1901 for a supply of dynamos and machinery, and another agreement dated the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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10th May 1901 for the supply of tramcars, had plans of buildings prepared, and took measures with the object of obtaining the money required for constructing the tramway, but did not commence the work of construction on any portion of the ground over which the tramway was intended to be made, or of erecting the necessary buildings and machinery on the site which had been obtained for that purpose.

An action was brought by the Attorney-General at the relation of certain persons for an injunction to restrain the defendants from proceeding with the construction of the tramway on the ground that their powers had ceased by virtue of sect. 18 of the Tramways Act 1870.

No notice of the non-commencement of the works within one year from the date of the provisional order had been published by the Board of Trade.

Held, that the words "conclusive evidence" in sect. 18 must not be read as "only evidence"; and that therefore other evidence was admissible as to the non-commencement of the works.

Re Dudley and Kingwinford Tramways Company (69 L. T. Rep. 711) overruled.

Held, also, that "works substantially commenced" in sect. 18 meant operations in execution of physical works; and that in the present case works had not been substantially commenced.

Decision of Eady, J. reversed.

By the Tramways Orders Confirmation (No. 5) Act 1900 (63 & 64 Vict. c. cxxiii.), passed on the 6th Aug. 1900, a provisional order was confirmed for the construction of certain tramways by the defendants, a section of which, known as "Tramway No. 6," would pass over the Christchurch-road, Bournemouth.

The Tramways Act 1870 and sect. 2 (among others) of the Lands Clauses Consolidation Act 1845 were incorporated in the provisional order.

By clause 3 of the provisional order the expressions "the tramways" and "the undertaking" were to mean respectively "the tramways and works and the undertaking by this power authorised."

By clause 6 the promoters were empowered (a) to construct and maintain in accordance with the deposited plans and the deposited sections the tramways thereafter described with all proper rails, points, plates, sleepers, channels, junctions, turntables, turnouts, crossings, passing places, works, and conveniences connected therewith or for the purposes thereof; and (b) to erect or construct on any lands acquired or appropriated for the purposes of the undertaking any offices, sheds, stables, workshops, stores, waiting-rooms, or other buildings, yards, works, and conveniences for the purposes of the undertaking.

By clause 18 it was provided that the tramways should not be opened for public traffic until the same had been inspected and certified to be fit for such traffic by the Board of Trade.

By clause 19 it was provided that the carriages used on the tramways might be moved "by animal power or . . . by mechanical power."

By clause 20 it was provided that, for the purpose of working any of the tramways by mechanical power, the promoters and their lessees might, subject to the provisions of this order, construct, maintain, and use stations for generating electrical power, with all necessary or proper machinery, dynamos, engines, buildings,

works, and conveniences; and might place, construct, erect, lay down, make, and maintain, on, above, or below the surface of any street or road, posts, brackets, electric conductors, wires, apparatus, subways, tunnels, cables, tubes, street boxes, and openings.

By the Christchurch and Bournemouth Tramways Act 1900 (63 & 64 Vict. c. cclxi.), also passed on the 6th Aug. 1900, the plaintiffs, the Poole and District Electric Traction Company Limited, were empowered to construct and maintain a tramway, a section of which, known as tramway No. 2, would pass over that particular portion of the Christchurch-road, Bournemouth, over which the defendants were empowered to construct their tramway No. 6. But sect. 6 of the Christchurch and Bournemouth Tramways Act 1900 provided that, notwithstanding anything in the Act contained, the plaintiffs should not commence the construction of tramway No. 2 between its commencement and the point at which it crossed the boundary of the borough of Bournemouth until after the 1st Aug. 1902; and that, if before that date the defendants should construct and complete their tramway No. 6, together with all necessary plant and machinery for working the same by means of a system to be agreed between the plaintiffs and the defendants, or, in the event of difference, settled by the Board of Trade, so as to enable the plaintiffs to exercise the running powers conferred upon them by the provisional order of the defendants, and should obtain the certificate of the Board of Trade as to the fitness of the same for public traffic, the powers in the Act contained for the construction of tramway No. 2 should cease and determine.

At the expiration of one year from the date of the confirmation of their provisional order the defendants had entered into two contracts. The first, dated the 18th April 1901, was with the British Thomson Houston Company Limited for the immediate supply of dynamos, plant, &c., for working their tramways by electricity. The second, dated the 10th May 1901, was with the British Westinghouse Company Limited for the immediate supply of electric cars.

On the 28th Feb. 1901 the defendants had acquired certain leasehold premises for the purpose of the erection of a generating station. They had not, however, on the 6th Aug. 1901 commenced the actual physical construction of the tramway No. 6, or of any portion of their system of tramways, either by laying the rails, by breaking up the roads, or by any other similar process.

The defendants had not obtained from the Board of Trade any extension of the time for the "substantial commencement" of the "works," nor was it possible, having regard to the rules laid down in the matter by the Board of Trade, that an extension should now be granted, such rules providing (*inter alia*) that the application for the prolongation of the time must be made at least one month before the expiration of the time prescribed for the commencement of the works.

In March 1902 this action was commenced by the Attorney-General, by and at the relation of the Poole and District Electric Traction Company Limited and the company as plaintiffs, asking for an injunction to restrain the defendants, their contractors, servants, and workmen, from commencing or continuing to construct the tramways

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authorised by the provisional order obtained by them; or, alternatively, that portion of the tramways known as tramway No. 6.

The ground of the action was that the defendants' powers under their provisional order had ceased to be exercisable by reason of the works not having been substantially commenced within one year, as required by sect. 18 of the Tramways Act 1870.

No notice of the non-commencement of the works within the year had been published in the *London Gazette* by the Board of Trade.

The action came on for trial before Eady, J. on the 12th and 13th June 1902, when the following judgment was delivered:—

EADY, J.—This is an information at the relation of the Poole and District Electric Traction Company Limited, and an action in which the same company are the plaintiffs against the mayor, aldermen, and burgesses of the borough of Bournemouth, and the claim seeks an injunction to restrain the defendant corporation from continuing to construct a certain tramway described in the proceedings, upon the ground that the statutory powers of the defendant corporation have expired. The defendant corporation obtained a provisional order which was confirmed by an Act of Parliament passed on the 6th Aug. 1900. By the terms of the provisional order so confirmed by statute power is given to the defendant corporation to construct certain tramways. An Act of Parliament was obtained, and was passed on the same date, by the plaintiffs, the Electric Traction Company. They also have power to construct under that statute one of the tramways which the defendant corporation are authorised to construct. But sect. 6 of the Electric Traction Company's Act provides that "Notwithstanding anything in this Act contained, the company"—that is, the plaintiff company—"shall not commence the construction of tramway No. 2 by this Act authorised between its commencement and the point at which it crosses the boundary of the borough of Bournemouth until after the 1st Aug. 1902; and if before that date the mayor, aldermen, and burgesses of the borough of Bournemouth (in this section called 'the corporation') construct and complete the portion of the tramways authorised by the Bournemouth Corporation Tramways Order 1900 which will be situate between the aforesaid commencement of tramway No. 2 and the point where the said tramway No. 2 crosses the said borough boundary, together with all necessary plant and machinery for working the same by means of a system to be agreed between the company and the corporation, or, in the event of difference, settled by the Board of Trade, so as to enable the company to exercise the running powers conferred upon them by the said order and obtain the certificate of the Board of Trade as to the fitness of the same for public traffic, the powers in this Act contained for the construction of the said tramway No. 2 shall cease and determine." In other words, although the plaintiff company acquired under their Act powers to construct tramway No. 2, those powers are not to be exercised if by the 1st Aug. 1902 the defendant corporation shall themselves have constructed the tramway. It is by reason of this section, and the special interest which the plaintiff company

have in the construction of it now in question, that the plaintiff company have brought this action. They are, as I have already said, co-plaintiffs as well as relators, and their complaint is that the defendant corporation are now exceeding their statutory powers, which it is alleged have come to an end. They have come to an end, it is contended, having regard to sect. 18 of the Tramways Act 1870, which provides, in effect, that if the promoters empowered by any provisional order to make a tramway do not commence the work within one year from the date of the provisional order, or within such shorter time as is prescribed in the same, "the works are not substantially commenced." The question raised by this action is whether the defendant corporation did substantially commence the works within the period of one year from the 6th Aug. 1900. The plaintiff company allege that they did not, and that therefore their powers have ceased. It has not been disputed that if within one year—that is to say, if before the 6th Aug. 1901—the defendant corporation had not substantially commenced their works their powers expired on that date. It is said on behalf of the defendant corporation in the first place that the only proper evidence under the Act of 1870 that they have failed to commence their works within the period of twelve months is a notice published in the *London Gazette*, and that that notice has not been published. Then, if they are wrong in that, they say, secondly, that in any case they did in fact substantially commence their works within the period of twelve months. Now, it has been decided by Kekewich, J. in the case of *Dudley v. Kingswinford Tramways Company* (69 L. T. Rep. 711) that upon proceedings in respect of the abandonment of a tramway the only evidence which the court would receive was the notice published in the *Gazette* by the Board of Trade. In opposition to that Mr. Warrington has cited two authorities, which were not cited before Kekewich, J., with the view of showing that "conclusive evidence"—the expression contained in the statute—does not mean exclusive; and that, although that evidence is conclusive, it does not prevent the parties from adducing other evidence upon the point. If the decision of this case depended upon my having to deal with that case, I should follow the decision of Kekewich, J. as a judge of co-ordinate jurisdiction having determined the precise point, leaving it open to another court to review my decision. But, in my judgment, that question does not arise, because I have come to a conclusion adverse to the plaintiffs and relators on the other part of the case. The conclusion I have come to is that the works were substantially commenced within the twelve months within the meaning of sect. 18 of the Tramways Act 1870. By the terms of the provisional order the defendant corporation were empowered to construct certain tramways. [His Lordship read clauses 3, 6, 19, and 20 of the provisional order as above set forth, and continued:] In other words, full power is given to the defendant corporation to construct and maintain their tramways and to use them as electrical tramways, and to generate the necessary current for the works to be constructed and maintained by themselves. Those being the terms of the order, I have to consider the precise meaning of the words "the works" as used in sect. 18 of the Tramways

Act 1870. Now, it will be observed that that section provides for three events. The first is: "If the promoters empowered by any provisional order under this Act to make a tramway do not, within two years from the date of the same, or within any shorter period prescribed therein, complete the tramway and open it for public traffic." The next alternative is: "Or if within one year from the date of the provisional order, or within such shorter time as is prescribed in the same, the works are not substantially commenced"—not the "tramway," but the "works." The third alternative is: "Or if the works having been commenced are suspended without a reason sufficient in the opinion of the Board of Trade to warrant such suspension." The first expression "the tramway" which is to be completed and opened for public traffic must mean the tramway authorised by the provisional order. The argument on the second branch of the section, "the works," has been this: "The works" mean the works relating to the construction and laying of the tramway itself; that is to say, the works incidental to putting the tram lines upon the road over which the tramway is to run. It is said that that construction is assisted, because the statute requires plans of the intended works to be deposited; that the only deposited plans upon which the works are shown are the works of the intended tramway itself; and that there is nothing that requires the promoters to deposit plans of any generating station or other necessary or incidental works. It is quite true that the promoters of the undertaking have to deposit plans and sections showing the intended tramway, but I am of opinion that it would be too narrow a construction of this section to limit the expression "the works" to those works. No doubt those words form part of "the works" referred to in the statute. But I think the expression "the works" in sect. 18 means the whole of the works which by the order the promoters are authorised to execute. The expression "the works" is defined in sect. 2 of the Lands Clauses Consolidation Act 1845, which is incorporated in the provisional order: "The works shall mean the works or undertaking of whatever nature which shall by the special Act be authorised to be executed." I am of opinion that the expression "the works" in sect. 18 of the Tramways Act 1870 has that meaning, and means the whole of the works which by the provisional order—which is equivalent to the special Act—the defendant corporation were authorised to execute. A question that I have still to consider is whether, attributing that meaning to the expression "the works," the defendant corporation did substantially commence the works within twelve months from the 6th Aug. 1900. Now, what the defendant corporation have done within that time has been this: I take it from the particulars of the works delivered by the defendant corporation because no evidence has been called, and the plaintiff company and the defendant corporation have dealt with this case as if there were no facts in dispute. The plaintiff company accept what the defendant corporation put forward as the works that they rely upon having done of which particulars have been furnished. Now, it appears from those particulars, amongst other things, that in Aug. 1900 negotiations were commenced by the defendant corporation with the owner of

such premises for the purchase of premises in Southcote-road, Bournemouth, for the purpose of erecting thereon offices, sheds, workshops, generating station, and other buildings requisite for the purposes of the tramways and works authorised by the Bournemouth Corporation Tramways Order 1900; and that on the 28th Feb. 1901 the defendant corporation purchased the leasehold interest in those premises for 4700*l.*; and that on the 28th Feb. that purchase was completed. It also appears from the particulars that within the twelve months the defendant corporation obtained tenders for and accepted and entered into contracts with two companies for certain works. One was a contract with the British Westinghouse Company Limited for the supply of electric cars for 28,020*l.*, and the other was a contract with the British Thomson Houston Company Limited for the sum of 14,733*l.* for the supply of dynamos, plant, &c., for the tramways. Those two contracts have been put in. The contracts are made in writing, each contract being manifestly a substantial contract, the contractors being under penalties for the due performance of the contract, and the contract in each case providing that the works comprised therein shall be commenced immediately. The Thomson Houston Company's contract, which provides for the supply of dynamos, provides not only for their being supplied, but for the fixing, and for the installation in Bournemouth of all the electrical and other part of the machinery, and so on, referred to in the specification. So that within the twelve months, with regard to the Thomson Houston Company's contract dated the 18th April 1901, contracts were entered into for providing, erecting, and fixing dynamos, plant, &c., for the purposes of the tramway. In each case, with regard to the cars and the dynamos, it is provided that the work shall be begun at once. So that it comes to this, that within the twelve months the defendant corporation entered into contracts with responsible contractors for the carrying out of a substantial portion of the works authorised by the provisional order, and the contracts provided for the work being commenced at once. Under these circumstances I am of opinion that the defendant corporation did within the period of twelve months from the passing of the Act commence the works by the provisional order authorised. In my judgment it would be far too narrow a construction to limit "the works" in sect. 18 to the actual laying of the tramway lines. It may well be that it would be proper to postpone the actual interference with the streets for the purpose of laying the tramways until as late a period as possible so that there might be less disturbance of the highway, and as little inconvenience to the public as possible; and that it would not be wise or prudent, if the tramways could actually be laid within six months, to lay them within the first six or twelve months, while still another year would be required to put up the generating plant and machinery which would be necessary before the line could be opened for public traffic. However that may be, the conclusion which I have come to is that the defendant corporation have within the period of twelve months substantially commenced their works within the meaning of sect. 18 of the Tramways Act 1870. I have not forgotten the argument addressed to me by Mr. Warming-

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tion that part 2 of the Act of 1870 shows the sense in which the expression "the works" is used. No doubt the expression "the works" is in various sections very often used, but that does not in my judgment in any way narrow the meaning in which the expression "the works" is used in sect. 18. I am of opinion the action of the plaintiff company fails, with costs as between solicitor and client.

From that decision the plaintiffs now appealed.

Warmington, K.C. and *B. J. Parker* for the appellants.—The first question raised by this appeal is whether the words in sect. 18 of the Tramways Act 1870, as to a notice purporting to be published by the Board of Trade in the *London Gazette* being "conclusive evidence" to show that works have not been substantially commenced, mean that such notice is to be the only evidence admissible. We submit that, upon the true construction of the section, other evidence can be received by the court. Eady, J. did not find it necessary to deal with this point, having regard to his opinion on the second question. Reliance is placed by the defendants upon the decision of Kekewich, J. in *Re Dudley and Kingswinford Tramways Company* (69 L. T. Rep. 711). But that case was not rightly decided, and ought not to be followed. A bankruptcy can be proved *aliunde* and not only by the production of the *London Gazette* :

Reg. v. Thomas, 22 L. T. Rep. 138.

The production of a Queen's printers' copy of an Act of Parliament was held to be sufficient evidence of the passing of the statute :

Re Yarmouth and Ventnor Railway, (1871) W. N. 236.

The second question is whether, by reason of the contracts of the 18th April 1901 and the 10th May 1901 into which the defendants have entered, and the acquisition by them of a site for the necessary works and offices, the works had been substantially commenced within one year from the date of the confirmation of the provisional order, under sect. 18 of the Act of 1870. Eady, J. decided that the word "works" in the section referred not only to the physical laying of the tramway, but to every other act incidental to the scheme and authorised by the provisional order—in short, anything necessary for carrying out the undertaking. That view, however, is we submit, not correct, for "works" must mean operations in execution of physical works of the tramway, and not such operations as entering into contracts and acquiring land. Accordingly the works were not substantially commenced within the statutory period, and the defendants' powers have therefore ceased.

Vernon R. Smith, K.C. and *Charles Church* for the respondents.—As to the first question, it is left to the Board of Trade to determine many matters in relation to tramways (Act of 1870, ss. 8, 16, 20, 33, 41, 42), and they have to decide whether works have been substantially commenced. The notice which is required to be given by them under sect. 18 is to be "conclusive evidence" of the matters referred to in that section, and that is the only evidence which is admissible :

Re Dudley and Kingswinford Tramways Company (*ubi sup.*).

As to the second question, what has to be con-

sidered is whether the promoters of a tramway have taken some *bonâ fide* steps to carry out the works authorised by their provisional order. It is not necessary that there should have been physical works, in order to comply with the words "works substantially commenced." For the purpose of sect. 18, "tramway" must mean the tramway undertaking as a whole; and where the promoters of a tramway have shown by the steps taken by them that they have a *bonâ fide* intention of carrying out the works authorised the requirements of the section have been fulfilled. In the present case the defendants had acquired the necessary site for their office and works, and they had entered into contracts in which it was specified that the operations were to be begun immediately. There was no object in pulling up the roads until the other part of the works was done. Under the circumstances, therefore, the defendants have done all that they could to comply with the section.

B. J. Parker replied.

WILLIAMS, L.J.—I am very sorry that I have to deliver the judgment I am about to deliver in this case, and if I could have seen my way out of delivering this judgment it would have afforded me very great satisfaction, because I do not think that the actual result of my judgment really accords with the true view of the case. The action is by the Attorney-General at the relation of the Poole and District Electric Traction Company. The object of the action is to restrain the Bournemouth Corporation from commencing or continuing to construct the tramways authorised by their Act, or, alternatively, that portion thereof which will be situate between the commencement of tramway No. 2 and the point where such last-mentioned tramway crosses the boundary (as it existed at the time of the passing of the company's Act) of the borough of Bournemouth. The ground upon which it is sought to restrain the Bournemouth Corporation from continuing to carry out the tramway works is based upon the 18th section of the Tramways Act 1870. By that section it is provided as follows: "If the promoters empowered by any provisional order under this Act to make a tramway do not, within two years from the date of the same, or within any shorter period prescribed therein, complete the tramway and open it for public traffic; or if within one year from the date of the provisional order, or within such shorter time as is prescribed in the same, the works are not substantially commenced; or if the works having been commenced are suspended without a reason sufficient in the opinion of the Board of Trade to warrant such suspension; the powers given by the provisional order to the promoters for constructing such tramway, executing such works, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the same as is then completed, unless the time be prolonged by the special direction of the Board of Trade; and as to so much of the same as is then completed the Board of Trade may allow the said powers to continue and to be exercised if they shall think fit, but failing such permission the same shall cease to be exercised, and where such permission is withheld then so much of the said tramway as is then completed shall be deemed to be a tramway to which all the provisions of this Act relating to

the discontinuance of tramways after proof of such discontinuance shall apply and may be dealt with accordingly." I do not know that I need read any more of that section at present. It is said that the works in question, which were preliminary works authorised by the provisional order, confirmed by the Act of Parliament, have not been substantially commenced within one year. It is said that there has been no prolongation of time or certificate of commencement obtained from the Board of Trade; that under this state of things it is *ultra vires* for the defendants, the Bournemouth Corporation, to continue the works authorised by the provisional order, confirmed by statute; and that under those circumstances an injunction ought to go. Now, the first answer which is given to that on behalf of the defendants is this: It is said that the only way of proving that those events have happened which are mentioned in the second of these alternative paragraphs in sect. 18 is by the production of "a notice purporting to be published by the Board of Trade in the *London or Edinburgh Gazette*" to the effect that the "tramway has not been completed and opened for public traffic, or that the works have not been substantially commenced, or that they have been suspended without sufficient reason," that being "conclusive evidence for the purposes of this section of such non-completion, non-commencement, or suspension." It is said that those words "conclusive evidence" in the latter part of the 18th section mean shall be the only evidence. I cannot agree in that conclusion. Eady, J. does not give any judgment based upon his own reasoning and conclusions upon this point, but he followed the decision of Kekewich, J. in the case of *Re Dudley and Kingswinford Tramways Company Limited* (69 L. T. Rep. 711), that, upon proceedings in respect of the abandonment of a tramway, the only evidence which the court would receive was the notice published in the *Gazette* by the Board of Trade. Then he says: "If the decision of this case depended upon my having to deal with that case, I should follow the decision of Kekewich, J. as a judge of co-ordinate jurisdiction." Then he goes on to point out how the question in this case arises, and then he says: "I have come to a conclusion adverse to the plaintiffs and relators on the other part of the case. The conclusion I have come to is that the works were substantially commenced within the twelve months within the meaning of sect. 18." It is necessary that in this court we should determine this question; and in my opinion it is not a right construction of the last clause of sect. 18 to read "conclusive evidence" as if the words were exclusive, or the only evidence. The sort of ground upon which the argument is based is this: It is said, if you look at the alternatives mentioned in the beginning of sect. 18, you will find that the whole phrase is that the body appointed is the Board of Trade, which is to determine whether anyone of those alternatives has occurred; and that, under those circumstances, the meaning of the provision that the notice published by the Board of Trade shall be conclusive evidence is that it shall be the only evidence. I am not sure that that might not have been so if the major premise were true—that is to say, if it were true that the Board of Trade is appointed the body to determine the three alternatives which are mentioned in the

18th section. But it is not so. It is quite true that, as regards the third alternative, the Board of Trade is the body appointed: "If the works having been commenced are suspended without a reason sufficient in the opinion of the Board of Trade to warrant such suspension." It may be said, perhaps, that in that case the Board of Trade has only a duty to decide whether the works have been suspended without a sufficient reason. But as to the other two alternatives there is no such provision; and the very fact that the Board of Trade is mentioned in the third alternative goes to show that the Board of Trade is not the body which shall exclusively determine these matters. Under these circumstances I am of opinion the decision of Kekewich, J. in the case of *Dudley v. Kingswinford Tramways Company* (*ubi sup.*) cannot be supported. That being so, it becomes necessary to deal with the other point, and that is the question whether "the works" were, in fact, substantially commenced within twelve months, within the meaning of sect. 18. Eady, J. has held that they were substantially commenced. He arrived at that conclusion by a consideration of what is the precise meaning of the word "works" as used in the Tramways Act 1870. He came to the conclusion that the words "the works" are used in such a sense that they may not only include physical works actually executed, but may also include the taking of any substantial step towards the carrying out of the contract. And he included in such substantial step the giving of the order for the execution of certain parts of the work, and also the buying of some land which was bought for the purpose of erecting the generating station. I cannot myself agree with this construction. In my judgment, substantial commencement of the works means the execution of physical works. In this particular case there is no evidence given, but particulars have been asked for by the plaintiffs of the defendants of the substantial commencement of the tramways and works, and in those one finds mentioned a contract of the 18th April 1901 by the defendants with the British Thomson Houston Company Limited for the supply of dynamos, plant, &c., and also a contract of the 10th May 1901, under the defendants' seal, with the British Westinghouse Company Limited for the supply of electric cars for the tramways. It is admitted that there are no works actually executed, and that nothing had actually been done as part of the works of the tramways before the expiration of twelve months from the date of the confirming Act. But it is said that the giving of the orders by these two contracts of the 18th April 1901 and the 10th May 1901 constitute a commencement of the works. I cannot, at any rate for myself, say that that is so. The giving of an order is, after all, an attempt to get something done by somebody else instead of doing it yourself; and it appears to me that the giving of an order cannot be said to be anything more than evidence of an intention to execute the works, and that it cannot be said that that was a substantial commencement of the works. Under these circumstances it seems to me that the second of the alternatives mentioned in sect. 18 comes into operation, and that from that time the powers given by the provisional order ceased to exist except as to so much of the same as was

then completed (there was none in this case), "unless the time be prolonged by the special direction of the Board of Trade." There has been no prolongation of the time for the substantial commencement of the works. There has been an application since the action to the Board of Trade to extend the time for completion, but that is another matter. That application was based upon the hypothesis that the time for commencement had been observed. The decision of Eady, J. was given upon this matter before the application to the Board of Trade, and as to tramway No. 6 they gave leave for prolongation without prejudice to the pending litigation. But if Eady, J.'s judgment cannot be supported, as I think it cannot, that order of the Board of Trade will go for nothing, and that order extending the time for completion will not affect the matter in any way. The reason why tramway No. 6 was exceptionally dealt with is this: By the special Act obtained by the Poole and District Electric Traction Company they got certain powers which take effect only if the Bournemouth Corporation do not themselves commence or complete, as the case may be, these works along that same line before Aug. 1902; but if the time for commencement has gone by without commencement, the completion afterwards would hardly be possible. Under these circumstances I am sorry to say that I see nothing for it but to reverse the decision of Eady, J. upon the ground that it is plain on the evidence that there has been no substantial commencement of these works within the specified time. I should have been glad if I could have seen that there was some way by which the Board of Trade could put right and remedy this slip, for I cannot help thinking that it is but a mere slip. It seems a very sad thing that the defendants cannot do what a private individual or a private company can do. The defendants by this slip may be prevented from carrying out the necessary works after they have, I am afraid, spent a considerable sum of money, or rendered themselves liable to spend a considerable sum of money, in respect of the contracts that they have already entered into. Under these circumstances one would have liked to have given an opportunity to the defendants to get the Board of Trade to do something to prevent this certainly unfortunate result. But I can only say that under the circumstances I cannot myself see how they can do it. This appeal must consequently be allowed with costs, and I think that an order for an injunction will have to go coupled with the necessary declaration.

ROMER, L.J.—I am of the same opinion. It is said, and I think it probably is the case, that if this appeal succeeds, which in my opinion it ought to do, great hardship will be inflicted upon the defendants. But clearly this court cannot allow considerations of that kind to affect its judgment on the true construction of the Act of Parliament which we have to consider. Indeed, it should be borne in mind that the provisions in question which have to be enforced here are provisions which in the interests of the public ought, when fairly construed and properly construed, to be strictly enforced, even though the enforcement of them results in individual hardship. Now, the only and short question which arises in this case is whether or not the defendants under the provisional order obtained by them have

substantially commenced the works within one year from the date of that order within the meaning of the phrase in that behalf contained in sect. 18 of the Tramways Act 1870. Now, the defendants take two points. The first point I may state as follows: Sect. 18 deals with the promoters' powers ceasing in three cases—namely, first, if the promoters do not make their tramway within two years from the date of the provisional order, or within any shorter period prescribed in that order, and open it for public traffic; secondly, if they do not within one year from the date of the order, or within such shorter time as is prescribed in the same, substantially commence the works; and, thirdly, if the works, having been commenced, are suspended without a reason sufficient in the opinion of the Board of Trade to warrant such suspension. With regard to those three cases there is a clause at the end of sect. 18 of the Act which provides that a notice purporting to be published by the Board of Trade in the *London* or *Edinburgh Gazette* to the effect that a tramway has not been completed and opened for public traffic, or that the works have not been substantially commenced, or that they have been suspended without sufficient reason shall be conclusive evidence for the purposes of this section of such non-completion, non-commencement, or suspension. Now, it is said on behalf of the defendants that, having regard to the construction of the Tramways Act 1870 taken as a whole, the provision as to the notice published in the *Gazette* being conclusive evidence means that that notice is to be the only evidence that the court can look at. In other words, the contention comes to this, that, in the matter of determining whether the powers of the promoters have ceased under the section, the opinion or determination of the Board of Trade is alone to be looked at or obtained, and inferentially that there is no jurisdiction in the High Court to consider the question apart from the determination of the Board of Trade. The first question, then, is, Is that a right construction of that provision in the section? In my opinion it is not. I need scarcely point out that if the Legislature had intended to make such a provision as is insisted on on behalf of the defendants it could have readily done so by clear and simple language. It certainly in this Act has not done so. Admittedly there is nothing clear in this Act which expressly provides for the Board of Trade determining the question as to substantial commencement of the works or as to the tramway being completed and opened for public traffic beyond what I shall say in a moment as to the second part. And in the absence of an express provision for such a power being given to the Board of Trade, you can only infer it if the rest of the Act of Parliament renders that inference necessary. In my opinion, in this Act of Parliament there is no such necessary inference. Certainly one cannot infer it from the fact that in other parts of the Act you do find special matters confided, if I may use the expression, or intrusted to the opinion or decision of the Board of Trade alone. On the contrary, I should think that the natural inference, when you find certain express provisions of that kind in the Act, would be that, where you find other clauses of the Act not contained in those express provisions, it was not intended that the opinion or decision of the

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Board of Trade should be final. But in this case I think that there are other considerations which show that such an inference as is contended for by the defendants cannot be made. The argument on behalf of the defendants on this point comes to this, that in the first two heads that are dealt with in sect. 18 of the Act of 1870—namely, the tramway not being completed and the works not being substantially commenced—you ought to imply and must imply that there is an insertion of the words “in the opinion of the Board of Trade.” That is what it practically comes to. Now, as a matter of fact, when you have to deal under sect. 18 with the third circumstance there provided for—namely, a suspension of the works—you do find an express provision that the suspension is to be “without a reason sufficient in the opinion of the Board of Trade to warrant such suspension.” That is an express provision following immediately after the first two cases. And I think that it is almost inevitably the inference from those three clauses that in the first two the Legislature did not intend to cover them by an implied insertion of the words “in the opinion of the Board of Trade.” It appears to me that the first two alternatives provided for by sect. 18 are put in contrast with the third. There is another consideration which points in the same direction. The first alternative, as I have already mentioned, refers to a completion of the tramway, but the whole clause says that the powers are to cease if the promoters do not within two years complete the tramway and open it for public traffic. As a matter of fact, under the provisional order of the defendants in this case, there is an express provision which runs thus: “The tramways shall not be opened for public traffic until the same have been inspected and certified to be fit for such traffic by the Board of Trade.” Now, it is to be noticed that in the special Act the Board of Trade has had committed to it the duty of certifying the tramways being fit for traffic, and no doubt when that certificate is given it is final, and then the tramways may be opened. But merely obtaining that certificate will not enable the promoters to escape from the operation of the first alternative in sect. 18, for not only must they complete the tramways, not only must they be fit for such traffic, but they must, within the words of the provision I am referring to, be in fact open for public traffic. So that, though they got their certificates, if they delayed in opening the tramway for public traffic they might still find that their powers had ceased at the end of two years. Clearly you cannot in that case infer for a moment that the Legislature has provided that the question of simple fact whether the tramway had in fact been opened for public traffic was in any way committed to the consideration of the Board of Trade at all. It appears to me, therefore, on these considerations that the first point taken on behalf of the defendants must be answered adversely to their contention. I then pass to their second point, which is shortly this: They have, as they say, complied with the provisions, and the works referred to in sect. 18 have been substantially commenced. Now, it is to be noticed that the provision as to the works being substantially commenced follows immediately after the provision as to the tramways being completed and opened

for public traffic, and seems to be another provision directed in the interests of the public towards preventing delay on the part of the promoters in getting the tramway opened for public traffic. Moreover, I think a light is thrown as to the meaning of the word “works” in the clause I am referring to by the following provision in sect. 18. It says that in the three cases indicated “the powers given by the provisional order to the promoters for constructing such tramway, executing such works”—and clearly to my mind those words refer to the works mentioned as being substantially commenced in the prior sentence—“or otherwise in relation thereto shall cease to be exercised except as to so much of the same”—that is, of the works or the tramway—“as is then completed.” It appears to me, therefore, that in this section the words “works substantially commenced,” referred to subsequently, as I have pointed out, as “works executed,” have their ordinary meaning, and point, I think, to some physical act done by the promoters, or by their contractors, agents, or servants. I think that is further borne out by the definition in par. 3 of the provisional order obtained by the defendants, which provides that “the expressions ‘the tramways’ and ‘the undertaking’ shall mean respectively the tramways and works and the undertaking by this order authorised.” I note the word “respectively,” showing that the word “tramways” goes with the words “tramways and works” in my view of that definition. It is said—but I need not decide whether it is the fact or not—that, for the purpose of construing sect. 18 of the Act of 1870, you ought to have regard to the definition in the Lands Clauses Consolidation Act 1845, s. 2. If that be turned to and had recourse to, what does it say? The definition there is as follows: “The expression ‘the works’ or ‘the undertaking’ shall mean the works or undertaking of whatever nature which shall by the special Act be authorised to be executed.” I note the words “to be executed.” All these considerations therefore point, in my opinion, to the conclusion that the words in sect. 18, “works substantially commenced,” are used in their popular or, I might say, in their natural sense, and that they mean works and nothing but works. Now, let me see what it is that the defendants say has been done by them by way of works substantially commenced. They first appear to have bought some leasehold land, but they did nothing upon it. They did not erect any buildings or commence any work upon it whatever. Can it be said that the mere purchase of vacant land and the doing nothing whatever on that land after it was bought, and not erecting any work or not commencing to erect or do any work whatever upon it, is within the words of sect. 18 of the Act of 1870 a substantial commencement of the works? In my opinion it cannot be so said. What else is there in the way of alleged works commenced by the defendants in this case? There are only the two contracts which have been relied upon by the defendants. What are those contracts? Substantially they are contracts for the delivery of chattels, so far as I can ascertain, but they may go beyond that, and I will take it that they are contracts for the construction of something which may properly be called “works.” Was anything done under those contracts within the time limited

by sect. 18? Nothing. Neither did the contractors do anything, nor their servants, nor the defendants nor their servants. The contract was made and nothing more. How can the defendants say that they have commenced works merely because the contractors have contracted to do works when those contractors have not in fact done or commenced any works whatever under the contract? It appears to me that it cannot be so said. In this case the defendants did not even do what they might have done under the contracts in question—namely, give a written order to the contractors to commence the works. Even that written order was not given by the defendants, but, as I have said, the contracts were contracts and nothing more, and no works whatever were opened or commenced under or by those contracts. There is nothing else whatever in this case on which the defendants can rely as showing that they have substantially commenced the works. In my opinion that contention wholly fails. It follows that the plaintiffs are entitled to succeed, and that this appeal ought to be allowed. I so far appreciate the hard position of the defendants, that I should have been personally glad if I could have seen that there was any way by which, by application to the Board of Trade or otherwise, the defendants might have been enabled to remedy what may well have been a slip on their part. But it has been admitted before us—and I agree that the admission had to be made—that there is no existing power on the part of the Board of Trade or any other body, so far as I can see, unless it be an Act of Parliament itself, which can put this matter straight. It is too late to apply to the Board of Trade. That being so, however hard it may be upon the defendants, it appears to me that the plain duty of this court is to allow the appeal, and to grant the declaration and the injunction which have been asked for.

STIRLING, L.J.—I am of the same opinion, and I have very little to add. The question which arises in the present case is whether the defendants, who have obtained a provisional order for the making of certain tramways, have lost their powers of making the tramways and executing the works authorised by that order under the provisions of sect. 18 of the Tramways Act 1870, which is incorporated in the order. It is contended on behalf of the plaintiffs that the defendants have lost those powers by reason of the works not having been substantially commenced within one year from the date of the provisional order. Now, at the end of sect. 18 there is a provision that “a notice purporting to be published by the Board of Trade in the *London or Edinburgh Gazette* . . . to the effect that a tramway has not been completed and opened for public traffic, or that the works have not been substantially commenced, or that they have been suspended without sufficient reason, shall be conclusive evidence, for the purposes of this section, of such non-completion, non-commencement, or suspension.” It is said that—regard being had to this proviso and to the general scope of the Act with reference to the position of the Board of Trade in relation to the tramways—the only proper evidence of the works not having been substantially commenced is a notice published in the *London Gazette* by the Board of Trade. Now, the provision of the Act is that such a notice is to be

conclusive evidence, and of course such it is. No such notice exists. But this is not saying that it is to be exclusive evidence of the fact, and I can find nothing in the other provisions of the Act which would enable the court to infer upon the construction of the Act that such was the intention of the Legislature—that is to say, that it was intended to intrust the Board of Trade and no other body with the power of determining whether or not the subsequent events which are referred to in that section had happened or not. As regards the third—namely, the suspension of the works without a sufficient reason—the opinion of the Board of Trade is specially referred to; and it may be that in that case the determination of the Board of Trade—it probably is so—is alone the means of ascertaining whether that had been construed or not. But I can find nothing as regards the other two. The reasons for that have been fully gone into, and I do not desire to add anything with regard to that point. We come then to the question whether on the evidence before the court it ought to hold that the works were not substantially commenced within the year. Now, with reference to the word “works,” I think the distinction is drawn in the section itself, as has indeed already been pointed out, between the construction of the tramways and the execution of the works; and, as regards the construction to be put on the word “works,” the learned judge in the court below put a wide construction on the word. He said he thought the expression “works” in sect. 18 meant the whole of the works which by the order the promoters were authorised to execute. I am not prepared to differ upon that interpretation of the word “works,” and in particular, as at present advised, I do not agree with the argument which was addressed to us by Mr. Warmington with reference to clause 6 of the provisional order, which authorises the promoters to do two sets of things: “(a) To construct and maintain in accordance with the plans and sections deposited at the office of the Board of Trade for the purposes of this order as the same have been amended previous to the passing of the Act confirming this order (which plans and sections so amended as aforesaid are in this order referred to respectively as ‘the deposited plans’ and ‘the deposited sections’) the tramways hereinafter described with all proper rails, points, plates, sleepers, channels, junctions, turntables, turnouts, crossings, passing places, works, and conveniences connected therewith or for the purposes thereof”; and “(b) erect or construct on any lands acquired or appropriated for the purposes of the undertaking any offices, sheds, stables, workshops, stores, waiting-rooms, or other buildings, yards, works, and conveniences for the purposes of the undertaking.” It was contended on behalf of the plaintiffs that the word “works” ought to be limited to those which are specified in sub-sect. (a) of sect. 6 of that order. I am not persuaded that that is the true construction, and for the present purpose I assume that the works which are referred to in sect. 18 of the Act, which is incorporated, as I say, in the order, extend to those mentioned in sub-sect. (b) as well as sub-sect. (a). But still I think that the true interpretation of sect. 18 is that some works must be substantially commenced, and that some substantial portion of the works authorised by the

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order must have been physically set about by the promoters. Now, when we look at that which is alleged to be the commencement of the works, we find that nothing has been done physically at all except the preparation. There are the negotiations, there are plans and estimates prepared, there are advertisements issued, and there are tenders and contracts and a purchase of a leasehold interest in certain premises; but nothing beyond. I cannot think that works can be said to be substantially commenced when all that is done is that they have been contracted for—no doubt, by substantial contractors—but that no part of them has been executed within the required time by the contractors; and that is what we find here. Neither can I think that the mere purchase of a piece of land for the purpose of erecting or constructing the buildings and works for the purposes of the Act—that is to say, the acquisition or appropriation of this land without anything being done upon it—satisfies the condition. In that state of things I agree that the plaintiffs have made out that which they allege—namely, that the works have not been substantially commenced within the prescribed period. Now, the Board of Trade certainly have powers of extending the time either for the commencement or for the completion of the works, and, if it had been possible that an effective application could have been made to the Board of Trade for the exercise of that power, I should have said that anything that was done by this court ought in no way to prejudice any such application which might be made. But our attention has been called to the rules which have been made by the Board of Trade under the Act itself, and which by the terms of the Act of 1870 have the force of an Act of Parliament. There we find that the times have been prescribed both for applications—first for extending the time for the commencement of the work; and, secondly, for the time for the completion of the work. And we find that the time for applying for extending the time for the commencement of the work passed by without any application having been made. Therefore it seems to me that, so long as that order remains unrepealed, no effective application can be made to the Board of Trade. The result, therefore, must be that the injunction must be granted as asked, and that this appeal must be allowed with costs.

Appeal allowed.

Solicitor for the appellants, *Sydney Morse*.

Solicitors for the respondents, *Lovell, Son, and Pitfield*, agents for *J. and W. H. Drutt*, Bournemouth.

June 24, 25, 30, and July 21, 1902.

(Before WILLIAMS, ROMER, and STIRLING, L.JJ.)

JEREMIAH AMBLER AND SONS LIMITED v. MAYOR, &C., OF BRADFORD. (a)

APPEALS FROM THE CHANCERY DIVISION.

Water—Running stream—Interference with flow of water—Rights of riparian owners—Action against public authority—Dismissal of action—Costs—Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61), s. 1.

An action was brought by the plaintiffs for an

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

injunction to restrain the defendants from obstructing the flow of water in a certain stream, by means of sluices that they had erected in connection with the electric light works which they proposed to construct under a provisional order obtained by them.

The plaintiffs also claimed damages for injury alleged to have been done to their premises and to goods stored therein, owing to their premises having been flooded by an overflow from the stream caused by a heavy thunderstorm on a certain date.

Joyce, J. dismissed the action with costs as between party and party only, refusing to allow the defendants their costs as between solicitor and client, on the ground that the case did not fall within the Public Authorities Protection Act 1893, as it was not one in which the defendants were charged with a breach of duty under any Act of Parliament.

Against that part of the judgment the defendants appealed, and the plaintiffs appealed against the dismissal of their action.

Held, that the obstruction created by the sluices erected by the defendants, although it might be regarded as an obstruction to the flow of water, was not the cause of the unfortunate result to the plaintiffs' premises, which occurred through the unaccustomed flow of water; and that therefore the plaintiffs were not entitled to damages.

Held, also, that notwithstanding that the obstruction was a material obstruction, it was not such as could reach the plaintiffs' premises, and they were not entitled to an injunction to restrain any repetition of the damage.

Bickett v. Morris (L. Rep. 1 Sco. & Div. 47) and Orr-Ewing v. Colquhoun (2 App. Cas. 839) considered.

Decision of Joyce, J. affirmed.

Held, also, that the sluices formed part of the works which the defendants had statutory power to construct, and were erected by them in pursuance of, and solely in execution or intended execution of, those powers; that therefore the erection constituted an "act done in pursuance, or execution, or intended execution of a public duty or authority," and that the action was one which fell expressly within the statute.

Fielden v. Corporation of Morley (82 L. T. Rep. 29; (1900) A. C. 133) considered and applied. Decision of Joyce, J. reversed.

THE plaintiffs, who were mohair and worsted spinners, had for many years carried on their business at a mill which was partly built over a stream, known as the Bradford Beck, the stream being covered over at this point.

In Oct. 1899 the defendants built brick walls along both sides of the stream, and erected a main sluice across it, about 300 yds. below the plaintiffs' premises, and also side sluices along one side of the stream below the plaintiffs' premises and between the main sluice and a bridge.

The object of the sluices was to divert the stream so as to provide motive power for the driving of electrical machinery placed in the works which the defendants had erected on adjoining land, under the powers conferred upon them by their provisional order for lighting their city by electricity.

The plaintiffs alleged that the sluices or sluice gates obstructed the flow of water from the

stream and caused it to overflow its banks; and in particular they complained that during a thunderstorm which occurred in July 1900 the pressure of water in consequence of the obstruction caused by the defendants' sluice gates, which on that occasion were raised to the top, and the consequent heading-back of the stream forced up the covering of the stream on the plaintiffs' premises, bursting up the floor of their buildings erected over the stream, and flooding a large portion of the basement.

The rooms which were thus flooded contained large quantities of mohair, worsted, and machinery, which were damaged by water.

The plaintiffs accordingly brought an action against the defendants claiming an injunction to restrain them from obstructing the flow of water in the stream, and thereby flooding the plaintiffs' premises, and from allowing the sluice gates already erected by them to remain so as to obstruct the flow of water. They also claimed damages.

The defendants denied that any obstruction was caused by their sluices, and contended that the same were in no way responsible for what happened on the plaintiffs' premises; but alleged that the damage to the plaintiffs' premises was the result of *vis major*.

The question was whether the damage was the result of the unaccustomed flow of water down the stream, or whether it was the result of the sluices, which had been put up by the defendants below the plaintiffs' mill, checking back the unaccustomed flow of water.

The action came on for trial before Joyce, J. in Aug. 1901, when his Lordship decided that the construction or existence of the sluices had caused no damage to the plaintiffs, nor had the same in any way affected, within the plaintiffs' premises, the effect of the flood water.

In dismissing the action his Lordship gave the defendants costs as between party and party only, refusing to allow them their costs as between solicitor and client, his Lordship being of opinion that the case did not fall within the Public Authorities Protection Act 1893 as it was not one in which the defendants were charged with a breach of duty under any Act of Parliament.

Against that part of the judgment the defendants appealed, and the plaintiffs appealed against the dismissal of their action.

Both appeals were set down for hearing together, the plaintiffs' appeal being argued first.

Neville, K.C. and *Hughes, K.C.* (with them *Kenyon Parker*) for the plaintiffs.—The learned judge in the court below came to the conclusion that the plaintiffs had not sufficiently proved that the disaster to them was the result of the act of the defendants in erecting the sluices and altering the beck. The question is whether his Lordship was right in considering that, having regard to the action as a whole, the burden of proof was upon the plaintiffs and not upon the defendants. We submit that the case of *Bickett v. Morris* (L. Rep. 1 Soc. & Div. 47) shows clearly that the burden of proof lay on the defendants to show that what they had done, which was an interference with the *alveus* of a natural stream, did not and could not cause an alteration of the flow of water past the plaintiffs' premises and thereby inflict a legal injury on them. There may then

be a difference between the question of damages and the question of injunction—with reference to the question on which side there lies the burden of proof. The learned judge was erroneously of opinion that there was no distinction between the two, but that what he had to consider was whether the plaintiffs had satisfied him that the disaster which undoubtedly had overtaken them was the result of the act of the defendants. The defendants' contention was that the plaintiffs had to prove not only that what the defendants had put in the bed of the stream has had the effect of retarding the flow of the water and thus altered it as it passed the plaintiffs' premises and flooded them and done them damage, but that the plaintiffs had to make a comparison between the original state of the river and the state of the *alveus* after the obstruction had been placed there; and, further, that, unless the state of the *alveus* after the obstruction had been placed there was compared with the state of the river before, and the plaintiffs were found to be in a worse position than before, they could not succeed in their case. Our contention is that that is absolutely bad law. The result of *Bickett v. Morris* (*ubi sup.*) is that any interference with the bed of a stream as against other riparian owners is an injury unless it can be shown that what has been done does not affect the flow of the water past the premises of the other riparian owners. If *Bickett v. Morris* means anything it must mean that. It was, to use the words of Lord Westbury in that case, the first decision establishing the important principle that an encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor. Lord Westbury puts the principle as applicable both to the *ex adverso* and the adjacent proprietor. He does not limit it to the person on the opposite bank of the river. That case is absolutely plain upon the point that the burden of proof is thrown upon a person who puts an obstruction in the bed of the river. That decision was considered by Lord Blackburn in the case of *Orr-Ewing v. Colquhoun* (2 App. Cas. 839), and he does not suggest that it was not a decision that the burden of proof lay on the person who, being in possession as riparian owner, found an adjacent riparian owner interfering with the *alveus* of the river. The defendants must satisfy the court that, contrary to the opinions of the plaintiffs' experts, it is impossible that the effect of the sluices can be felt at any point of the plaintiffs' riparian property. In order to do that, they must contrast the evidence of experts on the one side with the evidence of experts on the other. According to *Bickett v. Morris* (*ubi sup.*), the plaintiffs are entitled to say that they will have the *alveus* left undisturbed, because, unless the defendants can show that beyond all reasonable doubt what they did cannot affect the flow of the water past the plaintiffs' premises, they are not entitled to maintain their obstruction of the stream.

Sir Robert Reid, K.C. (with him *Tindal Atkinson, K.C., Younger, K.C., and W. J. Waugh*) for the defendants.—[WILLIAMS, L.J.—We think on the evidence that the conclusion of Joyce, J. was right, and that the sluices not only did not cause the accident in question, but also that the obstruction, so far as there is any by the sluices is of such a character that in no case could it cause any injury to the

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plaintiffs' premises. Therefore we only wish to hear you upon the legal proposition—that is to say, upon the point arising on *Bickett v. Morris* (*ubi sup.*).] Taking *Bickett v. Morris* to its fullest extent against the defendants, if it be the fact that this particular flood did not, then, from the example of this flood, no other flood can cause these sluices to be an obstruction or injury or damage to the plaintiffs under any circumstances.

Neville, K.C. in reply.—The rule established by *Bickett v. Morris* (*ubi sup.*) is a plain, intelligible rule, easily understood and easily followed, and from which I submit the court ought not to allow any departure. That case stands as the decision of the highest tribunal. Lord Blackburn's comments on it in the case of *Orr-Ewing v. Colquhoun* (*ubi sup.*) are *obiter dicta*, and he was dealing with a different case altogether—the case of the rights of the public on a navigable river as against the riparian proprietor. It did not raise the point dealt with in *Bickett v. Morris* (*ubi sup.*) at all, and Lord Blackburn did not and could not have altered the law as established by *Bickett v. Morris*. Therefore, though I accept the decision of the court with reference to the question of fact, and, accepting that, I must admit that the plaintiffs cannot recover damages, yet I do submit that they are entitled to an injunction to restrain the defendants from continuing the obstruction in the stream in question.

WILLIAMS, L.J.—In this case we think that the judgment of *Joyce, J.* must be affirmed. If the statement of claim is looked at, the claim of the plaintiffs here divides itself into two parts. First, the plaintiffs claim an injunction to restrain the defendants from obstructing the flow of water in a natural watercourse in the city of Bradford, known as the Bradford Beck, and thereby flooding the premises of the plaintiffs, known as the Midland Mills, and from allowing certain sluice gates already erected by them on and across such watercourse to remain so as to obstruct the flow of water therein. Then there is also a claim for damages, 33,000*l.* I will deal first with the claim for damages. Unfortunately, upon the occasion of this storm there can be no doubt that the result of the flow of the water down the stream was such as to do very great damage to the premises of the plaintiffs. The whole question in this case has been, so far as it is a question of fact, whether that damage was the result of this unaccustomed flow of water down this beck, or whether it was the result of the sluice put up by the defendants below the mills of the plaintiffs checking back that unaccustomed flow of water down this beck. Having considered the evidence and having heard all the arguments, I think, speaking for myself, that it is proved to demonstration that the sluices erected by the defendant corporation had nothing at all to do with the unfortunate result that occurred from the unaccustomed flow of water in the beck. It is not necessary for me to go at length through the evidence, or criticise it generally. It is quite sufficient to say that I agree with the judgment of *Joyce, J.* in this respect, and I agree with him for the reasons that he has given, and which were amplified very forcibly by Sir Robert Reid in his argument the other day. Under these circumstances I do not, so far as this part of the case is concerned, propose to say anything in

detail concerning the evidence which was given. But I do wish to say this about the evidence. It does seem to me that really the whole substratum of the argument which Mr. Neville addressed to us was this: That a good many of the scientific witnesses—I am speaking now of witnesses on both sides; I do not mean to say it is true of one side more than the other, but the particular evidence to which I am about to refer is the evidence of the defendants' witnesses—in their desire to negative the allegation of the plaintiffs and their witnesses do seem to me to have made general allegations which it was impossible to support. Those observations which they did make gave Mr. Neville the foundation upon which he based a very cogent argument; that is to say, that, if it had been necessary in this case to support all the propositions which were put forward on behalf of the defendants and which were criticised by Mr. Neville, I should have felt very great difficulty in supporting the defendants' case. But the real fact of the matter is that, quite apart from these theories of experts, the simple facts of this case seem to me entirely to negative the suggestion that the injuries and damage were caused by the existence of the sluices. But what I have said of course only disposes of the question of fact as to how the damage was caused, and negatives the right to recover any damages. It still remains to consider whether or not the plaintiffs are entitled to an injunction to restrain the continuance of the sluices. Now, I wish to say for myself that I am perfectly satisfied upon the evidence that the sluices do cause a sensible obstruction of the flow of the water at the point in question. I have already said that I am perfectly satisfied that that obstruction, although it must be recognised as a sensible obstruction of the flow of the water, had nothing at all to do and was in no sense the cause of what occurred at the plaintiffs' mill, or the damage which the plaintiffs sustained. But, although that is so, I am still of opinion that there was a sensible alteration caused in the flow of the water by the presence of the sluices. I am not prepared to say how far back that obstruction might affect the flow of water as it was passing the lands of the various riparian proprietors. I cannot say really on the evidence whether it would or would not in some conditions of the river affect the flow as it passed the plaintiffs' mill. Neither am I, of course, prepared to say—taking the view that I do—that you can treat this obstruction like the case of a stake put in the water, which was disposed of by Lord Cranworth in the House of Lords, in the case of *Bickett v. Morris* (L. Rep. 1 Sco. & Div. 47), by the application of the maxim *De minimis non curat prætor*. But notwithstanding that, and notwithstanding the fact that the obstruction is a sensible obstruction, I think as things stand at present, and as the evidence is now before us, that the plaintiffs are not entitled to any injunction at all. The real truth of the matter is, according to my understanding of the judgments in the House of Lords, and particularly the judgment in *Bickett v. Morris* (*ubi sup.*), that it is not a true proposition of law to say that a riparian proprietor is always entitled to an injunction if there is any obstruction of the water by a riparian proprietor above him, unless you can say that the obstruction is so small that it lets in the application of

the maxim *De minimis non curat prætor*. It seems to me that there is nothing in the opinions of the Law Lords in *Bickett v. Morris* (*ubi sup.*) which compels one to arrive at such a conclusion—a conclusion which would, in my judgment, if it were good law be really impossible of application with regard to the enjoyment by successive riparian proprietors of the convenience and advantage of the flow of water. But I propose at the present moment just to read one short passage from the opinion of Lord Westbury in *Bickett v. Morris* (*ubi sup.*) as showing that Lord Westbury had it in his mind that, whether the plaintiffs were applying for damages or whether the plaintiffs were seeking to get an injunction, in either case they must show a present sensible injury or some evidence of it. The particular passage that I am going to read is upon p. 61 of L. Rep. 1 Sco. & Div. But in order to make that passage easily intelligible as a part of my argument—when I say easily intelligible I mean the words are intelligible enough in themselves—I will read first the small passage that Mr. Neville read to us from the opinion of Lord Cranworth. That was the passage on the top of p. 59 of L. Rep. 1 Sco. & Div., and it is a quotation by Lord Cranworth from the judgment of Lord Benholme: “The owners of the land on the banks are not bound to obtain or be guided by the opinions of engineers or other scientific persons, as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is in this case, and in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say: ‘We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.’ This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure.” That is the passage from which Mr. Neville invites us to draw the conclusion that if you have got a flowing stream, and you have got any obstruction which is a sensible obstruction, and falls outside the limits of the *minima* of which the law will not take notice, the proprietor who complains of that is entitled *de jure* to an injunction. Now, having read that passage, I will read the passage from Lord Westbury’s opinion to show that that was not the way in which he understood the proposition. At the bottom of p. 61 of L. Rep. 1 Sco. & Div. he says: “In the bed of a river there may possibly be a difference in the level of the ground which, as we know, has the effect of directing the tide or current in a particular direction. Suppose the ordinary current flows in a manner which has created for itself by attrition a bay in a particular part of the bank; if that were obstructed by a building, the effect might be to alter the course of the current so as to direct the flow with a greater degree of violence upon the opposite bank, or upon some other portion of the same bank; and then, if at that part of the bank to which the accelerated flow of the water in greater force is thus directed, there happens to be a building erected, the flow of the water, thus produced by the artificial obstruction, would have

the effect, possibly, of wearing away the foundation of that building at some remote period, and would thereby be productive of very considerable damage.” I judge from that passage that Lord Westbury, at all events, would not have affirmed that you are entitled to an immediate injunction irrespective of some suggestion that there was a cause at work which at some period or other would be productive of very considerable damage. Now, if one turns to the opinion of Lord Blackburn in *Orr-Ewing v. Colquhoun* (2 App. Cas. 839, at p. 853), he says: “I have come to the conclusion that they”—that is, the court below—“have taken a mistaken view of the principle on which the case of *Bickett v. Morris* (*ubi sup.*) in your Lordships’ House, and those Scotch cases which are there affirmed, were decided, or, at least, have applied it to a case to which I think the true principle does not apply. I think and submit to your Lordships that the principle on which they were really decided was that where any unauthorised erection is a sensible injury to the proprietary rights of an individual there is *injuria* for which he might, in a court of law in England, recover at least nominal damages. A court of equity in England or the Court of Session in Scotland in the exercise of its equitable jurisdiction would not order the removal of the erection if convinced that the damage was only nominal, but where there is an injury to the proprietary rights in running streams, the present injury now producing no damage may hereafter produce much. And I understand the principle of *Bickett v. Morris* (*ubi sup.*) to be that where an erection is a present sensible *injuria* to the proprietary right of the owner of the other part of the *alveus*, or of the opposite bank of a running stream, he may have it removed on the ground that there is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage. And I think the same principle will apply where the complaining party is not a proprietor, *ex adverso*, of the spot where the erection is made, but is a proprietor of land on the banks of the stream below the spot, but so near to it that the erection *in alveo* alters the natural flow of the water on the complaining parties’ land. But I do not think it was intended to be decided, and I do not think it is the law, that an erection *in alveo* of a natural stream is illegal *per se*, if all who have property on the banks of the stream consent to the erection. Nor do I think it was meant to be decided, nor do I think it law, that a riparian proprietor on the water of Kilmarnock or on the water of Irvine, into which it flows, ten miles below the town, on whose land the flow of the water would be in no way affected, could have maintained the action against Bickett for altering the line of his building in the town on the water side, which Morris, the proprietor of the houses and building ground immediately opposite, did maintain, for I think that there would be no injury to the proprietary right of the party complaining in respect of such land, no *injuria* to him.” I gather from those observations that the view of Lord Blackburn—who is expressly recognising the authority of *Bickett v. Morris* (*ubi sup.*)—is that with reference to an injunction nobody is entitled to ask as of right for an injunction unless he is in a position to show that the obstruction to

the water will hereafter affect his proprietary rights. It is quite true that the moment he can show that, it is not necessary for the complaining party to say exactly what damage will result. He must, however, in my judgment, in order to entitle him to an injunction, show that the obstruction is of such a character that it might reasonably be expected that some injury will be caused to him, the complaining party, by the obstruction. Now, in my judgment, if you take the particular injury which is suggested by the plaintiffs here, the evidence shows to demonstration not only that the sluices did not cause the particular damage which is the subject of this action, but that in no condition of the water could they possibly have that result. Under these circumstances it seems to me that the plaintiffs are not only not entitled to damages, but they are not entitled to an injunction. It may be that hereafter—though I do not think it very probable—there might be some evidence to show that the obstruction here in some way so affected the flow of the water as to produce some injury—some undermining injury or some other injury of a totally different character to the injury caused in this action. If that state of things should ever come about, I do not wish to be supposed to say that the plaintiffs could not come upon giving certain evidence of that and obtain an injunction. But all that I do say is that at the present moment there is not upon the evidence any appearance whatsoever of any alteration in the flow of this stream brought about by the sluices doing any damage to the plaintiffs' mill excepting that damage which it has been suggested was brought about on the occasion of this storm. And I am perfectly clear myself upon the evidence that the sluices not only did not cause that damage upon this particular occasion, but that no condition of the river ever could bring about damage of a similar character or cause any injury of a similar character to the plaintiffs. Under these circumstances, although the sluices in fact must have produced some alteration in the flow of the river, it seems to me—I mention that piece of evidence—that the fall of the water, 2ft. or 3ft., whatever it was, at the sluices where it passed over them does prove that to a certain extent there must have been a retardation in the flow of the beck at that point. And I have no doubt that to the extent of some 2ft. or 3ft. the water was penned up or penned back. Whether such penning back would reach the plaintiffs' premises I cannot on the evidence say. I should think it was very doubtful. At all events it is not suggested that that such a penning back is causing or could cause any damage to the plaintiffs as riparian proprietors. Under those circumstances I think that, without departing in any way from the rule that was laid down in *Bickett v. Morris* (*ubi sup.*)—whether you take it as stated by Lord Cranworth or take it as stated by Lord Westbury—the plaintiffs have no right to an injunction. The result is, as there is neither injunction nor damages, the action fails altogether, and I think that the appeal must therefore be dismissed.

ROMER, L.J. — In the first place, upon the evidence I have come to the conclusion that the erection by the defendants of these sluices and weirs did not cause, or in any way contribute to, the damage suffered by the plaintiffs in respect of

which they sue. That disposes of the case so far as concerns the claim for damages. I also think that the plaintiffs fail in their claim for an injunction on the ground that, wholly apart from any question of damage, on the evidence they have not established that the erection of these works by the defendants caused any sensible *injuria* to the rights of the plaintiffs, and that therefore they are not entitled to an order to have these works removed. The claim for an injunction therefore also fails, and the appeal must be dismissed.

STIRLING, L.J.—I agree with the conclusion of fact at which my brethren have arrived. I rely on the evidence to which our attention was called by Sir Robert Reid, as to the carrying capacity of the stream at the sluices which have been erected by the defendants. That to my mind affords an answer to much of the evidence which was adduced on behalf of the plaintiffs. But it is rather in the nature of an *argumentum ad hominem* than carrying complete conviction to my mind. In fact, I doubt very much the basis of the reasoning on which both sides rely in the estimation of the volume of water which passes at the various points in this stream in a flooded state, which was its condition on the occasion which is referred to. But the other point to which he called attention—namely, the escape of water—does seem to me to be a very strong piece of evidence to show that the result which caused the damage was not due to the penning back of the water at the sluices, but to the vast accumulation of water from the extraordinary storm which took place on the date of this disaster. Coming to that conclusion, it follows that no damages can be given in this action, and in the result the plaintiffs are content with asking for an injunction. The injunction thus asked for is necessarily a mandatory injunction, claiming the removal of these sluices, which have now been erected for some time. In awarding a mandatory injunction the court has a discretion. And it is pointed out by Lord Blackburn in the case of *Orr-Ewing v. Colquhoun* (*ubi sup.*) that although there might be a case in which nominal damages would be awarded at law for an injury to the rights of a riparian owner on a river, yet it would not necessarily follow that the court would order the removal of the erection if it was considered that the damage was not only nominal, but that there was no probability of any substantial damage arising from the continuance of the erection. Now, the state of things here is this: that there has occurred an extraordinary storm, and the damage which has resulted is not, in our opinion, attributable to the acts of the defendants. It seems to me that it is almost impossible to suppose that in any future case any such damage would be occasioned by these works of the defendants. I think, therefore, that it would not be in accordance with the practice of the court if, in such a case as this, a mandatory order was made. I should like also to add, speaking entirely for myself, that I have a further difficulty as to the position of the plaintiffs, because the complaint of the plaintiffs is that the defendants have erected movable sluices that can move up and down in the channel of the river, and they attribute the damage to the existence of these sluices. On the other hand, they, or their predecessors in title, have built over the channel of

the river, and the plaintiffs' case is that the proximate cause of the damage was the existence of that covering; because one point on which both sides are agreed was this, that the disaster was due to the retardation of the current of the stream caused by its rise so as to come in contact with the erections which had been placed over it on the plaintiffs' ground. Before I could have assented either to an award of nominal damages or to the granting of an injunction, I confess I must have heard further argument. In the conclusion of fact at which we have arrived, it is not necessary to go into that. I desired to state my own view in order that it might not be supposed that it had been passed by.

Appeal dismissed.

The defendants' appeal was then argued.

Tindal Atkinson, K.C. (Sir *Robert Reid, K.C. Younger, K.C.*, and *W. J. Waugh* with him) for the defendants.—The act, neglect, or default (if any) in respect of which the plaintiffs brought this action was done in pursuance, or execution, or intended execution of Act of Parliament and of public duty and authority—namely, in pursuance, or execution, or intended execution of, among other Acts, the Electric Lighting Acts of 1882 and 1888 and the Bradford Electric Lighting Order 1883 confirmed by the Electric Lighting Provisional Orders (No. 8) Act 1883. The defendants accordingly object that sub-sect. (a) of sect. 1 of the Public Authorities Protection Act 1893 has not been complied with. It was alleged that the defendants in carrying out their statutory duties, the purchase of the land and the subsequent erection of the sluices, caused an injury to the plaintiffs. That contention has been negatived by the court. In *Fielden v. Morley Corporation* (82 L. T. Rep. 29; (1900) A. O. 133) Lindley, M.R. pointed out that the preamble or the title of the Act must be incorporated therewith. It is "An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." The question has arisen also in

The Ydun, 81 L. T. Rep. 10; (1899) P. 236;
Chamberlain and Hookham Limited v. Bradford Corporation, 83 L. T. Rep. 518.

The latter case shows how wide the interpretation has been that has been put on the Act of 1893 by the Chancery Division. Kekewich, J. held in that case that the defendants, the Bradford Corporation, were entitled under the Act to costs as between solicitor and client. [ROMER, L.J.—If what the defendants did in that case was something done "in pursuance, or execution, or intended execution" of a statutory duty, it seems to me that every public body would always be entitled to solicitor and client costs in every action.] In the present case the defendants' act was done in pursuance, or execution, or intended execution of an Act of Parliament, the act complained of being the putting of these sluices in the stream to the detriment of the plaintiffs. That was an act of construction, which was warranted and empowered on the part of the defendants by statutory powers. If the Act of 1893 is to be construed as being limited to acts in the shape of the execution of public duties, I submit that the supply of light, and the supply of water,

and the drainage of a district, are all acts which the Legislature has thought fit to intrust to the hands of a public authority. The Bradford Corporation is a public authority, and not a private trading concern.

Neville, K.C. (with him *Hughes, K.C.* and *Kenyon Parker*) for the plaintiffs.—What has to be decided is whether the effect of sect. 1 of the Act of 1893 is unlimited, so that, whenever a public authority is sued in respect of anything which it has done—because a public authority must always be acting under some statutory authority—such authority, if successful, is entitled to solicitor and client costs. I do not think that the statement of the law can be put more precisely than it was in *The Ydun* (*ubi sup.*) by the learned President. The question is whether the effect of the statute is that where a public authority is authorised to enter upon a commercial enterprise of any kind, its proceedings in furtherance of that commercial enterprise are to be upon a different footing from those of other persons, and its opponents are to be condemned in solicitor and client costs in case they are unsuccessful in litigation against the public authority. In *Fielden v. Morley Corporation* (*ubi sup.*) there was the building of an aqueduct over the land of another person. It is perfectly clear that that could only have been done under some special Act—that is to say, an Act which gave a special authority. The first subject of inquiry, therefore, is whether it was done in pursuance of a public duty. Some limitation must be put upon the absolutely general words of sect. 1 of the Act of 1893, for *prima facie* one does not attribute to the Legislature the imposition of gross injustice. It causes an intolerable injustice if the interpretation that the defendants seek to put upon the section is really right—that is to say, that because a public body is exercising proprietary rights you must either submit to what you believe to be an interference with your rights, or you must be mulcted in a special penalty because you have dared to sue a public authority. That never could have been intended. It is contrary to the course of the Legislature to legislate and differentiate in this way. What makes this work done by the defendants a public duty any more than the same enterprise carried out by a syndicate or by private individuals? The lighting of a town, which is a private enterprise, supposing A., B., and C. get statutory authority to carry it into effect, does not become a public duty because a public authority gets the same powers. The mere substitution as undertakers of a public authority does not convert what otherwise was not a public duty into a public duty. If Kekewich, J. was right in the decision that he came to in *Chamberlain and Hookham Limited v. Bradford Corporation* (*ubi sup.*), then I admit that there is no limitation of the words of the section at all. But I contend that he was not right. All the cases which have been decided up to the present time, except that of *Chamberlain and Hookham Limited v. Bradford Corporation* (*ubi sup.*), are readily distinguishable from the present case. They are cases where either the public authority was acting undoubtedly in performance of a public duty or where it was doing that which it had a special authority to do in itself, such as either erecting a hospital or carrying an aqueduct over another person's land. Of course *Chamber-*

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lain and Hookham Limited v. Bradford Corporation (ubi sup.) does not stand on that footing. But I submit that Kekewich, J. in that case was giving the section a totally unrestricted interpretation.

Cur. adv. vult.

July 21. — The following written judgments were delivered:—

WILLIAMS, L.J.—The Act 56 & 57 Vict. c. 61 is intitled "An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties"; and the short title of the Act is "The Public Authorities Protection Act 1893." It is enacted by sect. 1 of this statute that "Where, after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect." Then follow provisions (a) and (b), the former relating to the time within which the action must be brought, the latter to costs—viz., that "wherever in any such action judgment is obtained by the defendant it shall carry costs to be taxed as between solicitor and client." The Master of the Rolls (Lindley) points out in his judgment in *Fielden v. Morley Corporation* (79 L. T. Rep. 231; (1899) 1 Ch. 1), which was affirmed in the House of Lords (82 L. T. Rep. 29; (1900) A. C. 133), that although the "language" of the statute "is wide, the key to the enactment is," a desire "to protect public bodies from expense when they are unsuccessfully sued in respect of acts done, or omitted to be done, in the exercise of statutory powers or duties." Lindley, M.R. apparently thought that some limitation must be put on the wide words of the section. He seems to think that the limit is that the section does not apply to private persons acting in pursuance of a statutory authority, but only to persons who are acting in pursuance of public duties or authorities; but he does not so decide. On the contrary, he says: "It is not necessary to consider what cases, if any, do not fall within the Act, although apparently within the words. I add that by way of precaution, because some day there will probably be a great discussion as to what acts or defaults do or do not come within it." Sir Francis Jeune, in *The Ydun* (81 L. T. Rep. 10; (1899) P. 236), held that the Act applies to a public authority acting in pursuance of a trade or business which in private hands would be of a private character. This decision was affirmed by the Court of Appeal, but the judgments do not go quite the length of the judgment of Sir Francis Jeune. I mean that the judgments in the Court of Appeal do not necessarily affirm the proposition that the Act applies to municipal trading under the authority of a special Act or order which a corporation or other public body choose to obtain just as any private person might do without being under any obligation so to do. The public authority in regard to such trading is, in fact, a mere volunteer, and it may be urged that, as the public authority is under no obligation to exercise the statutory authority which it has obtained, and is at liberty to make a profit by the exercise of the authority,

such profit, however, going of course in reduction of local taxation, there is no reason why a public body trading in competition with private traders should be protected as to their costs or the time within which an action should be brought. The Court of Appeal, in affirming the judgment of the President in *The Ydun (ubi sup.)*, certainly proceeded rather on the ground that the action had been brought against a public body in respect of alleged default on their part in the execution of their public duty as the authority for the port and harbour of Preston. In the case, however, of *Chamberlain v. Corporation of Bradford (ante, p. 68; 83 L. T. Rep. 518)* the defendant corporation were empowered by a provisional order duly confirmed to supply electricity within their district, and one of the clauses empowered the corporation to "let for hire any meter for ascertaining the value of the supply of electricity by them to any customer." The corporation hired meters for this purpose which the plaintiffs alleged were an infringement of their patent, and in respect of such alleged infringement they sought an injunction, but their action was dismissed with costs. Kekewich, J. held that the corporation were entitled to have their costs taxed as between solicitor and client, as they were, in supplying the meters, acting in pursuance of a public "authority" within the meaning of sect. 1 of the Public Authorities Protection Act 1893. If this case is good law it clearly covers the present, but it does not bind us if it is wrong. The argument against it being good law is put somewhat in this way. It is said that the proper conclusion to draw from the judgment of Lindley, M.R. in *Fielden v. Morley Corporation (ubi sup.)* is that it is only public authorities which come within the purview of the Act, and that, if this is so, it is only acts done by public authorities as such—that is to say, acts done by public authorities in pursuance of a duty imposed on them by the common law, or by statute—which fall within the protection of the statute 56 & 57 Vict., or any other statute passed for the protection of persons acting in the execution of statutory and other public duties, and the exercise by a corporation of authorities or powers to carry on a business of electric light supply, or any other business which may be carried on by any person who or company which obtains the necessary order and statutory confirmation, is not something done "in the execution of statutory or other public duties" as mentioned in the title to the statute, and that the words of sect. 1, "any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority," must be construed as limited to things done in the execution of statutory and other public duties. There does not seem to be any case which decides that the words of the statute must be limited in this way. Sir Francis Jeune in *The Ydun (ubi sup.)* says that a railway company, although it certainly does act in pursuance or execution of an Act of Parliament, is not included within the operation of sect. 1. But, as he goes on to say that a public authority is protected by the section even when acting in pursuance of trade or business, I presume his view is that a railway company is not a public authority within the meaning of the statute. In *Attorney-General v. Margate Pier and Harbour Company* (82 L. T. Rep. 448; (1900) 1

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Ch. 749) Kekewich, J. held that a pier and harbour company did not fall within the section, but in that case part of the earnings were appropriated to a dividend for the shareholders. On the whole, I think it is sufficient to say in this case that the Bradford Corporation were acting in pursuance of an Act of Parliament, and that the protection of the Act seems plainly to extend to a municipal authority supported primarily by the levy of rates, and which is bound to apply all the earnings of any undertaking authorised by statute in relief of the ratepayers. I think, therefore, that we ought to order that the judgment obtained by the Bradford Corporation against the plaintiffs shall carry costs to be taxed as between solicitor and client. It may seem hard that this unequal liability for costs should be imposed upon the plaintiffs in a case where the Act of Parliament, under the authority of which the defendant corporation were acting, left it absolutely optional with them whether or not they should erect the structure complained of in the place at which they did, and where the only question between the parties was the very arguable question as to whether or not the structure thus erected by the corporation was an invasion of the rights of the plaintiffs as riparian proprietors. But I can find nothing in the Act to justify the exclusion from the protection afforded by the Act to public authorities of such a case as this.

ROMER, L.J.—Having regard to some of the arguments used on behalf of the plaintiffs, I think it right to state that this court is not concerned with the policy of the Legislature in passing the Public Authorities Protection Act 1893, and ought not to approach any question as to the application of the Act to a particular case with any feeling that it is desirable that the provisions of the Act should, if possible, either be enlarged or be curtailed in their application. The Act must be properly construed and applied even if the result may in certain cases appear to bear hardly on plaintiffs or applicants. Now, I agree with the arguments of the plaintiffs in the present case that in construing the Act the court may and ought to look to the general scope of the Act as expressed in its title. But, so doing, it still appears to me that the present action comes within the operation of the Act. The defendants in lighting or providing for the lighting of the streets of Bradford under the powers conferred upon them by their provisional order were, in my opinion, acting in execution of a public duty or authority. The sluices and works complained of by the plaintiffs were erected by the defendants in pursuance of and solely in execution or intended execution of those powers; and therefore constituted within the words of the statute an "act done in pursuance, or execution, or intended execution of a public duty or authority." And this action is one which seems to me expressly to fall within the statute, for the sole cause of complaint of the plaintiffs as against the defendants is the erection by the defendants of the above-mentioned sluices and works, and the action is one against the defendants "for" such an act as is specified by the statute. It is not an action based on some conduct of the defendants which is only indirectly concerned with their public duty or authority. It is an action whose ground is an act done by the

defendants directly in execution or intended execution of their public duty or authority. I think, therefore, that the appeal should be allowed.

STIRLING, L.J.—I am of the same opinion. In the view which I take of the facts, I find it impossible to distinguish the present case from that of *Fielden v. Morley Corporation* (*ubi sup.*). The defendants in this case are a municipal corporation having a statutory power to supply to the municipality light by means of electricity; and for that purpose to acquire lands and to construct works in execution of that power. The defendants acquired some land which adjoined a stream, including a portion of the bed of the stream. Upon that land they proceeded to erect certain sluices, the object of which was to divert the stream so as to supply motive power for the driving of the electric machinery placed in the works which they erected on the adjoining land. It seems to me that the sluices formed part of the works which they had statutory power to construct. In the case of *Fielden v. Morley Corporation* (*ubi sup.*) the defendants were also a municipal corporation. The municipal corporation had statutory power to supply the municipality with water, and in the exercise of that power they proceeded to construct an aqueduct, with reference to which the action was brought. It was held that the Public Authorities Protection Act 1893 applied; and the costs were ordered to be paid on the higher scale. I may point out that one of the arguments which was used in the present case, that there was no positive duty and that it was simply convenient in that case to supply the water, was used and did not prevail. I think, therefore, that this appeal ought to be allowed, with costs as between party and party.

Appeal allowed.

Solicitors for the plaintiffs, *Leslie and Hardy*, agents for *Greaves and Greaves*, Bradford.

Solicitors for the defendants, *Cann and Son*, agents for *Frederick Stevens*, Town Clerk, Bradford.

Aug. 4 and 5, 1902.

(Before WILLIAMS, ROMER, and
MATHEW, L.JJ.)

DYER v. SCHOOL BOARD FOR LONDON. (a)

APPEAL FROM THE CHANCERY DIVISION.

Education—School board—Elementary education—Erection of building as a pupil teachers' centre—Statutory corporation—Payment of expenses out of school board fund—Legality—Elementary Education Acts 1870-1900—Education Code (1890) Act 1890 (53 & 54 Vict. c. 2)—Education Board Provisional Order Confirmation (London) Act 1900 (63 & 64 Vict. c. cxxvii.).

The School Board for London have no power, under the Elementary Education Acts, to provide out of the school board fund pupil teachers' centres—i.e., schools for the education of their pupil teachers—such schools not being for elementary, but for higher education.

Rex v. Cook-rtton (ante, p. 171; 84 L T. Rep. 488; (1901) 1 K. B. 726) considered and applied.

Decision of Farwell, J. affirmed.

(a) Reported by E. A. SORABJOLBY, Esq., Barrister-at-Law.

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In his audit of the accounts of the School Board for London for the half year ended Michaelmas 1901, the auditor, Mr. T. B. Cockerton, disallowed (*inter alia*) by a certificate dated the 2nd June 1902 the sum of 27l. 10s. 11d. as a payment illegally made out of the funds of the school board; and surcharged Miss M. A. Eve and the Rev. E. Schnadhorst with that amount.

The reasons given for the disallowance were (1) because the sum was not paid in respect of the erection of a public elementary school within the meaning of the Elementary Education Act; (2) because school boards are not legally entitled to erect at the cost of the school fund schools or other buildings for the instruction of pupil teachers exclusively; (3) because the sum was not expended in the provision of accommodation in public elementary schools for the district of the school board within the meaning of sect. 5 of the Elementary Education Act 1870 or any of the Acts amending the same; (4) because the sum was paid in respect of the erection of a building for the provision of education in subjects not allowed, provided for, or recognised by the Education Code; (5) because the sum was paid in reference to the erection of a building for the provision of instruction of teachers, pupil teachers, or other persons who do not form part of the educational staff of a public elementary school within the meaning of the Elementary Education Acts; (6) because the school board had not any authority in law to pay the sum and to charge the same in their accounts as aforesaid.

Nevertheless, the school board proceeded with the erection of a pupil teachers' centre upon the site of certain premises formerly known as The Elms, No. 21, Hildrop-road, in the parish of St. Mary, Islington, which site had been acquired by them under the powers of a provisional order obtained in 1900 and confirmed by the Education Board Provisional Order Confirmation (London) Act 1900.

Sect. 4 of that Act provides that if the school board purchased the site it should not be used by them for a period of fifty years "otherwise than for the purposes of a pupil teachers' centre."

The school board had expressed their intention of appealing by *certiorari* to the King's Bench Division against the decision of the auditor.

By art. 31 of the Board of Education Day School Code for 1901 "the teachers recognised by the board" include "pupil teachers," and by art. 34 the managers of a public elementary school are bound to see that a pupil teacher engaged by them "is properly instructed during the engagement." Subsequent articles provided for the engagement of pupil teachers—at which time they must not be less than fifteen years of age—and for the establishment of "central classes" for their instruction, also for their periodical examination. Sched. 5 to the code comprises the curriculum of pupil teachers at the successive stages of their education, and sched. 6 contains a form of memorandum of agreement for the engagement of a pupil teacher, clause 5 of which is as follows:

The school board shall cause the pupil teacher to receive, without charge, from a certificated teacher, or other qualified teacher approved by the Board of Education, special instruction, including practical instruction in teaching, during at least five hours per week, of which hours not more than three shall be part of the

same day. Such special instruction, and any instruction in secular subjects, given to the pupil teacher during school hours shall be in the subjects in which the pupil teacher is to be examined during this engagement, pursuant to the code.

Joseph Dyer, William Tibbitt, and Everard Home Coleman, suing in their individual capacities as ratepayers, and also on behalf of themselves and all other the ratepayers of the metropolis assessable to the local rates in the metropolis mentioned in sched. 1 to the Elementary Education Act 1870, commenced an action against the school board, and then moved for an injunction to restrain them, their officers, contractors, servants, &c., until judgment in the action or further order, from expending any moneys the produce of the local rates in the metropolis (being the local rate within the meaning of the Elementary Education Act 1870) in or towards erecting or building, or continuing to erect or build, on the site in question, any building to be used for the purposes of a pupil teachers' centre or otherwise.

The motion came on to be heard before Farwell, J. on the 25th July 1902, when the following judgment was delivered:—

FAEWELL, J.—The only question before the court is, What is to be done till the action can be tried? The practice is well known. The court does all it can on a motion day, but it is impossible to hear an action on a motion day. This is an action which raises a question of very wide-reaching importance, and it is quite obvious that I could not try it under at least a day, and probably more. I would, if I could, give a day before the Vacation, but I cannot, in justice to the other suitors, do so now, because, so far as I can judge from my list, I shall not finish what I have got. If the parties had come earlier, I might have been able to give them a day before this. Now, what has happened is this: The auditor, Mr. Cockerton, who is the person appointed by the Act of Parliament, has disallowed certain payments made out of the rates in respect of certain premises in Hildrop-road for a pupil teachers' centre. He has given his reasons for the disallowance on the ground, amongst other things, "(1) because the said sum was not paid in respect of the erection of a public elementary school within the meaning of the Elementary Education Acts; (2) because school boards are not legally entitled to erect at the cost of the school fund schools or other buildings for the instruction of pupil teachers exclusively." He has also given various other reasons which I need not read. The School Board for London are dissatisfied, they tell me, with this certificate. It was dated the 2nd June 1902. They have not yet taken any steps beyond, as I am told, instructing counsel to get that certificate set aside. I can see no reason why they should not have gone at once for a *certiorari* within at least a week or a fortnight after the date of that certificate. They have not chosen to do so. Meanwhile they disregard the certificate entirely, and go on spending the rates exactly as though no certificate had ever been issued at all. What is the *status quo*? The *status quo* is that the properly constituted authority, the auditor, has disallowed these payments on the ground that they are *ultra vires*

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and illegal. What is the duty of the School Board for London? It is to refrain from spending money *ultra vires* and illegally until they have got a court of superior jurisdiction to say that the auditor is wrong. Until his certificate is set aside it remains valid and binding on them, and they ought not to disregard it. Mr. Jenkins has asked me to go into the question now on the merits. As I have already said, I would if I had time, but I cannot do so on a motion day; and I cannot, in fairness to the other suitors, give the School Board for London a precedence in point of time which, so far as I can see, they have no real equity to call for, because of their own delay in applying for the *certiorari*. What, then, is the balance of convenience? The plaintiffs are solvent. They will give an undertaking in damages. The School Board for London are at liberty to go on erecting this building if they have other funds, as it is suggested they have, available for the purpose. The only thing the plaintiffs ask is that they may be restrained from applying the rates to that purpose which the auditor has said cannot be legally applied to that purpose. If those rates are so applied, I am told by Mr. Jenkins that of course the members of the school board individually who sanctioned those payments would have to refund. Theoretically that may be so. Practically it is a very poor consolation to the ratepayers, the plaintiffs in this case, if, as happened in the other *Cockerton* case (*Rez v. Cockerton*, ante, p. 171; 84 L. T. Rep. 488; (1901) 1 K. B. 726), the only result is that the Legislature say: "It would be hard on individuals to make them refund, and therefore we pass an Indemnity Act and set them free from the liability." I say that irrespective of the fact that this is a contract on which 23,000*l.* is to be expended, and, if the cheques are signed by a number of different members of the school board, it is, at least, open to question whether they will be competent to refund the amount which will be found against them. Certainly, so far as I know, it is not usually found very easy to get sums which are disallowed by an auditor refunded. The balance of convenience appears to me to be entirely in favour of saying: "Let the School Board for London hold their hand so far as the expenditure of rates goes, and let them be loyal and obedient to the certificate which their auditor, the official duly appointed by the Act, has made." The injunction will therefore go in the terms of the notice of motion until judgment or further order. So far as I can, I will assist an early trial of the action. If I can find a day before the Vacation I will do it, but I do not think it is the least likely, so far as I can see. I will do my best. I will not stop the defendants from making payments out of the rates before Monday next—that is to say, I will stay the injunction pending an appeal, if they give notice not later than Monday. Then they must apply to the Court of Appeal for a stay.

From that decision the defendants now appealed.

Upon the opening of the appeal it was agreed between the counsel for the parties that the appeal should be treated as if it were the trial of the main question in dispute in the action—viz., as to the authority of the defendants to employ moneys derived from the rates in the way objected to by the plaintiffs—the counsel for the school

board waiving any objection as to the absence of the Attorney-General and as to the action not being maintainable without him.

Jenkins, K.C. and Llewelyn Davies for the appellants.

Upjohn, K.C., Danckwerts, K.C., and H. Court-hope-Munroe, for the respondents, relied on

Rez v. Cockerton, ante, p. 171; 84 L. T. Rep. 488; (1901) 1 K. B. 726.

The arguments sufficiently appear from the judgments.

WILLIAMS, L.J.—This is an appeal against an injunction granted by Farwell, J. The terms of the order are: "Order that the defendants, the School Board for London, their officers, contractors, servants, workmen, and agents, be restrained until judgment in this action or further order from expending any moneys, the produce of the local rates in the metropolis (being the local rate within the meaning of the Elementary Education Act 1870), in or towards erecting or building, or continuing to erect or build, on the site of the premises formerly known as The Elms, No. 21, Hildrop-road, in the parish of St. Mary, Islington, any building to be used for the purposes of a pupil teachers' centre or otherwise." The present appeal, as I have said, is against that order; but it has been agreed between the parties that, instead of dealing with this order as if it were an interlocutory order, we should treat this appeal as being a trial of the question, the object of all parties being to obtain as soon as possible a decision as to whether the moneys derived from the rates may be employed in the way mentioned in this order, and which, by this order, the defendants are, until judgment, restrained from using for those purposes. As I understand the argument of Mr. Jenkins, it comes to this: He accepts, he says, to the full, the decision in the case of *Rez v. Cockerton* (ante, p. 171; 84 L. T. Rep. 488; (1901) 1 K. B. 726). He does not deny that the application of the local rates is limited to the establishment and carrying on of public elementary schools; and he does not deny that the education in public elementary schools has to be the education of children in elementary subjects. But he says that the employment of pupil teachers is an employment which is recognised by the code, and that pupil teachers are an adjunct to the staff of teachers in the elementary schools. He says that if you look at the code and ascertain what the instruction intended by the code to be given to pupil teachers is, you will find that that instruction is certainly of a character which could hardly be described as elementary education. For the purpose of proving this he refers us to the form of agreement between the school board and pupil teachers and the surety, which is to be found on p. 52 of the code of 1901. He points out that the 5th clause of that form of agreement runs thus: "The school board shall cause the pupil teacher to receive without charge, from a certificated teacher, or other qualified teacher approved by the Board of Education, special instruction, including practical instruction in teaching during at least five hours per week, of which hours not more than three shall be part of the same day. Such special instruction, and any instruction in secular subjects given to the pupil teacher

during school hours, shall be in the subjects in which the pupil teacher is to be examined during this engagement, pursuant to the code." Then he turns to sched. 5, and he points out that under that, in the later years of the period of pupil teachership, the pupil teacher has to receive education in subjects which cannot be called elementary. Then he says it follows from this that you must regard the instruction given to pupil teachers as being something which is not dealt with in any way by *Rex v. Cockerton* (*ubi sup.*), and which was not in the contemplation of Sir Archibald Smith when he delivered his judgment in that case. Then he goes on a further step and says that if these premises are all true it follows that you are entitled to establish a separate school of the character of the pupil teachers' centres for the purpose of giving this education, and that, being empowered to establish such a school, it follows that you are entitled to build such a school and that that is a mere detail of the carrying on of the authorised school, and is necessary to it. Mr. Jenkins goes on to say that in this argument he is in no way withdrawing from his admission that the pupil teachers' centre is not a public elementary school or that the education given is not a substantially elementary education but something which is substantially different. I hope that I have stated the arguments of Mr. Jenkins and his admissions in the way in which he intended to present them. Now, speaking for myself, I am not disposed to quarrel with the proposition that in an elementary school education may be given to pupil teachers under the agreement with pupil teachers which could not properly be described itself as being merely elementary education. I do not so far quarrel with the argument which is based upon the 5th clause, but I see nothing in that agreement to lead me to suppose that that education which is undertaken by the managers to be given to the pupil teacher should not be given in the public elementary school itself. In fact, I gathered from what Mr. Jenkins said that, so far from denying it, he affirmed the practice, and said where it was done an extra payment was made to the certificated or qualified teacher who, in the school, gave that instruction. But although he makes that admission, he asks us to say—as a necessary consequence of the agreement the form of which is recognised by the code for the employment and instruction of pupil teachers, and which, as he says, is not allowed by the code to be in any way departed from—that the school board have the power to establish a separate school for the purpose of giving this instruction to pupil teachers, and to charge the cost of carrying on that separate school, and of the building of that separate school, upon the local rates. I cannot agree with that in the slightest degree. It seems to me that so to hold would be entirely inconsistent with the judgment in *Rex v. Cockerton* (*ubi sup.*). The judgment in that case in substance decides that the only schools which are to be paid for out of the rates—whether in respect of buildings or instruction or anything else—are elementary schools which are devoted to the elementary education of children. And it seems to me that, whatever instruction may be given in those schools to pupil teachers beyond the mere elementary instruction, it is a mere accessory

of the public elementary schools; and that it is not right to draw an inference from the fact of what the education may be given to pupil teachers in the public elementary schools, and that the school board have a right to establish a school for the purpose of giving education that cannot be described as elementary education in a school which it is admitted cannot be properly described as a public elementary education school. The force of what I have been saying is very much increased when you come to consider what is in fact done at this school. This is a school at which the average age of the scholars ranges between seventeen and twenty-four; it is a school apparently to which scholars may come from, not a limited district, but from any part whatsoever from which they choose to come to get their education at the school, an education which is obviously higher education, and not an elementary education. It seems to me impossible to say consistently with *Rex v. Cockerton* (*ubi sup.*) that the Elementary Education Act 1870 authorises the charging of the rates with the expense of the establishing and conduct of such a school not an elementary school, and not intended for the giving of an elementary education.

ROME, L.J.—I am also of opinion that the disallowance in question made by the auditor, Mr. Cockerton, was rightly made. What are the facts established with reference to these pupil teachers' centres? In the first place, they are schools perfectly distinct from the ordinary schools of the school board, distinct not merely in locality but in their nature. They are not public elementary schools at all; they are schools at which the education given is substantially higher education, though of course it also covers the subjects within the elementary code. The education is given not to persons who are only children. It is in evidence—and there appears to be no difference on this point—that the ages of the pupils in the pupil teachers' centres vary from fourteen years to twenty-four years. The education given, it is clear, is not even limited to making the pupil teachers fit only for the duties of acting as pupil teachers at the schools of the school board. It is clear on the evidence and on the admitted facts of the case that the education given is of a wider kind, and is not limited to the special purpose I last mentioned. Finally, though I do not think this is so material, the centres are not limited to the pupils connected with the London School Board schools. Those being the facts connected with these pupil teachers' centres, I can only say that it appears to me that the expenditure in respect of them out of the rates is wholly unauthorised by the Elementary Education Acts. It was said that there was something in the code which recognised these centres, or sanctioned some expenditure in respect of them. In the first place, all I can say is, that if the code had attempted to sanction any such expenditure it would in my opinion have gone beyond its due authority. The authority vested in the board, the power that established the code, could not have extended the provisions of the Elementary Education Acts to sanction such an expenditure. But, as a matter of fact, when the code is looked at it is clear it does not attempt to do any such thing. It very properly makes no provision with regard to these pupil teachers' centres. It does not insist in any way upon their establishment, or refer in

any way to any expenditure upon them. That being so, it is undoubted to my mind that the declaration must be made here that the school board have no power to apply the rates for the purposes of these pupil teachers' centres. There is one argument which I ought perhaps to mention, and which was founded on the special provision in the Education Board Provisional Order Confirmation (London) Act 1900. What happened with regard to that was this: The school board apparently wanted to obtain compulsory powers to purchase some sites, and amongst others a site on which they intended apparently to erect a pupil teachers' centre, and they obtained a provisional order enabling them to do so. But that provisional order simply recited that the School Board for London required to purchase divers pieces of land for the purposes of the Elementary Education Acts 1870 and 1873, and on that footing the board asked for compulsory powers to purchase amongst other sites the site in question. Now, that had to be sanctioned by an Act of Parliament, and it was so sanctioned. I gather that before Parliament the owner of the site in question insisted as a term upon some special provision for his own benefit with regard to his property which was being taken, and the surrounding property, and amongst the provisions inserted for his benefit I find this: a provision that if the school board did purchase the site in question, the site should not for a period of fifty years, I think it was, be used by the School Board for London "otherwise than for the purpose of a pupil teachers' centre." And it is said that in some way the insertion of those words, "otherwise than for the purpose of a pupil teachers' centre," gives a legislative sanction to what the school board are doing with regard to these centres. In my opinion it does nothing of the kind. That Act was not concerning itself with any question as to the expenditure of the rates upon a valid or an invalid purpose at all; it was a provision inserted, as I have pointed out, for the protection of the owner of the site. To my mind, it would be an extraordinary thing to suppose that such a provision as that was inserted for the purpose of extending the provisions of the Elementary Education Acts and sanctioning that which up to that time was unlawful. It had an entirely different object. The Legislature was not considering or dealing with any such question as we have here; it was considering simply the question of the user of land as between the owner of the land and the school board. And in my opinion it cannot be said that an Act like this was intended to sanction what was otherwise illegal under the provisions of the existing Acts and codes. That being so, that argument also appears to me to fail; and it therefore follows that this appeal must fail, and with the usual result.

MATHEW, L.J.—I am of opinion that the school board cannot establish these pupil teachers' centres without further statutory powers, and those powers do not appear to me to be conferred either by the code to which reference has been made, or by the Act of 1900 to which Romer, L.J. has just referred. We have to start with the Act of 1870, the object of which is perfectly clear; it provides for elementary education in the schools established by the school board. There is a provision in the Act for a certain purpose—namely, the

teaching of pupil teachers—and something more than the ordinary elementary education appears to be contemplated, because these pupil teachers have to be taught the art of teaching, and in that respect their position is different from the other scholars in the schools. Beyond that the school board have no power to go. What they are attempting to do is to establish what it is not at all extravagant to describe as independent colleges for the tuition of pupil teachers. The justification for the assertion that this may be done is sought in the form of the agreement to which my Lord has referred, and it has been suggested that the object of that agreement is to enable the school board to do what they have been attempting to do in the establishment of these pupil teachers' centres. It is possible to construe every word of clause 5 of the agreement as being within the powers of the school board. There is very great caution, it appears to me, in the language that is used so as not to indicate any intention of going beyond what was understood at that time to be the powers of the school board. Instruction is to be given in the elementary schools to pupil teachers, who are afterwards to act as certificated teachers, supposing their education in that respect is sufficient. The clause is drawn very carefully. "The school board shall cause the pupil teacher to receive without charge from a certificated teacher or other qualified teacher"—that does not indicate any intention to create a separate institution—"approved by the Board of Education, special instruction, including practical instruction in teaching." "Special instruction"—again it is guarded phraseology explained by the words which follow—"including practical instruction in teaching." "Such special instruction, and any instruction in secular subjects, given to the pupil teacher during school hours shall be in the subjects in which the pupil teacher is examined during this engagement." A concession is made in that respect and the certificated teacher may go beyond what is elementary. There is no power to create an institution on the footing that the pupil teachers shall receive special instruction to enable them afterwards to become certificated teachers. Then with reference to the Act of Parliament, it was not at all intended by the Act of Parliament to alter the Act of 1870; and nothing is clearer than that. Therefore the arguments with reference to the code and the statute appear to me to fail, and I agree in the judgment that has been pronounced by my learned brothers.

Their Lordships then made a declaration that the disallowance by Mr. Cockerton had been rightly made, and granted a perpetual injunction to restrain the School Board for London from making, out of the school board fund, any payments for the building of any school other than a public elementary school; and the School Board for London were ordered to pay the costs of the action.

Appeal dismissed.

Solicitor for the appellants, *C. E. Mortimer.*

Solicitor for the respondents, *F. Arnold Baker.*

CHAN. DIV.]

ATTORNEY-GENERAL, &C. v. OXFORD CANAL NAVIGATION.

[CHAN. DIV.]

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, June 4, 1902.

(Before KEKEWICH, J.)

ATTORNEY-GENERAL AND WARWICKSHIRE
COUNTY COUNCIL v. OXFORD CANAL NAVI-
GATION. (a)*Highway—Canal bridge—Approaches—Liability
to repair—Construction of statute.*

Sect. 26 of 10 Geo. 4, c. 48, a Canal Navigation Act, provided that a canal company should not be liable to repair any part of the roads approaching any bridge over their canal beyond or further than the extremity of the wing walls of any such bridge, but that the company were not to be exonerated from the repair of all such bridges and of the wing walls, ramparts, and side banks thereof.

Upon action by a highway authority to compel the canal company to repair a broken fence on a raised approach to one of their bridges:

Held, upon the construction of the section, that the company were not liable to repair the fence, although prima facie an obligation to repair a bridge would include an obligation to repair the necessary approaches thereto.

UNDER the powers conferred upon them by 9 Geo. 3, c. 70, and other statutes of George III., all since repealed by 10 Geo. 4, c. 48, the Oxford Canal Navigation Company cut through a highway in the county of Warwick known as the Coventry and Stoney Stanton main road, and carried the road by means of a bridge called Tusnes Bridge over their canal. The bridge itself was a brick structure consisting of a single arch terminated at either end by what are called wing walls. The roadway on either side was led up to the bridge by means of inclined embankments, the ends of which rested against the wing walls. The sides of the inclined embankments were supported by perpendicular stone retaining walls about 9ft. high where they met the wing walls of the bridge and thence sloped gradually down away from the bridge. On the top of one of these stone retaining walls there had been fixed some wooden posts and a railing, part of which was now broken down and thereby became a danger to the public.

The Warwickshire County Council, who were the highway authority for the district, alleged that the canal company were liable to repair the broken fence, and now brought this action for a declaration that the canal company were so liable, and a mandatory injunction to compel them to repair the fence.

The defendant company denied any liability to repair the approaches to the bridge or the fences thereon.

The determination of the question depended upon the construction of the Acts of Parliament under which the canal company made the bridge, and in particular of the following section (10 Geo. 4, c. 48, s. 26):

Provided always, nevertheless, and be it further enacted that the said company of proprietors hereby established shall not be liable to repair or amend any part of the roads approaching to any bridge or bridges

made or to be made over the said canal cuts or canals or any part thereof after such roads shall have been first made and used for one year and then put into good and sufficient repair by the said company of proprietors beyond or further than the extremity of the wing walls of any such bridge or bridges; but nothing herein contained shall be construed to exonerate the said company from the future repairs of all such bridges and of the wing walls, ramparts, and side banks thereof.

This section was a re-enactment of a section of a former Act of the canal company—viz., sect. 10 of 48 Geo. 3, c. 3.

The bridge and approaches had been originally properly made and put in a proper state of repair.

Macmorran, K.C. and P. Bagnall Evans for the plaintiffs.—Upon the construction of sect. 26, the company are bound to repair side walls. "Bridge" includes approaches thereto:

Nottingham County Council v. Manchester, Sheffield, and Lincolnshire Railway, 71 L. T. Rep. 430.

If the company is not bound to repair, there is no one upon whom the liability can fall.

Warrington, K.C. and Etherington Smith for the canal company.—We are not liable to repair the approaches to this bridge either at common law or upon the construction of sect. 26.

KEKEWICH, J.—If the question for decision depended upon the Act of Parliament 9 Geo. 3, c. 70), and particularly upon sect. 59 of that Act, it would be my duty to give judgment for the plaintiffs. That section provides for the erection by the proprietors of the Oxford Canal Navigation of bridges over their canal, and it concludes as follows: "And all such bridges so to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company of proprietors, their successors and assigns." Now, there is nothing in that Act to indicate or define what a bridge is, and I think that common sense points to the conclusion that, where the Legislature gives no guide to the meaning of the word, "bridge" includes not only the actual foot or roadway and the walls and supports thereof, but also that which is essential to the passing over the bridge—that is to say, the necessary approaches. That was the opinion of the judges in *Nottingham County Council v. Manchester, Sheffield, and Lincolnshire Railway Company* (ubi sup.), and the decision there certainly commends itself to my own common sense. But it seems to me that in the case of these bridges the Legislature itself has said that that is no longer to be the construction of the meaning of the word "bridge" in that sect. 59 of the Act of Geo. 3, c. 70, which has been repealed. It appears that doubts had arisen as to how far the proprietors were liable to repair the roads leading to their bridges, and accordingly a further Act was passed (48 Geo. 3, c. 3, s. 10), which, although repealed by 10 Geo. 4, c. 48, was re-enacted by sect. 26 of the latter Act, which provides as follows: [His Lordship read the section above set out, and continued:] That section plainly includes the subject-matter of this action, for the road in question has been made for more than a year, and there is no suggestion that at the end of the year it was not put into good repair by the defendants. It would be absurd in construing that section to say that

(a) Reported by O. F. DUNCAN, Esq., Barrister-at-Law.

K.B. Div.] **PEARKS, GUNSTON, AND TEE LIMITED (apps.) v. WARD (resp.);** [K.B. Div.]

"bridge" included the approaches to it. The section treats the approaches as distinct from the bridge itself, and relieves the proprietors from the liability of repairing the approaches, and says they are not to be liable for repairs further than the extremity of the wing walls of the bridge—that is, the retaining walls at either extremity of the structure of the bridge; but so far as that the proprietors must repair, including the parapets and side banks which I suppose are the lateral supports of the bridge itself. If that is the result, then it is said no one will be liable to repair the approaches or the fences thereon, but I do not think that can be a right contention, for I have no doubt that those persons upon whom is cast the duty of repairing the roads are liable also to repair the approaches and the fences thereon. But I am not concerned with that question. I am only asked whether the defendants are liable to repair these fences, and, as I have already explained, the Act of Parliament says that they are not, having defined "approach" as not being part of "bridge." I must therefore decide in favour of the defendants, and declare that they are not liable to repair these broken fences.

Solicitors: *Field, Boscoe, and Co.*, for *E. Field*, Leamington; *Thomas H. Jones*, for *Stockton and Sons*, Banbury.

KING'S BENCH DIVISION.

April 22 and 23, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PEARKS, GUNSTON, AND TEE LIMITED (apps.) v. WARD (resp.); HENNER (app.) v. SOUTHERN COUNTIES DAIRIES COMPANY LIMITED (resps.). (a)

Food and Drugs—Liability of limited company—Sale to prejudice of purchaser—Sale for analysis—Butter wrapped in paper—Escape of moisture—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), ss. 6, 14—Interpretation Act 1889 (52 & 53 Vict. c. 63).

A limited company, incorporated under the Companies Acts, can be convicted under sect. 6 of the Sale of Food and Drugs Act 1875, for selling an article of food not of the nature, substance, and quality demanded by the purchaser.

A sale is none the less to the prejudice of the purchaser because such purchaser has special knowledge (as where the article is bought for the purpose of analysis), unless such special knowledge is derived from what the seller informs the purchaser, either by notice or otherwise.

A sample of butter submitted for analysis was done up in grease proof paper. In consequence of this, the analyst was of opinion that there was more water in the butter at the time of purchase than of analysis; it was also found that no change had taken place in the butter. The justices were of opinion that sect. 14 of the Act of 1875 had been complied with.

Held, that this was a matter for the justices.

PEARKS, GUNSTON, AND TEE LIMITED v. WARD.

CASE stated on three informations preferred by the respondent against the appellants under sect. 6 of the Sale of Food and Drugs Act 1875, charging them with having sold, to the prejudice of the

purchaser, butter which was not of the nature, substance, and quality of the article demanded, the same having had water added thereto to the extent respectively of 8·7, 7·8, and 4·4 per cent. beyond the usual limit of 16 per cent. natural to butter.

The appellants are a limited joint stock company incorporated under the Companies Acts 1862 to 1898, and carry on business as grocers and provision merchants, amongst other places in the borough of Richmond, Surrey, their registered office being 16, Bayer-street, Golden-lane, London. The respondent is an agent of the Butter Association, 79, Mark-lane, London.

On the 30th April last the respondent caused one Annie White to purchase on his behalf at the appellants' shop at Richmond $\frac{1}{2}$ lb. of 1s. fresh butter, $\frac{1}{2}$ lb. 10d. fresh butter, and $\frac{1}{2}$ lb. of 10d. salt butter, for the purposes of analysis.

Immediately after the purchase Annie White handed the butter as she received it to the respondent, who divided it into three parts, and marked each part of the 1s. fresh butter, No. 50; the 10d. fresh butter, No. 51; and the salt butter, No. 52; and fastened up each part in a grease-proof envelope. The other requirements of sect. 14 of the Sale of Food and Drugs Act 1875 were duly complied with. A sample of each part was sent to the public analyst to be analysed.

The public analyst certified on the 4th May that sample No. 50 contained 24·7 per cent. of water; sample No. 51, 23·7 per cent. of water; and sample No. 52, 20·4 per cent. of water, and added the following observations:

No change had taken place in the constitution of the article that would interfere with the analysis.

There is no fixed standard as to the amount of water natural to butter; but it is generally understood that 16 per cent. should be the extreme limit.

It was admitted by Annie White that she understood Pearks's butter was moist, and she could see it was moist, but that she asked for butter and expected to get butter. It was also admitted by the respondent that he was not surprised on seeing the result of the analysis that the butter was adulterated with water, but when the purchase was made he expected to get pure butter.

It was proved that the process of mixing butter with milk adopted by the appellants is to put the butter into a churn with full cream milk and this is re churned; any excess of water in the butter in question was derived solely from the milk so added during this process of blending; no water was separately added to the butter.

There was no evidence that at the time of the sale the attention of the purchaser was in any way drawn by the appellants to the nature and the composition of the article sold.

Upon the application of the appellants the three samples of butter which were produced before the justices by the respondent inclosed in grease-proof paper, were sent in pursuance of sect. 21 of the Sale of Food and Drugs Act 1899 to Somerset House to be analysed, inclosed in grease-proof paper.

The Government analysts certified on the 5th Nov. last sample No. 50 contained 23·7 per cent. of water, and added the following observations:

We are of opinion that this percentage of water is excessive, having regard to the fact that the proportion

(a) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

K.B. Div.] HENNEN v. SOUTHERN COUNTIES DAIRIES COMPANY LIMITED. [K.B. Div.]

of water in butter ranges from a little below 10 to 18 per cent., but more commonly from 12 to 16 per cent.

And

In consequence of the sample having been improperly inclosed merely in paper it is probable that the butter contained more than the above percentage of water at the time of purchase.

They also certified that sample No. 51 contained 17.1 per cent. of water, and sample No. 52 17.5 per cent. of water, and added the following observation:

In consequence of these samples having been improperly inclosed merely in paper, and having been also flattened into thin pats, there must have been considerable loss of water by evaporation since the date of the purchase.

At the outset, objection was taken by the appellants to the summonses, on the ground that the appellants, being an incorporated company, they were not liable to the penalties imposed upon "a person" offending against sect. 6 of the Sale of Food and Drugs Act 1875, and that the actual seller was the person liable and should have been the person summoned, although he was the servant of the appellants and assisting in carrying on their business.

The justices overruled the appellants' contention, being of opinion that the appellants were, by virtue of sect. 2 (1) of the Interpretation Act 1889, included in the word "person" used in sect. 6 of the Sale of Food and Drugs Act 1875, no contrary intention so as to exclude a body corporate therein appearing, and that the summonses were properly taken out against the appellants. In forming their opinion, they considered the case of the *St. Helens Tramway Company v. Wood* (56 J. P. 72).

It was also contended by the appellants that there was no sale to the prejudice of the purchaser within the Act of 1875, on the ground that at the time of purchase the purchaser knew what she was in fact buying, and knew that Pearks' butter contained more moisture than other butter, and was different to other butter.

The following cases were cited: *Sandys v. Small* (39 L. T. Rep. 118; 3 Q. B. Div. 449), *Gage v. Elsey* (48 L. T. Rep. 226; 10 Q. B. Div. 518), and *Morris v. Johnson* (54 J. P. 612; 6 Times L. Rep. 171).

They also contended that the requirements of sect. 14 of the Sale of Food and Drugs Act 1875 had not been complied with, on the ground that the samples were improperly inclosed in paper, which permitted the moisture in the butter to escape.

It was contended by the respondent that there was a sale to the prejudice of the purchaser within the meaning of the section, inasmuch as the attention of the purchaser was not called to the nature and composition of the article sold, and he cited *Webb v. Knight* (36 L. T. Rep. 791; 2 Q. B. Div. 590), and *Morris v. Askew* (57 J. P. 724); that sect. 14 of the Sale of Food and Drugs Act 1875 had been complied with, and that inclosing the samples in grease-proof paper was a sufficient compliance with the section.

The justices were satisfied, and found as a fact that the purchaser did not know that the butter asked for contained such an excessive amount of moisture such as was shown by the analysis that this butter contained; that the purchaser received

something different to that asked for—namely, butter plus something the nature of which was not disclosed at the time of sale. They were therefore of opinion that there was a sale to the prejudice of the purchaser within the meaning of sect. 6 of the Sale of Food and Drugs Act 1875.

They were also of opinion, having regard to the certificate of the public analyst to whom the samples were sent immediately after purchase and the statement therein, that no change had taken place in the butter, and that inclosing the samples in grease-proof paper was a sufficient compliance with sect. 14 of the Sale of Food and Drugs Act 1875.

The questions for the opinion of the court were: (1) Does the word "person" in sect. 6 of the Sale of Food and Drugs Act 1875 include any incorporated company so as to make the appellants liable to the penalty thereby imposed upon a person offending against the section? (2) Whether upon the facts stated there was a sale to the prejudice of the purchaser within the meaning of sect. 6 of the Sale of Food and Drugs Act 1875? (3) Whether the requirements of sect. 14 of the Sale of Food and Drugs Act 1875 were sufficiently complied with?

Macmorran, K.C. and *Bicardo* for the appellants—Three points arise here: First, the appellants, being a limited company, are not a person within the meaning of sect. 6 of the Sale of Food and Drugs Act 1875. It is quite true that in the Interpretation Act "person" is to include body corporate, unless a contrary intention appears. When one looks at the Act of 1875 it is quite clear that a contrary intention does appear, for in all the sections of the Act the intention and state of mind of the person are referred to, and again by the amending Act of 1899 imprisonment can be inflicted. In *Pharmaceutical Society v. London and Provincial Supply Association Limited* (43 L. T. Rep. 389; 5 App. Cas. 857) it was held that a limited company was not a person within the meaning of the Pharmacy Act 1868. *Bramwell, L.J.*, in the Court of Appeal (42 L. T. Rep. 569; 5 Q. B. Div. 310), and Lord Selborne in the House of Lords, lay down what is the proper principle to be applied. The latter at p. 862 says: "I think the principle laid down by the junior counsel for the respondents was substantially right—that if a statute provides that no person shall do a particular act except on a particular condition, it is *prima facie* natural and reasonable (unless there be something in the context, or in the manifest object of the statute, or in the nature of the subject-matter, to exclude that construction) to understand the Legislature as intending such person as, by the use of proper means, may be able to fulfil the condition, and not those who, though called 'persons' in law, have no capacity to do so at any time, by any means, or under any circumstances whatsoever." They referred to

Stevens v. Midland Railway Company, 10 Ex. 352;

Abrath v. North-Eastern Railway Company, 55

L. T. Rep. 63; 11 App. Cas. 247;

Cornford v. Carlton Bank, 80 L. T. Rep. 121; 81

L. T. Rep. 415; (1889) 1 Q. B. 392; (1900) 1 Q. B. 22.

[CHANNELL, J.—A civil case does not conclude a criminal one, for malice of an agent may be sufficient in civil proceedings.] With regard to

K.B. Div.] **PEARKS, GUNSTON, AND THE LIMITED (apps) v. WARD (resp.);** [K.B. Div.]

the second point, the purchaser knew what she was getting, and so there was no sale to her prejudice. She knew what she was getting was not of the nature, substance, and quality demanded. They referred to

Sandys v. Small, 39 L. T. Rep. 118; 3 Q. B. Div. 449.

Thirdly, sect. 14 of the Act of 1875 must be strictly complied with, and the way in which this was wrapped in paper so that part escaped was not such a compliance. They referred to

Mason v. Cowdary, 19 Mag. Cas. 620; 82 L. T. Rep. 802; (1900) 2 Q. B. 419.

Morton Smith for the respondent.—The decision in *Pharmaceutical Society v. London and Provincial Supply Association (sup.)* turns upon the construction of that particular statute. Under sect. 6 of the Act of 1875 it has been held in *Betts v. Armistead* (58 L. T. Rep. 811; 20 Q. B. Div. 771) that want of guilty knowledge is no defence. Further, under the same section, in *Brown v. Foot* (66 L. T. Rep. 649) it was held that a master employing a servant is responsible for the act of the servant, and that even when the servant has done something contrary to the master's instructions. In *Kearley v. Tyler* (65 L. T. Rep. 261) it was held by Cave, J. that it would be a good defence for the master to show that the servant had acted contrary to his express orders and under a mistake. No contrary intention appears in these Sale of Food and Drugs Acts, and therefore the word "person" must include a limited company or a corporation. [He was not called on as to the other two points.]

Macmorran, K.O., in reply, referred to

Abrath v. North-Eastern Railway Company (sup.);
Hotchin v. Hindmarsh, 65 L. T. Rep. 149; (1891) 2 Q. B. 181.

HENNEN v. SOUTHERN COUNTIES DAIRIES COMPANY LIMITED.

This was a case stated on an information under sect. 6 of the Sale of Food and Drugs Act 1875.

Upon the hearing of the information, counsel representing the respondents took preliminary technical objection that the summons was bad upon the face of it, inasmuch as the seller, who was known to the appellant, and who in fact served him, should have been summoned and not the company, who, counsel contended, could not be summoned and dealt with for an offence of this nature and under this section, and he cited cases in respect of this his contention.

He cited, moreover, sect. 2 (1) of the Interpretation Act of 1889, wherein it is enacted that a "person" shall include a body corporate unless the contrary intention appears. Counsel contended that a "contrary intention" did appear in this case and under this section, inasmuch as the penalty for a third conviction under it was punishable by imprisonment, and he argued that the respondents as a company could not be imprisoned.

It was contended on behalf of the appellant that the respondents were a "person" within the meaning of the section of the Sale of Food and Drugs Acts, as interpreted by sect. 2 (1) of the Interpretation Act 1889, on the ground that no contrary intention appeared in either of the sections of the Sale of Food and Drugs Acts; that the preliminary objection to be summoned

was bad; and that the respondents could be convicted on the summons under sect. 6 of the Sale of Food and Drugs Act 1875.

The justices decided that the respondents were not a "person" within the meaning of sect. 6 of the Sale of Food and Drugs Act 1875, on the ground that a contrary intention appeared in that section and in sect. 17 of the Sale of Food and Drugs Act 1899, so as to prevent the application of sect. 2 (1) of the Interpretation Act 1889, and they accordingly allowed the respondents preliminary objection and dismissed the summons.

The question for the opinion of the court was whether their decision was right in law or wrong?

Ricketts for the appellant.—Lord Selborne, in *Pharmaceutical Society v. London and Provincial Supply Association* (43 L. T. Rep. 389; 5 App. Cas. 857) says at p. 865: "The thing being made universally unlawful, 'person' must, I think, there include a corporation, if the sale is made by any apprentice or servant on behalf of a corporation." There is a universal prohibition by sect. 6 of the Act of 1875, for the section says: "No person shall sell, &c." When one looks at the provisions of sect. 17 (2) of the Act of 1899, which allows the justices to inflict imprisonment, that clearly shows that the Legislature contemplated "persons" who could not be guilty of culpable negligence, and who could not commit the offence by their personal act or default.

The respondents did not appear.

LORD ALVERSTONE, C.J.—In the case of *Pearks v. Ward* three points were argued. It was a prosecution under sect. 6 of the Act for the sale of *Pearks's* butter, an article which we, at any rate, know something about. It was alleged that a summons could not be maintained where the defendants were a limited company, and that is the main point on which I have to give judgment. The other points are, that under the particular facts of the case there was no sale to prejudice of the purchaser under sect. 6, because the woman who bought it knew that the butter was moist, and the persons for whom she acted knew that it was moist. To deal first with that point, it seems to me that we have not to deal with the actual knowledge of the purchaser except so far as it is derived from what the seller informs him, either by notice, by the nature of the article itself, or by what passes at the time, because, of course, the person who buys on behalf of the inspector for analysis, buys *Pearks's* butter, and expects to get *Pearks's* butter, that is, the milk and butter mixture. We have to consider what would be the position of an ordinary purchaser. To say that because the woman stated that she knew the butter was moist, that meant that the butter had more water in it than pure butter would have had, seems to me impossible to maintain. I do not think that the statement that the woman knew it was moist is sufficient to show that there was no sale to the prejudice of the purchaser, the magistrates having found that there was. The next point raised is on sect. 14. The sample of butter was divided, and was put into grease-proof envelopes, and it is found that nothing happened which could prejudice the defendants; that, in fact, if anything, water would have escaped. The words of the section provide that each part shall be marked and sealed or fastened up in such manner as its nature will

permit. The magistrates have found that there was a sufficient compliance with sect. 14, and I think it was a matter entirely for them. Now, as to the important point whether or not these proceedings can be taken against a limited company, it seems to me to be very much the same question as arises in a civil action, whether or not a master was responsible for the act of his servant, because a corporation ought to be within these provisions unless *mens rea* is necessary as an element of the offence. The words of sect. 6 are: "No person shall sell to the prejudice of the purchaser any article of food." The Interpretation Act says: "In the construction of every enactment relating to offences punishable on indictment, or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression person shall, unless the contrary intention appear, include a body corporate." I cannot see in this section of the Act, nor in any of the circumstances contemplated, any contrary intention. This was a sale of an article which was not of the nature, substance, and quality of the article demanded by the purchaser. The description of the article came from the purchaser, and the sale was just as much a sale by a limited company as by an individual. Therefore, unless it comes within the class of cases discussed in *Pharmaceutical Society v. London and Provincial Supply Association (sup.)*, unless it clearly appears from the section that no person can sell the article unless he has some particular personal qualification, as, for instance, a licensed chemist or a qualified surgeon, or anything of that kind, I cannot see any contrary intention. In dealing with sects. 3 and 5 different considerations may arise, and also in reference to the section in the Act of 1899 to which our attention has been called; but I think this point is covered in principle by the decisions. This point has never been raised before, although there have been many proceedings under these Acts, but, as was pointed out in the course of the argument, it may well be that inasmuch as proceedings might have been taken against the managers, and the limited company would no doubt have protected their managers, there was not much object in taking the point. When one remembers that it was decided in *Betts v. Armstead* (58 L. T. Rep. 811; 20 Q. B. Div. 771) that want of guilty knowledge is no defence under this section, and that proceedings could be taken against a master for a sale by his servant, it seems to me that any ground for a distinction is cut away. Therefore, both the protective object of the section and the necessary ingredients in the offence all seem to point to putting a corporation in the same position as a private individual, provided the sale is made on its behalf. There is a case which came before Cave, J. (*Kearley v. Tyler*, 65 L. T. Rep. 261), where there was an express prohibition by the master, so that the servant was not acting within the scope of his authority, and where it was held the master would not be liable. That again shows the analogy between this offence and the ordinary case of civil responsibility. I am of opinion that a corporation can be made responsible if they have in fact sold the article. There is nothing which points to a contrary intention, and I can see no argument which shows why a corporation should be exempt from the provisions of sect. 6.

DARLING, J.—I am of the same opinion. As to the point that a corporation or a limited company would not be liable, by the Interpretation Act, person means corporation unless there is something in the statute to show that the word "person" does not bear that meaning. I cannot see here anything to exclude a limited company from the operation of the word "person." The other point has been constantly alluded to in cases which have come before the court, where it has been contended that there was no sale to the prejudice of the purchaser within the meaning of sect. 6. It is said there is no sale to the prejudice of the purchaser, because the woman knew there was some moisture in the butter, though how much did not appear. It is constantly argued in these cases that the prosecution must prove that there was a sale to the prejudice of the person who bought the article. I do not think that is the meaning of the statute. I think the words are used in the sense of being to the prejudice of purchaser in the abstract, not merely the actual purchaser. The words were probably put in for the reason that the goods might be sold with a false description, and might not inflict any kind of harm or injury, because they might be of a better quality than the goods demanded. But when one comes to consider who the purchaser is, and whether the section means the actual purchaser of the particular article, one must notice that provision is made by sect. 13 that any medical officer of health, inspector of nuisances or of weights and measures, or any police-constable, under the direction and at the cost of the local authority, may go and buy a sample of food or drugs. Applying these words as it has been attempted to apply them in many cases, to mean that the prejudice of the particular purchaser must be proved, it is apparent that it could never be proved in the case of a purchase by such a person as that. The person under that section, in all probability, goes with money which is not his own, money provided out of public funds; and, however bad the article which he gets may be, he is none the worse. He has got an article which, whether good or bad, he is not going to use; he is going to divide it into three parts and have it analysed, and then throw it away; and whether it is good or bad makes no difference to him. A person like that cannot in the nature of things be prejudiced by what is done. Then with regard to the protection given to the seller, it seems to me that the placard which is now exhibited with regard to some of these things is important for this reason—not as showing what was in the mind of the purchaser, because in the case of an inspector, of course, he knows what he is going to get, but as bringing to the knowledge of the purchaser, either the abstract or actual purchaser that what is being sold is properly described as a mixture of this, that, or the other thing. If that is done, then there is not a sale to the prejudice of the purchaser, either the actual purchaser or the purchaser in the abstract, because the seller has taken care to affect with knowledge of what he is doing the person who is buying.

CHANNELL, J.—I agree. With reference to the last point mentioned, there is this additional reason for making clear, if possible, what "to the prejudice of the purchaser" means, because it is not understood. We seldom have the cases which come

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before us directed to the correct point, which is whether another person who has not the special knowledge of the inspector, but who purchases under the same circumstances in other respects, would be prejudiced. Very often the magistrates do not find the facts which are necessary to determine that, which is the real question. As to the other point, which is of importance, whether a corporation can be liable under this Act, I agree with what has been already said, but on account of its importance will add a few words. By the general principles of criminal law, if any matter is made a criminal offence, there is imported into it that there must be something in the nature of a *mens rea*. Therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to that in the case of quasi-criminal offences, as they may be termed—acts forbidden by law under a penalty—possibly even under the penalty of imprisonment, at any rate in default of payment of a fine, because the Legislature thought it so important to prevent the act being committed that it forbade it absolutely to be done in any case. And if it is done—whether the man has any *mens rea* or not, whether he intended to commit a breach of the law (if he knew the law) or not—if he does that forbidden thing he is liable to the penalty. Where the act is of this character, then a master who in fact does that forbidden thing through his servant, is responsible and liable to the penalty; and there is no reason why he should not be, because the very object of the Legislature was to forbid the thing absolutely. It seems to me that exactly the same principles apply to a corporation doing such a thing. If it does the act which is absolutely forbidden it is liable for a penalty. Therefore when such a question as this arises one has to see whether the thing is absolutely forbidden or whether it is merely a new offence to which the ordinary principles of the criminal law as to *mens rea* would apply. Applying to this sect. 6 of the Food and Drugs Act—there might be a slight difference in the case of sect. 3—I think it is quite clear, and it has already been decided in at least two cases, that there is an absolute prohibition of the particular sale mentioned in the section, and consequently there is no reason why it should not apply to a corporation. As to sect. 3 there is a slight difference, because, putting sects. 3 and 5 together, it seems to be analogous to that which has been held to be the true construction of the Merchandise Marks Act, that *mens rea* is involved in the offence but need not be proved by the prosecution, as it must in ordinary criminal cases. It is so far an element in the offence, that if the defendant succeeds in proving that he had no *mens rea* he is acquitted, the burden of proof having been altered in such cases. That was done in cases where the Legislature desired really to prevent the act being done, but recognised that there might be cases where it might be done innocently, and therefore the person ought not to be convicted; but the Legislature also saw that while the innocent person could prove his innocence, it was not quite so easy for the prosecution if the burden were left in the ordinary way upon them to show *mens rea*. Consequently, with the object of preventing the act being done, but at the same time of not

punishing persons who really were blameless, the enactment was framed in that particular way. In those cases there may be more difficulty than there is under sect. 6 in applying the rule to a corporation, but personally I am inclined to think that a corporation would come under sect. 3 as well as under sect. 6, but it is not quite so clear, and it may have to be argued later, and the decision of the present cases does not necessarily involve a decision on that point. I agree with Mr. Rickett's argument that sect. 17 of the Act of 1899, which provided for the imprisonment of offenders in certain cases, is in his favour rather than otherwise, because it requires something more to be proved than is necessary under sect. 6—some wilful act before imprisonment could be inflicted. If there had been simply a provision that imprisonment should follow a breach of sect. 6 there might have been some difficulty about it.

Judgment accordingly.

Solicitors: for Pearks, H. Nelson, Paisley; for Ward, W. T. Ricketts and Sons; for Hennen, Prior, Church, and Adams, for Linthorne, Southampton.

May 1 and 2, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

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Adulteration of food—Milk—Milk sold as taken from cow—Deficiency in milk fat—Sale of article not of nature, substance, and quality demanded—Liability to conviction—Sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), s. 6.

The appellant was summoned under sect. 6 of the Sale of Food and Drugs Act 1875 for selling to a purchaser who asked for new milk an article which was not of the nature, substance, and quality demanded.

It was proved and admitted that the milk had not been tampered with, but had been sold exactly in the same condition as it had come from the cows, and the justices found that there had been no adulteration of or subtraction from the milk, but it was proved that the milk sold was deficient by at least 30 per cent. in the milk fat proper to genuine milk; and it appeared that this deficiency in fats was due to the system of milking adopted by the owner of the cows from whom the appellant purchased the milk, by allowing an unusually long interval to elapse between the milkings, whereby a portion of the fat in the milk became absorbed by the cows.

The petty sessions having convicted the appellant under the section, and the quarter sessions having affirmed the conviction:

Held (by Lord Alverstone, C.J. and Channell, J., Darling, J. dissenting), that there was evidence on which the justices could properly convict the appellant under sect. 6, and that he was rightly convicted of having sold an article which was not of the nature, substance, and quality demanded.

CASE stated by the general quarter sessions for the county of Essex, held at Chelmsford on the 1st Jan. 1902.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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At the petty sessions held at Thorpe-le-Soken, in the county of Essex, on the 7th Oct. 1901, the appellant was convicted of an offence under sect. 6 of the Sale of Food and Drugs Act 1875, for that on the 15th Aug. 1901, at Great Clacton, he the appellant did unlawfully and wilfully sell to the respondent and to his prejudice a certain article of food—to wit, milk—which was not of the nature, substance, and quality of the article of food demanded by the respondent as the purchaser.

The appellant was fined on this conviction in the sum of 20*l.*, and ordered to pay 19*s.* costs.

The appellant gave notice of appeal against the conviction to the quarter sessions.

On the 1st Jan. 1902 the appeal came on for hearing before the quarter sessions, when it was proved or admitted that at about nine o'clock in the morning of the 15th Aug. 1901 at Clacton-on-Sea, the respondent (an inspector under the Sale of Food and Drugs Acts) stopped a hand cart on which was a churn of milk belonging to the appellant in the course of being sold and in charge of a man employed by the appellant.

The respondent asked to be supplied with a pint of new milk; the man served him from a small can, and the respondent paid for the milk the sum of 2½*d.*, which was the recognised price for new milk.

The respondent stated that he purchased the milk for analysis, divided the sample, and otherwise complied with the requirements of the Acts.

The public analyst for the county of Essex gave his certificate (dated the 30th Aug. 1901) in the following terms:

I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under, namely, only 2·09 per cent. of fat, and was therefore deficient to the extent of at least 30 per cent. of the fat proper to genuine milk, seeing that normal milk of even poor quality contains at least 3·00 per cent. of fat. No change had taken place in the condition of the article that would interfere with the analysis.

It was therefore proved by the production of the analyst's certificate, and not disputed by the appellant, that the milk supplied contained only 2·09 per cent. of fat, and further, that the cows from which the milk had been obtained had been milked at about four o'clock on the morning of the 15th Aug., and that the milk so sold as above mentioned had not been tampered with or adulterated in any way, but was in the same condition exactly as it had come from the cows at that milking.

It was further proved that the cows before the four o'clock milking had not been milked for nearly sixteen hours—that is to say, at about twelve o'clock at noon on the previous day—and that the small percentage of fat above-mentioned was accounted for by the fact of that long interval between the two milkings, a portion of the fat of the milk during that long interval of sixteen hours becoming absorbed by the cows.

It was further proved that the owner of the cows had on divers occasions during the preceding eighteen months or thereabouts consulted with veterinary surgeons as to his cows having abnormally large calves and the consequent loss

and danger of loss of his cows in calving, and that he had been advised by the veterinary surgeon that it was due to the system of milking adopted, which, while having the effect of increasing the quantity of milk at the morning milking, caused it to be deficient in fat by reason of a portion of the fat in the milk while retained in the cows becoming absorbed by the cows and going to the nourishment of the calves.

It was further proved or admitted that the cows which supplied the milk were not the property of or under the control of the appellant, but were the property of and under the control of a Mr. Tilley, from whom the appellant purchased the milk under a guarantee of its genuineness and purity as new milk.

The cows were kept by Mr. Tilley at his farm about four miles from Clacton.

The guarantee was in the form of a label attached to the churns, was dated the 14th Aug. 1901, and specified the milk as two churns containing 24½ gallons, "warranted pure new milk with all its cream. Delivered under contract." But the appellant did not either at petty sessions or quarter sessions prove or rely on a compliance with the provisions of sect. 25 of the Act, nor was any alleged compliance with the provisions of that section, or the fact of there being such guarantee, raised as a ground of appeal in the notice of appeal.

The justices in quarter sessions were of opinion that there had been no adulteration of or abstraction from the milk, but they were of opinion, notwithstanding, that the offence charged had been proved and established, and that the conviction ought to be affirmed. They therefore affirmed the conviction, but reduced the penalty from 20*l.* to 1*l.*, and dismissed the appeal without costs.

The question of law for the opinion of the court was whether upon the evidence and under the circumstances above set out, an offence was committed under sect. 6 of the Sale of Food and Drugs Act 1875.

The Board of Agriculture in exercise of the powers conferred on them by sect. 4 of the Sale of Food and Drugs Act 1899 (62 & 63 Vict. c. 51) made the following regulations—called the "Sale of Milk Regulations 1901," and dated the 5th Aug. 1901—

1. Where a sample of milk (not being milk sold as skimmed, or separated, or condensed milk) contains less than 3 per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk fat, or the addition thereto of water.

2. Where a sample of milk (not being milk sold as skimmed, or separated, or condensed milk) contains less than 8·5 per cent. of milk solids other than milk fat it shall be presumed for the purposes of the Sale of Food and Drugs Acts 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk solids other than milk fat, or the addition thereto of water.

These regulations extended to Great Britain, and came into operation on the 1st Sept. 1901, and therefore did not apply to or affect the present case.

Warburton for the appellant.—The conviction under sect. 6 was wrong. There was no adulteration at all, as it was clearly proved and was

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admitted that the milk sold was exactly in the same condition as that in which it had come from the cows, and the justices in quarter sessions expressly find that there was no adulteration of or abstraction from the milk. The milk being pure milk from the cows there could be no offence under sect. 6, as, to constitute an offence under that section, the article sold must be one which is not of the nature, substance, and quality demanded by the purchaser. Here the purchaser asked for new milk, and the article sold was new milk in exactly the same state as it had come from the cows. The offence charged was committed on the 15th Aug. 1901, and therefore the regulations made by the Board of Agriculture do not apply to this case, as those regulations did not come into operation till the 1st Sept. 1901. There was therefore no standard as to the percentage of milk fat in genuine milk existing at the time. If this conviction stands no person would be safe in selling genuine milk even as it comes from the cows. There is no case exactly in point, but there are dicta which show that this conviction is wrong. For instance, Lush, J., in *Hoyle v. Hitchman* (40 L. T. Rep. 252, at p. 255. 4 Q. B. Div. 233, at p. 239), speaking of cream, said: "Cream is not an article having any standard of quality. It varies with the character of the cows from which the milk comes, and the food on which they are fed. This was genuine cream, though of inferior quality. It appears to me that the sale in such a case was not an offence within the Act at all." That precisely applies here, as the milk was genuine milk, though of inferior quality, and therefore, according to Lush, J., the sale was not an offence within the Act: (see also the comments on the case of *Morgan v. Auger*, decided by the Divisional Court on the 14th March, in the *Law Journal* of the 26th April 1902, at pp. 228-9). The finding of the justices that there was no adulteration in fact rebuts the presumption of adulteration arising from the finding in the certificate that the milk was deficient in milk-fat. The appellant has displaced that presumption by showing that the milk was as it came from the cows. Both sect. 6 and the Board of Agriculture Regulations of 1901 show that to constitute adulteration there must be either an addition to or subtraction from the milk. Here the case finds that there has been neither. He also referred to sect. 4 of the Sale of Food and Drugs Act 1899.

C. E. Jones for the respondent.—The question is a question of fact for the justices whether the certificate is sufficient for a conviction, and the justices both in petty sessions and in quarter sessions have held that it was sufficient. It is not a question of whether the milk was pure or genuine milk from the cow or not. New milk must be milk with 3 per cent. of milk fat, which this milk had not. That standard is now laid down by the Board of Agriculture, but formerly it depended on the facts. It is entirely a question of fact for the justices when there is any evidence at all on which they can properly act:

Hewitt v. Taylor, 74 L. T. Rep. 51; (1896) 1 Q. B. 287.

No doubt this was new milk, but the cows had been so manipulated in their treatment that the milk was deficient in quality, and in fact it was

not milk at all. When a purchaser asks for new milk he expects to get milk of normal quality; this was not milk of normal quality, and therefore was not the article which the purchaser had asked for. [Lord ALVERSTONE, C.J.—The case of *Lane v. Collins* (52 L. T. Rep. 257; 14 Q. B. Div. 193) seems very much against you. I should doubt if it is right, and I am not at present prepared to say that I should follow it.] *Dyke v. Gover* (65 L. T. Rep. 760; (1892) 1 Q. B. 220) is strongly in the respondent's favour. It shows that where very poor milk with a deficiency of 33 per cent. of fat was sold, the seller was convicted. There must be no manipulation of the feeding or milking of the cows, and the appellant is in the same position as the owner of the cows.

Cur. adv. vult.

May 2.—CHANNELL, J.—In this case the court are not entirely agreed as to the result; but I think that there is no real difference of opinion as to the principles applicable to the case. I proceed to deliver my judgment first. The proceeding in this case was instituted under sect. 6 of the Sale of Food and Drugs Act 1875, and it is very important to bear in mind that the section differs in a very material respect from some of the other sections of that Act. It has been clearly decided that under that section no question of guilty knowledge or fraudulent intention arises, but that the only question is whether the seller has sold to the prejudice of the purchaser something which is not of the nature, substance, and quality of the article demanded by the purchaser. There are cases which decide that *mens rea*, or guilty knowledge, is not necessary to constitute the offence: (see *Betts v. Armistead*, 58 L. T. Rep. 811; 20 Q. B. Div. 771). A master may be liable where the sale is the act of his servant: (see *Brown v. Foot*, 66 L. T. Rep. 649), and a corporation may be liable for the offence under this section as was decided in a recent case: (see *Pearks, Gunston, and Tee v. Ward* (1902) 2 K. B. 1). I refer also to the case of *Goulden v. Rook* (84 L. T. Rep. 719; (1901) 2 K. B. 290), which was the case of the sale of beer which in fact had arsenic in it owing to some mistake in the process of the manufacture of one of the ingredients of the beer. The retail seller of the beer was convicted under sect. 6, and the judgment of the Lord Chief Justice in that case brings out very clearly the principles I wish to state as applicable to this case. That was the case of a manufactured article—namely, beer; this is the case of a natural product—namely, milk. There is necessarily some difference between the two, but I think the same principle must be applied to both. A person—as in this case—asks for new milk, and if in fact he gets something which he does not expect to get under that description, it seems to me that the offence under sect. 6 is committed. If, in ordinary cases, the seller is able to show that what he has sold as milk is without alteration and is the identical thing that has come from the cow, then, in the absence of any other evidence, he would clearly prove that that substance which he had sold was milk. But if the certificate of the analyst shows that what was sold as milk had not the proper constituent parts of milk, and if the seller were to prove that he had made inquiries and had found that the cow from which the milk came was suffering from illness, or that there was some

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other cause which made the cow not produce milk of normal character as to strength or richness, then I think that evidence would confirm the analysis, and would, as it seems to me, show that what was sold was not of the nature, substance, and quality of the article demanded. It is true that in that case the seller has sold something which is the direct product of the cow; but it is something which in fact is not milk, but something else; and in that case the seller, although acting in good faith, ought to be convicted under sect. 6 for selling a different thing and a thing not of the nature, substance, and quality demanded by the purchaser. The case may be a hard one, and I think the justice of the case would probably be met by a merely nominal fine, but I think that under the circumstances there must be a conviction. Those being the principles on which the case ought to be decided, we have to apply them to the facts of the present case. Now, as to the facts, the magistrates have found that the milk was not of the normal strength, and they have also found that the milk was in the same condition as it came from the cows, and that it had not been tampered with or adulterated in any way; but they also found that, by reason of the peculiar way in which these cows were milked, the substance that came from those cows was not what was demanded by the purchaser, namely, milk. That was a question of fact for the justices to deal with, and if they have come to those findings as questions of fact—as they have done—it was within their province to do so. In my opinion they were right in coming to that conclusion. Under these circumstances the justices have come to a conclusion in a matter of fact which they were entitled to come to, and I think therefore that we cannot interfere with their decision. As to the case of *Lane v. Collins* (52 L. T. Rep. 257; 14 Q. B. Div. 193), what Mathew, J. there says is that it had not been shown that the article supplied was other than the purchaser might expect to get as milk; that is to say, the facts there were found in the opposite way to that in which they have been found in the case before us. The case is, no doubt, a hard one; but if we do not lay down the rule in this way it may work mischief in other cases, such as where the milk, although coming direct from the cow, may be clearly infected with disease.

DARLING, J.—I regret that I am obliged to come to a different conclusion. The purchaser asked for new milk, and he got milk delivered to him in exactly the same condition as it had come from the cow. It is said that the appellant had sold an article not of the nature, substance, and quality demanded. If he did so, then clearly he committed an offence under the section; if he did not do so, then there is no offence. It seems clear that what he got was new; the only question therefore is whether it was milk. I do not think we ought to uphold this conviction unless we are prepared to decide that what the purchaser got was not milk. In this case it was milk; it came direct from the cow and appeared to be milk. It must be milk from a cow; it must not be milk from some other animal; it must be cow's milk. But I do not think that milk from a diseased cow would come within that word, because, as it is an article of food, a person asking for milk must be taken to be

asking for milk which is fit for human consumption. Was it milk? If it was not milk, what was it? It is said that it was not milk because it did not contain a certain amount of essential fats. At the time of the alleged offence there was no standard as to the percentage of milk fat genuine milk should contain, such as the standard which the Board of Agriculture have since set up; but at the time now in question there was no standard. The analyst says in his certificate that normal milk contains a certain proportion of fat. But it is perfectly well known that some kinds of cows give milk which contains more fats than the milk given by other kinds of cows, and people keep particular kinds of cows for this very reason. There being no standard, the appellant sold what was described as, and what he was entitled to describe as, milk, although it was not so rich as other milk, because of the peculiar manner in which the cows were milked, and he cannot be convicted unless it can be shown that what the purchaser got was not new milk. Look at the matter how you will, what was supplied here was milk; it was new milk, and therefore I think that the purchaser got an article which was of the nature, substance, and quality of the article demanded. I should probably not have differed in this case if I thought that our decision would only apply to milk because of the order of the Board of Agriculture to which I have referred. But what I am afraid of is that the decision of the court in this case may be applied in the case of a perfectly natural product as to which there is no standard applicable; and I cannot help seeing that difficulties might arise in such cases where there is no standard, if it were held that a natural product were not of the nature, substance, and quality of the article demanded, merely because it did not contain all the elements which were usually present in normal samples of that product, and in the same proportions. Take, for instance, the case of apples. A purchaser who had asked for apples and who had been supplied with them as plucked from the tree, might complain that they contained less malic acid or other essential than some analyst might declare to be usual in apples. These apples, however poor in quality they might be, would still be apples, and exactly as Nature produced them. It is the same in the case of this milk; it is as Nature produced it, though the fat went into the calf instead of into the milk. I think the principle would be capable of dangerous extension if a person can be convicted for selling without any fraud a natural product in the state in which it is produced. Therefore I think that this conviction ought to be set aside.

LORD ALVERSTONE, C.J.—This case is one of some difficulty; but, on the whole, I have arrived at the conclusion that we must affirm the conviction. I cannot distinguish the case against the present appellant from the case which would have been against Lilley, from whom the appellant purchased, if Lilley had been proceeded against. The magistrates have found certain facts, and upon those facts the appellant was convicted, and on appeal the quarter sessions affirmed the conviction, but reduced the fine. I think that both courts have dealt with the matter as a question of fact, and I think that if there was any evidence here upon

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which they could reasonably come to that conclusion, then this court cannot interfere and the conviction ought to stand. I agree with my brother Darling that the real question is whether what was sold was milk. It is not necessary in order to constitute an offence under sect. 6—as my brother Channell has pointed out—that the seller should know the condition of the article sold. If it is not of the nature, substance, and quality of the article demanded, then he is liable under sect. 6, whether he knew the condition of the article or not. As no question arises as to any warranty, it is not possible to distinguish between the appellant and Lilley by whom the milk was originally provided, and therefore we have really got to deal with a person who is in the same position as Lilley. I think the only question for us in this case is, was there evidence upon which the magistrates could reasonably find that the article sold was not of the nature, substance, and quality of the article demanded? The analyst in his certificate has found that the milk was “deficient to the extent of at least 30 per cent. of the fat proper to genuine milk, seeing that normal milk of even poor quality contains at least 3 per cent. of fat.” I entirely agree that, if there had been evidence that the milk came direct from the cow, and there was no evidence of anything abnormal in the cow or in the way it had been treated, the conviction would have been wrong. But in this case it has been found as a fact that, although the milk was the same as it had come from the cow, yet that its condition was owing to the abnormal way the cow was treated, remaining unmilked for the abnormal period of sixteen hours; and I cannot but think that the magistrates found that the milk was not of the nature, substance, and quality of the article demanded because by the abnormal way the cow had been treated, the milk was so deficient in fat that it could not be described as new milk at all. That being the state of things, it seems to me that it is quite impossible to say that there was no evidence upon which the magistrates could come to that conclusion. As to the recent order of the Board of Agriculture, I do not think that it has set up a standard of what is or what is not genuine milk, but I think it only means to say that the want of a certain amount of fat is to be *prima facie* evidence that the milk is not genuine. I think, however, that if it turns out that the article produced, although a natural product, is the result of an abnormal state of things, whether arising from disease or the abnormal treatment of the cow, it affords evidence upon which a magistrate may find that the article is not of the nature, substance, and quality of the article demanded. With regard to the case of *Lane v. Collins* (*ubi sup.*), it may seem to be in conflict with our present decision. That case was decided on its own special facts, though I should have had some difficulty in coming to the same conclusion. When the purchaser here asked for new milk, he was entitled to have an article which was not other than ordinary new milk by reason of any special way the cow had been treated. The magistrates having found upon the facts that this was not new milk, I come to the conclusion that we cannot reverse their finding, and that this appeal must be dismissed.

Appeal dismissed. Conviction affirmed.

Solicitors for the appellant, *Speechly, Mumford, Rodgers and Craig*, for Prior, Colchester.
Solicitors for the respondent, *Doyle, Devonshire, and Woodhouse*, for Jones and Son, Colchester.

Thursday, May 15, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

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Local government—General district rate—Appeal—Estimate—Inclusion in, of retrospective charges—Right of appeal against rate—Validity of rate—Provisional order, construction of—“Hereafter”—Meaning of—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 210, 218, 269.

The general right of appeal against a district rate given by sect. 269 of the Public Health Act 1875 is not taken away by the concluding words in sect. 218 of the Act, that the estimate, which is to be made under that section, “shall not be deemed part of the rate, nor in any respect affect the validity of the same,” where it appears from the estimate that the rate includes retrospective charges which are not authorised by sect. 210 as being charges incurred more than six months before the rate was made.

A borough council in their estimate for a general district rate for the borough included items which consisted of debts contracted in former years and which had from year to year been carried to a “suspense account” opened for that purpose, and a balance due for works executed in previous years. The council from time to time paid these old debts by money borrowed from their bank by overdrafts, but, so far as the ratepayers were concerned, the items remained unpaid so long as they appeared in the suspense account.

The appellant appealed against the rate on the ground that it contained charges incurred more than six months before the making of the rate.

Held, that the estimate could be looked at for the purpose of seeing what items were included in the rate; and that there was sufficient ground for holding that the rate contained items which were more than six months old, and that the council could not by borrowing money from the bank and paying these old debts, treat the debts as the debts of the bank, and so prevent the charges from being retrospective charges more than six months old within sect. 210; and that the rate was bad in consequence.

A provisional order for the extension of the borough provided that any further capital sums which “shall hereafter be expended” in respect of certain works in which the existing borough was interested should be raised by a general district rate on the existing borough. A sum in respect of these works was included in a rate made for the whole borough, including the added area.

Held, that the word “hereafter” meant, not the interval between the passing of the order and its coming into operation, but the time after its coming into operation, and that consequently the rate was bad by reason of its containing such sum to be levied on the added area.

(a) Reported by W. W. OLL, Esq., Barrister-at-law.

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SPECIAL CASE stated by the Recorder of Southampton at the hearing before him, at a court of quarter sessions for the borough, of an appeal against a general district rate made by the respondents on the 12th June 1901.

The following facts were admitted or proved in evidence before the recorder:—

The appellant was a ratepayer at Shirley, a district which up to 1895 formed no part of the county borough of Southampton, but which with other districts, known and described as the "added areas," became part and parcel of the county borough by virtue of a provisional order of the Local Government Board made pursuant to sects. 58 and 59 of the Local Government Act 1888, and dated the 30th May 1895. This provisional order was duly confirmed by the Local Government Board's Provisional Orders Confirmation (No. 16) Act 1895, session 2, and received the Royal Assent on the 5th Sept. 1895, and, except for the special purposes as otherwise provided therein, came into force on the 9th Nov. 1895, the date of "the commencement of this order" (art. 1).

The respondents, acting by the council of the borough, as the urban sanitary authority, on the 12th June 1901 made a general district rate on the whole area of the borough to enable them to defray expenses incurred or to be incurred for the period commencing the 1st April 1901 and ending the 31st March 1902.

The respondents before proceeding to make this general district rate, pursuant to sect. 218 of the Public Health Act 1875 caused an estimate of the rate to be made, and this estimate was on the 22nd May 1901 duly approved by the respondents. The estimate was duly entered in the rate-book which contained the rate made on the 12th June 1901, and was kept at the respondents' office and was open to public inspection.

The total expenditure of the borough for the year ending the 31st March 1902 was estimated at 110,454*l.* 4*s.* The amount of income estimated apart from the rate to be levied amounted to 14,379*l.* 6*s.* 6*d.*, leaving the sum of 96,074*l.* 17*s.* 6*d.* to be produced by the proposed district rate to complete the sum of 110,454*l.* 4*s.* required.

The appellant, alleging himself to be aggrieved by the rate, duly appealed against the same on the grounds set forth in his notice of appeal.

The appellant contended that the rate was bad because it included retrospective charges, in particular certain charges which had been incurred or become due more than six months before the rate was made, contrary to the provisions of sect. 210 of the Public Health Act 1875.

The principal items which were objected to were the following—namely, (1) 1463*l.* 3*s.* 10*d.*, balance of suspense account for 1900 upon electricity works; (2) 220*l.* 11*s.* 10*d.*, deficit for year ending the 31st March 1900 on the electricity account; (3) 2154*l.* 8*s.* 1*d.*, one-fifth liability to bank, pursuant to resolution of the council of the 27th March 1901; (4) 903*l.* 0*s.* 4*d.*, due on capital and suspense accounts.

As to items 1 and 2, it appeared that on the 31st March 1897 there was to the credit of the net revenue account a balance of 21*l.* 2*s.* 5*d.*; on the 31st March 1898 a deficit on working of 18*l.* 16*s.* 9*d.*, causing a debit balance of 1188*l.* 0*s.* 9*d.*, and a suspense account was opened and the amount carried thereto; on the 31st

March 1899 a deficit on working of 640*l.* 19*s.* was also charged to the suspense account, which was thereby increased to 1828*l.* 19*s.* 9*d.*; on the 31st March 1900 one-fifth of 1828*l.* 19*s.* 9*d.* was written off and charged to net revenue account; the suspense account was thereby reduced to 1463*l.* 3*s.* 10*d.*, and a further deficit of 220*l.* 11*s.* 10*d.* on the working for the year ending the 31st March 1900 appeared on the net revenue account.

The items of 1463*l.* 3*s.* 10*d.* and 220*l.* 11*s.* 10*d.* were the sums in question.

Item No. 3—2154*l.* 8*s.* 1*d.* This was one-fifth of a sum of 10,772*l.* 0*s.* 3*d.* outstanding on special suspense account on the 31st March 1901, which was dealt with in the following manner by the council, who on the 27th March 1901, by resolution, directed "that the balance of liabilities omitted in the estimate for the year 1900-1901 be placed to a special suspense account and spread over a period of five years."

The amount placed to the special suspense account under this resolution was the above sum of 10,772*l.* 0*s.* 3*d.*, and item No. 3 (2154*l.* 8*s.* 1*d.*) is a fifth of that sum charged to the current rate pursuant to such resolution.

Item No. 4—903*l.* 0*s.* 4*d.* This item appeared in the estimate as follows: "One-fifth of expenditure payable out of revenue." It represented one-fifth of 4515*l.* 1*s.* 8*d.*, the total of the following items in respect of works done in the years and on the objects specified, less a sum of 851*l.* 12*s.* 1*d.* credited thereto, as followed [then followed a list of the works, the years—from 1879 to 1898 inclusive—in which they were executed, and the amounts for the same, making up a total, after deducting the 851*l.* 12*s.* 1*d.*, of 4515*l.* 1*s.* 8*d.*] These works, with the exception of the last of them, were all executed before the added areas became part of the borough in 1895. The last, which was an item for 300*l.* for paving at Shirley, was in 1898.

Subject to the respondents' contention herein-after stated, it was not proved when any of the items were paid, although it was stated by the borough treasurer, who was called for the appellant, that the items had been paid to the respective tradesmen by cheques on the bank, but the items were traced by the appellant through the old permanent works ledger and the present general district fund ledgers, which showed that the items had been carried forward from year to year as owing, and still appeared therein to be owing.

The respondents did not deny that the foregoing items Nos. 1, 2, 3, and 4 were retrospective charges, but they contended that there was no proof that they were included in the rate at all, and that, inasmuch as the estimate was not to be deemed part of the rate nor in any respect to affect the validity thereof, it ought not to be received in evidence, and that the estimate did not show that those four sums or either of them were included in the rate.

In the published estimate of the rate, which is made under sect. 218 of the Public Health Act 1875, in addition to the estimated income on the credit side, it was stated that a sum of 96,074*l.* 17*s.* 6*d.* was required to be raised by a district rate to meet the various items referred to, and exactly the same sum of 96,074*l.* 17*s.* 6*d.* appeared on another page of the estimate appor-

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tioned between the various parishes for the purpose of the rate.

Under the above circumstances, these sums 1, 2, 3, and 4 being included in the estimate for the rate, which was the only means available to any ratepayer to discover what was to be included in the rate itself, and was published by the respondents themselves, the recorder came to the conclusion that there was *prima facie* evidence that those sums were included in the rate, and, in the absence of any rebutting evidence being produced, he found as a fact that those items were included in and to be met out of the rate. He further held that, even if the respondents were at liberty to appropriate the balance income of 14,379l. 6s. 6d. to the items objected to (which there was no evidence that they had done in fact), yet, as the effect would still be to increase the rate by the amount of such items, the rate would be equally retrospective both in law and fact as if such appropriation had not been made.

The respondents also contended that those sums were not incurred and did not become due more than six months before the rate was made, but formed part of the overdraft of 161,794l. 8s. 8d. due to the respondents' bankers on the 13th June 1901, and that the liability of the respondents to their bankers on this overdraft had been incurred since the 13th Dec. 1900 by reason of the payment into respondents' credit of 456,351l. 15s. 1d. between the 13th Dec. 1900 and the 13th June 1901. The respondents contended that such items did not exist as charges, but were covered by the current overdraft at the bank, which, being balanced every day, was not a charge incurred more than six months prior, and that so far as the original creditors were concerned they had been paid, but with money borrowed from the bank.

For some years the respondents had an account with the Capital and Counties Bank.

The account had been constantly overdrawn, but the respondents had been accustomed to pay from time to time by means of cheques drawn upon the bank, who thereupon debited the respondents' account therewith. The respondents' payments into the bank, whether derived from rates, money borrowed, or other sources, were credited as and when received in the account which was balanced each day.

On the 13th Dec. 1900 the respondents were indebted to the bank in a debit balance of 98,121l. 4s. 4d., and on the 12th June 1901 in a debit balance of 161,794l. 8s. 8d., and it was proved that there was no occasion after the end of 1896 when the account was not overdrawn.

It was proved with regard to the first item, 1463l. 3s. 10d. (balance of suspense account), that so long as the items appeared in a suspense account, so long the items were not paid so far as the ratepayers were concerned.

The explanation given in evidence of the meaning of a suspense account was that when debts had been incurred which could not conveniently be met at the moment, they were transferred into a suspense account until it became convenient to pay them.

Except in the one instance of the 2154l. 8s. 1d., the charges did not appear in the estimate as a debt due to the bank. They appeared as liabilities already incurred on the 31st March 1900, which was more than six months before the making of

the rate, and that they were so the recorder found as a fact.

The respondents further contended that the inclusion of those sums or some one or more of them in the rate was not a ground for quashing the rate.

The recorder found that the four sums named were proved to be for charges incurred more than six months before the making of the rate, and that they did not come within any of the exceptions to the general rule that a retrospective rate is bad.

He further held that, inasmuch as the respondents had no statutory or other authority to borrow from their bank for the purpose of discharging old liabilities, the form in which the account between the respondents and the bank was kept did not prevent the rate from being retrospective.

Further, the appellant contended that the terms and provisions of the above provisional order had been contravened in the making of the rate—in that (1) certain sums were levied in the general district rate in respect of the matters specifically mentioned in art. 21 (1) of the order which were not a charge upon the district fund; and (2) that charges in respect of the matters specifically mentioned in art. 21 (1) of the order were not levied in the rate in pursuance of sect. 2 of that article.

By art. 19:

Subject as hereinafter provided, all property vested in the corporation at the commencement of this order for the benefit of the existing borough shall be held by the corporation for the benefit of the borough, and subject as aforesaid the corporation shall hold, enjoy, and exercise for the benefit of the borough all the powers which at the commencement of this order are exercisable by or vested in the corporation for the benefit of the existing borough, and subject as hereinafter provided all liabilities which on the date aforesaid attached to the corporation in respect of the existing borough shall attach to them in respect of the borough.

By art. 21 (1):

The said sum of . . . and also any further capital sums and interest thereon which shall hereafter be expended in respect of the sewerage of the existing borough in connection with and including the Belvidere outfall, and in respect of the Portwood sewage farm and drainage district, and any other sum or sums borrowed by the corporation acting as the urban sanitary authority for the existing borough or sanctioned by the Local Government Board, or in respect of which the corporation shall have resolved to apply for such sanction before the commencement of this order, shall, so far as such sums respectively are now or may hereafter be charged upon and payable out of the general district rates leviable in the existing borough be charged upon and payable out of the rates to be levied in pursuance of subdivision (2) of this article. (2) The corporation shall from time to time make and levy such a rate in the nature of a general district rate upon the area now comprising the existing borough as will be sufficient to raise the sums required to be raised by rates for the repayment of the several sums to which subdivision (1) of this article applies and for the payment of interest on such sums.

Since the date of the commencement of the order (namely, the 9th Nov. 1895) the respondents from time to time and up to the present time have expended: (1) "Further capital sums and interest thereon" in respect of the sewerage of the existing borough in connection with and

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including the Belvidere outfall, and in respect of the Portawood sewage farm and drainage district; and (2) "Other sums" in respect of a scheme in pursuance of the provisions of the Housing of the Working Classes Act 1890, in addition to the respective sums recited in art. 21 (1). During the years from 1896 to 1901 no charge had been levied on the added areas in respect of the above matters, but charges in respect of such matters were for the first time levied on the added areas in the rate appealed against. The amount was agreed between the parties to be 1644*l*.

The respondents contended that on the true construction of art. 21 this sum of 1644*l*. was rightly levied on the added areas.

The recorder held that the term "existing borough" as used in art. 21 meant the area of the old borough which was described in the recital of the order as the borough of Southampton, and was described in the corporation map as coloured pink, and again in art. 3 by inference as the area of the old borough.

The respondents also contended that the word "hereafter" occurring in the sentence "and also any further capital sums and interest thereon which shall hereafter be expended in respect of the sewerage of the existing borough," &c., meant only the time between the passing of the order and the date of its coming into force. The appellant contended that art. 21 meant that the three groups of charges therein named were charges to be borne for the future by the ratepayers of the area comprising the old borough and not by the ratepayers of the added areas; and that those items which were included in the present rate which came under either of the groups were improperly charged to the added areas. The recorder upheld that contention of the appellant. He decided on the above grounds that the rate was bad and quashed the same, and gave judgment for the appellant with costs. Acting on the provision contained in sect. 269 (5) of the Public Health Act 1875, he ordered that, notwithstanding the quashing of the rate appealed against, the moneys charged by such rate should be levied as if no appeal had been made, and that such moneys when paid should be taken as payment on account of the next effective rate in respect of which the quashed rate was made.

It was proved that from time to time the respondents borrowed certain sums of money on various accounts and for divers purposes without legal sanction or authority, and that items for interest thereon appeared in the estimate for the rate. It was contended for the appellant that such charges were illegal.

The question for the opinion of the court was whether the recorder was right in holding and determining that the rate ought to be quashed.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 210. For the purpose of defraying any expenses chargeable on the district fund which that fund is insufficient to meet, the urban authority shall from time to time, as the occasion may require, make by writing under their common seal, and levy in addition to any other rate leviable by them under this Act, a rate or rates to be called "general district rates." Any such rate may be made and levied prospectively in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses incurred at any

time within six months before the making of the rate; in calculating the period of six months during which the rate may be made retrospectively, the time during which any appeal or other proceeding relating to such rate is pending shall be excluded.

Sect. 218. Every urban authority, before proceeding to make a general district rate or private improvement rate under this Act, shall cause an estimate to be prepared of the money required for the purposes in respect of which the rate is to be made, showing the several sums required for each of such purposes; and the rateable value of the property assessable; and the amount of rate which for those purposes it is necessary to make on each pound of such value; and the estimate so made shall forthwith, after being approved of by the urban authority, be entered in the rate-book, and be kept at their office, open to public inspection during office hours thereof; but it shall not be deemed part of the rate, nor in any respect affect the validity of the same.

In the corresponding section of the Public Health Act 1848 (11 & 12 Vict. c. 63)—namely, sect. 98—the section ended with the words "during office hours thereof." The words "but it shall not be deemed part of the rate, nor in any respect affect the validity of the same," were added in the Act of 1875.

Sect. 269. Where any person deems himself aggrieved by any rate made under the provisions of this Act, or by any order, conviction, judgment, or determination of or by any matter or thing done by any court of summary jurisdiction, such person may appeal therefrom, subject to the conditions and regulations following.

Macmorran, K.C. (S. H. Emanuel with him) for the corporation of Southampton.—There was no proof that the items objected to by the appellant were included in the rate at all, and there was no proof that the charges were retrospective; but, even if they were retrospective, the appellant adopted the wrong course in appealing against the rate. He ought to have had it removed by *certiorari* for the purpose of having it quashed. Sect. 269 of the Public Health Act 1875 does no doubt give a right of appeal. That, however, does not apply where the appeal is on the ground that the estimate contains retrospective or illegal charges. Sect. 98 of the Public Health Act 1848 provided for the making of an estimate before proceeding to make any general or district rate, "showing the several sums required for each of such purposes"—that is, for the purposes for which the rate was made. Under that section it was held in the year 1857, in *Reg. v. Workshop Local Board* (21 J. P. 451), that if the estimate contained any illegal purposes it was bad. The matter was considered again in 1865 in the second case of *Reg. v. Workshop Local Board* (10 L. T. Rep. 297; 5 B. & S. 951; 28 J. P. 596), and, in consequence of the difficulties arising in those cases, the words in the concluding part of sect. 218 of the Public Health Act 1875 (which was substituted for sect. 98 of the Act of 1848), "shall not be deemed part of the rate, nor in any respect affect the validity of the same," were added. The effect, therefore, of those added words in sect. 218 is to take away the right of appeal on the ground that there is included in the estimate any illegal or improper items. In such a case the proper course now is to proceed under sect. 141 of the Municipal Corporations Act 1882, and have the order removed by *certiorari* and quashed. Again, retrospective rates of more than six months may be paid, provided they are not

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paid out of the rates; here there is no proof that they were paid out of the rates, as the corporation had sufficient income from other sources to pay these items; and, further, these debts to the various creditors having been paid by the bank's overdraft, they no longer existed as charges, but were covered by the overdraft at the bank which, being balanced every day, was not a charge incurred more than six months prior to the rate, and so far as the actual creditors were concerned they have been paid, but with money borrowed from the bank. Then, with regard to the question arising upon the construction of the provisional order, it is said that in the rate now appealed against there is levied a charge in respect of matters that by the provisional order ought not to have been levied on the added areas. The word "hereafter" occurring in the sentence in art. 21 (1), "and also any further capital sums and interest thereon which shall 'hereafter' be expended in respect of" the specified works, does not mean after the date of the commencement of the order, but means the time between the passing of the order and the date of its coming into operation, and therefore no objection can be raised against this rate upon that ground.

Foots, K.C. and *Forder Lampard*, for the appellant, were not called upon to argue.

Lord ALVERSTONE, C.J.—The questions raised in this case are important, and are to a certain extent difficult until they are clearly explained, as they have been during the argument. Before dealing with the facts I ought to say a word upon the law applicable to this case. By sect. 210 of the Public Health Act 1875 a general district rate, which, when collected, forms part of the general district fund, is to be levied in order to raise money for the payment of future charges and expenses, or retrospectively in order to raise money for the payment of charges and expenses incurred at any time within six months before the making of the rate, and so forth. There is therefore an express and a very distinct statutory prohibition against allowing retrospective payments to be included beyond the period of six months, and all the more so because money may be raised by a rate to work retrospectively for a certain period—namely, that period of six months. The matter is obviously one of importance, and the Legislature have met the difficulty which corporations or public bodies would have in making those payments by fixing a period of six months during which those retrospective payments may be made. Then there is the general right of appeal given under sect. 269, and, notwithstanding all that has been urged before us by counsel for the respondents, I think it would be extremely difficult to say that *prima facie* there was not a right of appeal in respect of a rate that was levied and purported to be levied in respect of charges which were not authorised by sect. 210. It was expressly decided in the first case of *Reg. v. Workson Local Board* (*ubi sup.*), in 1857, that there was this right of appeal. At that time the concluding words of sect. 218, with regard to the operation of the estimate, were not in the then existing statute—the Public Health Act 1848. It is contended that as to the old provision with regard to the making of the estimate there are added the words that the estimate "shall not be deemed part of the rate, nor in any respect affect

the validity of the same;" therefore a person has not a right of appeal in respect of an allegation that the rate includes the payment of a charge more than six months old. I think that it would require very much stronger language than that to take away the existing right of appeal which I think was given, and I do not think that the addition of these words are sufficient to do so, although I agree that very probably they were added in consequence of the question raised in the second case of *Reg. v. Workson Local Board* (10 L. T. Rep. 297; 5 B. & S. 951; 28 J. P. 596). It is not necessary for us to say exactly what is the full effect of those words. I should think that they would be sufficient to prevent a person from being allowed to rely upon any defect in the estimate, or on any particular way in which the estimate was made up, or possibly to prevent him from marshalling the items in an estimate so as to show that, according to his contention, the estimate so construed would indicate the payment of a debt more than six months old. But I cannot think it ever could have been intended that if upon the facts before the quarter sessions on appeal it is established that there is in fact a payment more than six months old which will be made out of the moneys to be raised by the rate levied, the right of appeal is gone. I do not think it means that one may not look at the estimate for the purpose of ascertaining the facts. I can quite imagine that it is open to the corporation to say, and the court would receive all evidence to show, that the estimate does not represent the true state of facts; but to say that nobody may look at the estimate for the purpose of raising a *prima facie* case on appeal is, I think, going too far. It is not necessary for us to decide what is the exact effect of those words as imposing a limit upon the rights of persons, because, when we come to look at the facts stated here, there really does not seem to be any reasonable doubt, now that we have got before us all materials to enable us to form a judgment. It appears that there was included a balance of suspense account for the year 1900 upon electricity works, a deficit for the year ending the 31st March 1900 on the electricity account, and one-fifth the liability to bank pursuant to the resolution of the council of the 27th March 1901 that the balance of liabilities omitted from the estimate for the year 1900-1 be placed to a special suspense account and spread over a period of five years. Then there was a resolution which was practically the same with regard to the 903*l.*, representing the one-fifth of expenditure payable out of revenue. It represents one-fifth of 451*l.* 1*s.* 8*d.*, the total of certain items set out in the case in respect of works done in the years and on the objects specified, going back many years. In that state of things it certainly does appear that in order to meet the number of items, amounting to a very considerable sum, which had been incurred beyond the six months period, it was necessary to raise as a mere matter of debtor and creditor account this general district rate which amounted to a sum of upwards of 96,000*l.* Therefore, unless the corporation were able to show that this was only a mere matter of book-keeping, and that they were in fact meeting these amounts out of another purse than that which would be filled by the district rate, there certainly

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was evidence on which the recorder was entitled to come to a conclusion that they were paying these debts out of the moneys to be raised. The first broad contention seems to me, for the reasons stated in the very careful judgment of the recorder, to be untenable. It was said by the corporation that they had borrowed from their bank, and that it was true their accounts were going from bad to worse and that they were owing their bank more and more, but they contended that they had paid their tradesmen, and had paid their principal debts, and that the whole had become a debt due to the bank, and that therefore it must only be assumed at the end of the given financial year that they owed the bank so much money, and that it was to meet that debt that they made this rate. It seems to me that if that argument were allowed to prevail, a public body would only have to arrange with their bankers to borrow money to pay their debts and so defeat the provisions of sect. 210 altogether. I cannot think that argument is right. The other argument that was urged was that you may take the 14,000*l.*, which are receipts other than the 96,000*l.* raised by the general rate, and you may assume that these debts would be paid out of that. I think the judgment of the learned recorder on that point is perfectly sound, that even if you do that you get the amount increased and therefore you do in reality pay those debts out of the rate. But I do not rely so much on that, because I can imagine a case in which, the estimate having been made in a way which *prima facie* would show that the general rate was being raised in order to pay such items as these, the corporation or the charging authority would be able to show that, if the accounts were properly arranged and the receipts properly marshalled, there was no money coming out of the general district rate; as, for instance, the case put during the argument by my brother Channell, of the corporation possessing real property or other property which produced income, which income was not subject to the restrictions which the general rate was subject to. Therefore, without in any way suggesting that the corporation may not be entitled under certain circumstances so to explain what the estimate would show, I think, when the facts are such as were established in this case, there was a clear breach of sect. 210. There is only one other matter I wish to notice. If it had turned out that there had been large payments on capital account, and the accounts were complicated by the inclusion of large payments that were made on capital account not properly chargeable against this general district rate and that this would be met by a future loan, I am not prepared to say that such an illegality as that could be relied upon if in fact it was established that the ultimate adjustment of the accounts would not make any of the debts payable out of the general district fund more than six months old. It is not necessary to decide that, but I was impressed by counsel's argument that in that particular case the mere illegality of the borrowing might not be sufficient to justify the person in objecting to the rate. I do not, however, wish to express an opinion one way or the other on that particular point, which does not arise in this case. That, therefore, disposes of the first objection which was taken to the recorder's judgment—that is, the

objection as to there being the payment of debts more than six months old which were to be defrayed out of the general district rate—the recorder being of opinion that the rate was levied in order to raise money for the payment of those charges. There remains the point which was raised upon the terms of the provisional order, and, as to that, I think that when the order is read there really is no doubt at all about it. It was desired when the borough was being extended not to impose upon the new district certain charges which it was thought ought to be confined to the borough as it existed at the time the extension of the borough took place; and in clause 21 of the provisional order a number of things were enumerated which were to remain chargeable, so to speak, upon the old borough; first, a large number of sums of money; then “any further capital sums and interest thereon which shall hereafter be expended in respect of the sewerage of the existing borough in connection with and including the Belvidere outfall and in respect of the Portswood sewage farm”; and “any other sum or sums borrowed by the corporation acting as the urban sanitary authority for the existing borough or sanctioned by the Local Government Board”; and then “or in respect of which the corporation shall have resolved to apply for such sanction before the commencement of this order.” It now appears that there were included two sums which are not divided, but which amount to 1644*l.*, partly in respect of further capital sum and interest thereon for the Belvidere outfall and the Portswood sewage farm, and partly in respect of the Housing of the Working Classes Act scheme as to which the corporation had applied for sanction before the commencement of the order. Then the enumeration of those sums is followed by the words: “Shall so far as such sums respectively are now or may hereafter be charged upon and payable out of the general district rates leviable on the existing borough, be charged upon and payable out of the rates to be levied in pursuance of subdivision 2 of this article.” It is said that because these words are added the word “hereafter” is to be limited, and that it must have been intended to confine that word to the period between the making of the order and its coming into operation. I think that these words are only necessary in order to indicate the character of the charges that might still be levied and charged upon and payable out of the general district rates. I think there were limitations of various kinds with regard to the sums which were still to be met by the old borough; first, the enumerated amounts, and then the capital and interest in respect of these particular subject-matters, then the sums already borrowed and sanctioned by the Local Government Board, and then the sums applied for. I cannot see that we are to limit the word “hereafter” in such a manner, if in fact the money included in this rate was capital money and interest thereon in respect of the subject-matter referred to in the words which immediately follow the enumeration of these specific sums in art. 21 (1), and I think that the learned recorder has come to a right conclusion upon this point, as well as upon the previous point, and that this appeal must be dismissed.

DARLING, J.—I am of the same opinion.

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CHANNELL, J. — I entirely agree with the judgment which has been delivered, but I should like to point out what is the real meaning of the objection that a rate is retrospective, and it does seem to me to be very clear that this rate is retrospective within the meaning of the objection. The objection means that any particular ratepayer is entitled to say that the rating authority are charging him with a sum that ought to have been charged upon and paid by ratepayers in previous years. To that extent it is a meritorious objection. The principle is that corporations and bodies of this kind are only entitled to charge present expenditure upon future ratepayers so far as they get borrowing powers through the machinery of various statutes. The effect of a borrowing power, of course, is to enable them to charge upon future ratepayers instalments or obligations arising out of their present expenditure, and the borrowing power is granted upon the supposition that the capital expenditure will benefit the future ratepayers. Subject, therefore, to their borrowing powers corporations and bodies of this character have no right to charge for present expenditure upon future ratepayers. That, of course, is a well-known principle applicable long ago to poor rates, and under the majority of the rating statutes something of the kind is applicable, only in particular statutes it depends upon the construction of the particular statute as to what may be done in that respect. In this particular statute there is a section permitting retrospective payments or retrospective rating to the extent of six months, and the question is what that means. It is evidently intended to prevent the obvious inconvenience that would arise to all these bodies if they were bound to pay, as it were, cash down for every single item of expenditure they incurred. Practically that could not be done, and therefore there is to be a certain limit given to them, and this particular statute gives that limit to the extent of six months. I think that Mr. Macmorran's argument seems to me to come to this, that the effect of that six months clause is that this corporation may always have a floating debt arising from past expenditure, provided that that floating debt does not exceed six months' income, because if it does exceed six months of their income they can always by an adjustment of the accounts and by borrowing the money from their bankers say it has accrued in the last six months. If ever their floating debt got beyond that limit it is obvious that no appropriation of the accounts could possibly have that effect. I think, however, that it is not a matter of appropriation of accounts at all. It is a matter of substance, and looking at it as a matter of substance, and looking at the resolutions that were passed, and so on, it is perfectly clear that the corporation had in fact been exceeding their borrowing powers, and that in fact they had got into debt—into this sort of floating debt. The learned recorder in his judgment says that they have secured the services of an accountant who has drawn their attention to the matter, and that they have been making an effort to clear off the debt by charging so much to each year until they get the matter straight. However laudable it may have been for them to do that, in point of fact the way in which they have done it clearly is

to charge upon the present ratepayers expenditure which really was incurred in past times, in fact in times long previous to the six months before the making of this rate, and which was not covered by their borrowing powers. Nothing that I am saying, and nothing that my Lord has said, would in any way suggest that there would have been anything wrong in that which must as a matter of practice always be done—namely, in having temporary loans within the limits of their borrowing powers, in respect of matters which they have to pay quickly when they want to raise a loan and to raise their whole loan in one sum, as, for instance, by issuing stock, in which case they must incur some small expenditure before they raise their loan. In such a case obviously a temporary loan from the bankers within the limits of their borrowing powers would, of course, stand upon a totally different footing from such things as have been done here. Without dealing with the question about the form of the estimate, it is quite clear that as a matter of substance this rate was in point of fact raised for the purpose of paying to a certain extent expenditure for past years long previous to the six months before the making of the rate. With regard to the words in sect. 218, as to the estimate not being a part of the rate, it seems to me that that really means that the rate need not be right on the face of it. It is meant to meet the objection in the second case of *Reg v. Work-sop Local Board* (*ubi sup*), which was, that there was an insufficient item on the rate, so that there might be, as it were, a sort of demurrer to the estimate on the ground that it did not show that all the items were justified. That is a very different thing from using the estimate for its legitimate purpose of showing what in point of fact was the purpose for which the rate was made, and I can see no objection to that being done. But whether we use that estimate or not, it is quite clear that upon the facts this rate was for a retrospective purpose. In reference to the other matters I do not think it is necessary to add anything. I think it is quite clear that existing loans were to be repaid by the existing borough, and that, for the purpose of considering what were existing loans and what were not, all sums actually borrowed before the commencement of the order were to be taken into account, and also all sums which they had resolved to borrow before that time. These were to be taken as existing debts of the old borough and payable by the old borough.

Judgment of quarter sessions affirmed, and this appeal dismissed, with costs.

Solicitors for the appellant (Smith), *Speechly, Mumford, Rodgers, and Craig*, for *E. E. Ensor*, Southampton.

Solicitors for the respondents (the corporation), *Prior, Church, and Adams*, for *E. E. Linthorne*, Town Clerk, Southampton.

Thursday, May 15, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

MAYOR AND CORPORATION OF WESTMINSTER
v. WATSON AND OTHERS. (a)

Metropolis—Wooden structures—Supervision and inspection of—District surveyors—Transference of powers and duties to city council—Duty of surveyors to inspect such structures—Right of surveyors to building notice and to fees—London Building Act 1894 (57 & 58 Vict. c. ccciii.), ss. 84, 138, 145, 154—London Government Act 1899 (62 & 63 Vict. c. 14), s. 5, sub-s. 1, and sched. 2, part 1.

Upon questions which arose between the Westminster City Council and the district surveyors acting under the London Building Acts within the city, as to whether, and, if so, to what extent, the powers, duties, and liabilities of the district surveyors with respect to the supervision and inspection of wooden structures falling within sect. 84 of the London Building Act 1894 have been transferred from the district surveyors to the city council and its officers by sect. 5 (1) of the London Government Act 1899:

Held, that (1) the powers, duties, and liabilities of the district surveyors with respect to the supervision and inspection of wooden structures falling within sect. 84 have not been transferred to the city council and its officers, but the transfer to the city council of the power to license the setting up of such wooden structures, which formerly was exercised by the county council, has substantially diminished the powers and duties of the district surveyors with respect to such wooden structures, and, so far as such duties were formerly imposed upon the district surveyors by the licence granted by the county council, no such duties are now imposed on them, but such duties are imposed upon the person named in the licence granted by the city council, though any other statutory duties imposed upon the district surveyors, such as their duties as to dangerous structures, remain as before; (2) wooden structures falling within sect. 84 are works of which the district surveyor is still entitled to have notice under sect. 145 of the Act, as there may be questions arising which require the district surveyor in a proper case to inspect the structure; but he would not be entitled to notice of all the things specified in that section, as they would not all be applicable; (3) the district surveyor has a right to receive the fees for such inspection and supervision, if in a proper case he does inspect such wooden structures; such right has not lapsed, or been transferred to the city council, but is still retained by the district surveyor, though incidentally he would be entitled to a much smaller fee, in proportion to the lesser duties which he has to perform. The county council has power under sect. 154 to lay down a scale of fees applicable in such cases.

SPECIAL CASE agreed upon between the mayor, aldermen, and councillors of the city of Westminster and Mr. Thomas H. Watson and six others, district surveyors acting under the London Building Acts.

The case was stated under the powers given by sect. 29 of the London Government Act 1899,

which enacted that, if any question arose as to whether any power, duty, or liability, was or was not transferred by or under the Act to the council of any metropolitan borough, that question might, on the application of the council, be submitted for decision to the High Court in such summary manner as might be directed by the court.

Questions arose between the mayor, aldermen, and councillors of the city of Westminster and the district surveyors acting under the London Building Acts within the city of Westminster as to whether to any and to what extent the powers, rights, duties, and liabilities of the district surveyors with respect to the supervision and inspection of wooden structures falling within sect. 84 of the London Building Act 1894, and the right of the district surveyors to recover fees for their services with respect to such structures, have been transferred from the district surveyors to the council of the city and its officers.

By sect. 1 of the London Government Act 1899 it was enacted that the whole of the administrative county of London (exclusive of the city of London) should be divided into metropolitan boroughs, in the Act subsequently referred to as boroughs, and it was also declared lawful for Her late Majesty by Order in Council subject to and in accordance with the Act to form each of the areas mentioned in the 1st schedule to the Act into a separate borough, subject to such alteration of area as might be required to give effect to the Act, and to such adjustment of boundaries as might appear to Her Majesty's Council expedient for simplification or convenience of administration, and to establish and incorporate a council for each of the boroughs so formed.

By sched. 1 of the Act it was declared that one of the areas to be constituted a separate borough was "the area of the ancient Parliamentary borough of Westminster comprising the parishes" therein specified. By the "Borough of Westminster Order in Council 1900," dated the 15th May 1900 and made under the provisions of the London Government Act 1899, there was constituted a metropolitan borough of Westminster, and provisions were made therein for determining the area of the borough so constituted, and a council was established for the borough. By royal charter of the 29th Oct. 1900 there was granted to the metropolitan borough of Westminster the title of city, and the council of the borough were to be styled the mayor, aldermen, and councillors of the city of Westminster.

By sect. 5 (1) of the London Government Act 1899 it was enacted that

As from the appointed day the powers and duties of the London County Council under the enactments mentioned in part 1 of the second schedule to this Act shall, subject to the conditions mentioned in that schedule, be transferred to each borough council as respects their borough.

The 9th Nov. 1900 was appointed as the day for the coming into force of this section.

Sched. 2, part 1, of the Act, so far as is now material, is as follows:

Part 1.—Minor powers and duties to be transferred from county council.—Powers and duties transferred: Power under sect. 84 of the London Building Act 1894 to license the setting up of wooden structures, and power to take proceedings for default in obtaining or observing the conditions of a licence under that section.

Sect. 84 of the London Building Act 1894 is one of a group of five sections included in part 7 of that Act under the title "Special and temporary buildings and wooden structures."

Sect. 84 provides :

(1) No person shall set up in any place any wooden structure (unless it be exempt from the operation of this part of this Act) except hoardings inclosing vacant lands and not exceeding in any part 12ft. in height, without having first obtained for that purpose a licence from the council, and the licence may contain such conditions with respect to the structure and the time for which it is to be permitted to continue in the said place as the council think expedient. (2) Provided that a licence shall not be required in the case of any wooden structure of a movable or temporary character erected by a builder for his use during the construction, alteration, or repair of any building, unless the same is not taken down or removed immediately after such construction, alteration, or repair. Provided that this section shall not extend to or apply within the City [that is, the city of London] or to any hoarding duly licensed by the local authority under any statutory powers in that behalf.

In order to enable spectators to view the funeral procession of the late Queen on the 2nd Feb. 1901 and the procession of His Majesty the King to open Parliament on the 14th Feb. 1901, a large number of stands or structures were erected within the city of Westminster along the line of route of the procession. These stands or structures were constructed of wood except the nails and some of the other fastenings and the cloth or other hangings placed upon them.

Questions arose between the city council and the London County Council as to whether the city council or the county council was the proper authority (1) to license the erection within the city of Westminster of the structures above referred to; (2) to take proceedings against persons who without licence, permission, or approval, erected such structures; and (3) whether such structures were or were not subject to the supervision or inspection of the district surveyors, under the London Building Act 1894.

These questions were submitted for the opinion of the King's Bench Division under sect. 29 of the Act of 1899, and the court determined that structures of the kind described fall within sect. 84 of the London Building Act 1894, and that the city council were the proper authority to grant licences for their erection and to take proceedings for the erection of such structures without licence : (see the case of *Mayor and Corporation of Westminster v. London County Council*, ante, p. 403; 86 L. T. Rep. 53; (1902) 1 K. B. 326.) The court there declined, in the absence of any representative of the district surveyors, to answer the third question in that case, and that question was still left open and in controversy between the city council and the district surveyors—parties to this case—acting within the city of Westminster.

As the route fixed for the processions on the occasion of the King's Coronation passed through many streets in the city of Westminster and it was certain that licences would be applied for a very large number of wooden structures falling within sect. 84 for the use of spectators, it became of urgent importance in the interests of the public safety that the points left undeter-

mined with regard to the respective duties of the district surveyors and the city council with regard to the supervision and inspection of such structures should be determined.

The functions of the district surveyors are in the main regulated by part 13 of the London Building Act 1894 (sects. 136-163). The district surveyors are appointed by the London County Council (or by their predecessors the Metropolitan Board of Works) from persons having certain professional qualifications (sects. 139, 140). The county council have power to dismiss or suspend the district surveyors and to alter their districts (sect. 139). They are ordinarily paid by fees specified in the schedule to the Act or fixed by the London County Council under the Act, subject to alterations not now material, and subject to a power to pay salaries in lieu of fees.

The following sections of the London Building Act 1894 are material with reference to the questions raised in the case :

Sect. 138. Subject to the provisions of this Act and to the exemptions in this Act mentioned, every building or structure and every work done to, in, or upon any building or structure, and all matters relating to the width and direction of streets, the general line of buildings in streets, the provision of open spaces about buildings and the height of buildings, shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate.

Sect. 139 (1). The council shall have the following powers with regard to the district surveyors and their districts (that is to say) : (a) They may alter the limits of the district of any district surveyor. . . . (b) They may dismiss or suspend any district surveyor, and in case of any suspension or during any vacancy may appoint a temporary substitute. . . .

Sect. 142. If any district surveyor is prevented by illness, infirmity, or any other unavoidable circumstances, from attending to the duties of his office, he may with the consent of the council appoint some other person as his deputy to perform all his duties for such time as he may be prevented from executing them.

Sect. 143. Where it appears to the council that on account of the pressure of business in any district, or on any other account, the surveyor of that district cannot discharge his duties promptly and efficiently, the council may direct any other district surveyor to assist the surveyor of that district in the performance of his duties, or appoint some other person to give such assistance, and the assistant surveyor shall be entitled to receive all fees payable in respect of the services performed by him.

Sect. 145. In the following cases and at the following times (that is to say) : (a) Where a building or structure or work is about to be begun, then two clear days before it is begun; and (b) where a building or structure or work is after the commencement thereof suspended for any period exceeding three months, then two clear days before it is resumed; and (c) where during the progress of a building or structure or work the builder employed thereon is changed, then two clear days before a new builder enters upon the continuance thereof, the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work. Every building notice shall state the situation, area, height, number of storeys, and intended use of the building or structure, and the number of buildings or structures, if more than one, and the particulars of the proposed work and the name and address of the person giving the notice and those of the owner then in possession of and the occupier of the building or structure, or of its site or intended site. All works in progress

at the same time to, in, or on the same building or structure may be included in one building notice.

SECT 154 (1). There shall be paid by the builder, or in his default by the owner or occupier, as the case may be, of the building or structure in respect whereof the same are chargeable, to every district surveyor in respect of the several matters mentioned in parts 1 and 3 of the third schedule to this Act, the fees therein specified, or such other fees not exceeding the amounts therein specified as may be directed by the council. (2) If in consequence of any reduction being made by the council in the amount of the said fees the income of any existing district surveyor is diminished, the council shall grant to him compensation in respect of such diminution.

In the 3rd schedule, under the title of "Fees payable to district surveyors"—part 1—"On Wooden and Temporary Structures":

On inspection of any wooden structure or on inspection of any structure or erection put up on any public occasion the same amount as for a new building calculated on the area of the structure or erection without reference to the area of any building to which it may be attached, or in or on which it may be put up.

Part 7 of the London Building Act, which includes sect. 84, contains no express reference to district surveyors, except in sect. 82 (5), which requires a copy of the plans and particulars approved by the council in the case of any iron building or structure, or any other building or structure to which the general provisions of part 6 are inapplicable, to be furnished to the district surveyor. Prior to the transfer to the metropolitan boroughs of the administration of sect. 84, it was the practice of the London County Council to make any grant of licence or approval under part 7 conditional on the work being done to the satisfaction of the district surveyor. Copies of the forms of licence in use by the county council were annexed to the case.

The regulations and licence now used by the city of Westminster for structures falling within sect. 84 do not contain any conditions that the structure licensed should be subject to the supervision or inspection of the district surveyor, or should be erected to his satisfaction.

Part 9 of the Act makes provision as to "dangerous and neglected structures." The district surveyors have a duty to report to the London County Council information received by them that any structure is in a dangerous state, and may be required by the London County Council to survey such structure. Fees are provided for district surveyors for surveys and subsequent action as to dangerous structures, but no fee is provided merely for reporting information, and the provision as to these fees is made by sect. 113, coupled with part 2 of the 3rd schedule.

It was contended for the city council (1) that the district surveyors were officers of the London County Council; (2) that on the transfer to the city council of the powers, duties, and liabilities of the London County Council as to the wooden structures of the character specified in this case and falling within sect. 84 of the London Building Act 1894, all duties, powers, and liabilities of the district surveyors as officers of the London County Council, or otherwise, with reference to the supervision and inspection of such structures passed to the city council and its officers; (3) that the right to receive the fee in respect of such wooden structures was contingent on the actual designation of the district surveyor in the licence

as the person to survey and inspect the licensed erection, or was transferred from the district surveyors to the city council and its officers, so far as the fee was payable for the supervision and inspection of wooden structures erected under the licence of the city council granted under sect. 84 of the London Building Act; (4) that the functions of the district surveyor with respect to wooden structures within sect. 84 are now limited to such functions as he may have under part 9 of the Act with respect to dangerous or neglected structures, and that the fees recoverable by him with respect to such wooden structures are limited to cases falling within part 9 (dangerous structures).

It was contended for the district surveyors (1) that under sect. 5 (1) of the London Government Act 1899 the powers and duties of the London County Council alone were transferred; (2) that the district surveyors were not officers of the London County Council, but, though now appointed by, and to some extent responsible to, that council, they exercised powers and performed duties under express statutory provisions, and did not derive their authority from that council; (3) that their powers and duties in respect of structures to which sect. 84 of the London Building Act applied arose under other sections of that Act, and did not in any way depend on the licence which might be granted under that section; (4) that their powers and duties in respect of such structures were not limited to such as arose under part 9 of the Act; and (5) that they were entitled in respect of the exercise of their powers and duties as to structures within sect. 84 to the fees prescribed by the 3rd schedule of the London Building Act.

The questions which arose between the council of the city of Westminster and the district surveyors were these three: (1) Whether the powers, duties, and liabilities of the surveyors with respect to the supervision or inspection of wooden structures falling within sect. 84 had been transferred to the city council and its officers; (2) whether wooden structures falling within sect. 84 were works of which the district surveyor should have a notice under sect. 145 of the Act, and as to which he has duties of inspection and supervision independently of the terms of any licence; (3) whether the right to receive the fees for such supervision and inspection specified in the case had been transferred to the city council and its officers or had lapsed, or was still retained by the district surveyors independently of the terms of the licence granted.

The form of the licence granted by the city of Westminster, so far as is now material, was as follows:

City of Westminster.—Wooden Structures.—London Building Act 1894, ss. 84, 200 (3) (e); London Building Act 1894 (Amendment) Act 1898, ss. 6 and 7; and London Government Act 1899, s. 5 (1), and second schedule, part 1.

Name of divisional superintendent or inspector.

Licence.—Whereas of ha applied to the Westminster City Council (hereinafter called the council) for a licence for the erection of a wooden structure, situate : Now the council, in the exercise of its powers under sect. 84 of the London Building Act 1894, does hereby grant a licence for such erection at aforesaid on the following conditions: 1. That such wooden structure be commenced within days, and completed within

days, from the day of 190 .
 2. That the whole of the work be executed to the satisfaction of the city engineer and surveyor.
 3. That the city engineer and surveyor, and any person or persons appointed by him, shall have access to visit and inspect the structure at all times during its construction and existence. 4. That the wooden structure be set up, erected, or carried out, as the case may be, and be retained, without any addition thereto, or any word, advertisement, or device thereon, and in exact accordance with the application for the licence, and the plans and particulars accompanying such application, except so far as the council otherwise consent. 5. That no wooden structure erected on any public occasion or otherwise shall be used until a certificate of its safety has been granted by the city engineer and surveyor.

Manisty, K.O. (W. F. Craies with him) for the council of the city of Westminster.—In the recent case of *Mayor and Corporation of Westminster v. London County Council* (86 L. T. Rep. 53; (1902) 1 K. B. 326) it was held that these wooden structures were within sect. 84 of the London Building Act, and that the power to license them passed from the county council to the city council, under sect. 5 (1) of the London Government Act 1899. The question was also raised in that case whether such structures were or were not subject to the supervision or inspection of the district surveyors. That question was expressly left open, and it is the question which arises in this case. The duty of inspection and supervision of these wooden structures has also been transferred to the city council. It was the practice of the county council in granting a licence under sect. 84, to insert in the licence the conditions and the term that the work should be executed to the satisfaction of the district surveyor; now the city council insert the condition that the work should be executed to the satisfaction of the city surveyor. There are no provisions of the Act relating to these wooden structures except sect. 84. That section stands by itself, and these wooden structures are dealt with in that section alone. They are analogous to hoardings, which come under the Metropolis Management Acts, and not under the Building Acts, and the object was to place these wooden structures in the same position as hoardings. The words "building or structure" in sects. 138 and 145 have no reference to these wooden structures and do not include them; and sect. 138 in providing for the supervision by the district surveyor of a "building or structure" has no reference to the supervision of wooden structures within sect. 84. So, when sect. 145 provides for the giving of a building notice in the case of a "building or structure or work," it has no reference to this case. "Structure or work" must be something in the character of a building: (see the judgment of Wills, J. in *Venner v. McDonnell*, 76 L. T. Rep. 152; (1897) 1 Q. B. 421). Sects. 138 and 145 must be read together as applying to buildings or structures only, and they do not apply to these wooden structures; and therefore the duties of district surveyors with regard to buildings under sects. 150 and 151 do not apply. It follows, therefore, as to the first question, that the duties as to supervision of these structures are transferred to the city council, and that as to the second question, as these wooden structures do not come within sect. 145 at all, no building notice to the district surveyor is necessary; and that as

to the right to the fees, as these are payable under sect. 154, they are not payable to the district surveyor in respect of these structures.

Macmorran, K.C. (W. C. Byde and Hilliard with him) for the district surveyors.—Sects. 84 is not limited to temporary structures; it applies generally to all wooden structures, and subsect. 2 confirms that view. Sect. 82 is the section which deals with buildings or structures to which part 6 is not applicable, but sect. 84 deals generally with wooden structures; and the only thing which is transferred by the Act is the power to license—that is, the power to forbid the erection of wooden structures except under the licence. The general provisions of the Act apply to these wooden structures apart altogether from the licence which has to be granted. Sect. 138 applies to a case of this kind as well as to a case of a hoarding or building, and that section gives the right of supervision to the district surveyor; and if a person were putting up a wooden hoarding and got a licence to do so, the structure would clearly be under the supervision of the district surveyor. The duties which are cast on the district surveyors by the Act itself are not taken away by the transfer of the powers of licensing wooden structures coming under sect. 84, and the general duties of supervision in the district surveyors under sect. 138 continue in them. Part 9, as to dangerous structures, also shows that the district surveyors have still duties in these cases. By sect. 103 a clear discretion is left to the county council as to whom they may appoint to make a survey of a dangerous structure. It is in general terms, where "any structure" is in a dangerous state, then the county council may require a survey by the district surveyor "or some other competent surveyor"; and it is quite clear that under that section (sub-sects. 3 and 4), even with regard to the temporary structures in this case, it would be the duty of the district surveyor to enter and inspect them if he considered them dangerous, and he could take proceedings in respect of them. These powers and duties which the district surveyor had are not taken away by sect. 5 (1) of the Act of 1899, or by the transfer to the city council of the power under sect. 84 to license these structures. Under sect. 138 the district surveyor has a general right of supervision. If he goes to inspect a wooden structure, he simply assumes that it has been erected under a licence; he has nothing to do with that licence, but his duty is to see whether the general provisions of the Building Acts have been complied with. He is, therefore, entitled to a building notice under sect. 145, and to his fees for inspection.

Manisty, K.C. in reply.

Lord ALVERSTONE, C.J.—This is a difficult case. The necessities of modern legislation, or the conditions under which legislation takes place, have rendered it absolutely necessary that in some cases there should be legislation by reference to previous statutes, and the difficulty imposed on the courts (for which no blame attaches to anyone) is that they frequently have to construe Acts of Parliament which incorporate sections of other statutes by mere reference. We have in this case to deal with a question which arises in consequence of this legislation by reference. The 2nd schedule of the London Government Act 1899 transferred from the county council, under the words "minor

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powers and duties to be transferred" the power under sect. 84 of the London Building Act 1894 to license the setting up of wooden structures and power to take proceedings for default in obtaining or observing the conditions of a licence under that section. Sect. 84 of the Act of 1894 contemplated that the licence might contain conditions with reference to the structure and the time for which it was to be permitted to continue. That the city or metropolitan borough of Westminster got something under that transfer is not denied. In *Mayor and Corporation of Westminster v. London County Council* (*ubi sup.*) this court decided, and I think this further discussion shows that we were right in so deciding, that the right of licensing, or of imposing conditions in the licence, and of taking proceedings in respect of not obtaining a licence and of not observing the conditions of a licence, were transferred to the city of Westminster. There were at the same time existing a number of provisions respecting the duties of district surveyors, which imposed upon them duties partly defined by the Act of Parliament, and partly resting on bye-laws which might be made under the Act. They were duties imposed upon persons who were not strictly servants of the county council, but who were under the jurisdiction to a certain extent of the county council. They were deputies having to be appointed with the approval of the county council, but still they were public officers under the London Building Act, having very important duties to discharge. In our opinion it was not intended to transfer to the officers of the new corporations the duties of district surveyors. Much stronger language than has been used would have been necessary to make the transfer. The transfer was to be a transfer of something which the county council previously had, and which was to be transferred to the new corporations. But it might be that the transfer of certain powers of the county council might by its operation and effect take away some of those duties; therefore it is quite possible that by this kind of legislation the duties of the district surveyors might have been to a certain extent taken away. We have therefore to consider what is the true view of the law, having regard to what was the former position of the county council and of the district surveyors, and what was intended to be transferred. The city council can specify the conditions of the licence; they can add in their licence any safeguard they may think fit to put in for their own protection, or for the protection of the public within their municipality; and if by the licence any duties are imposed upon any persons, those duties are not imposed upon the district surveyors as such. At the same time we also think that the transfer of the duties of the county council to the metropolitan boroughs does not destroy any of the rights or the duties of the district surveyors except so far as the actual necessity of the transfer implies the alteration or the destruction of these duties. In the light of these general observations, which I have endeavoured to state as clearly as I can, we have to consider the three questions that are put to us in this case. The first is whether the powers, duties, and liabilities of the surveyors with respect to the supervision or inspection of wooden structures, falling within sect. 84, have been transferred to the city council and its officers.

In so far as these duties depend upon the terms of the licence, it is not altogether a question of transfer; it is a question of the duties which are or may be imposed upon the officers of the city council, if there are any such officers named by the terms of the licence. They are not duties which are taken away from the district surveyors, and therefore it follows that the district surveyors do not have either the right, or the power, or the obligation of performing any of the duties prescribed by the licence, unless the licence by its terms indicates that they are the persons to fulfil the duties. For instance, it might still be possible for the city council in some cases to say that they still direct these structures to be erected subject to the supervision of the district surveyor. Our answer, therefore, to the first question is that the powers and duties of the district surveyors are not transferred to the city council and its officers, and that the district surveyors have no powers, or duties, or liabilities under the licence which is granted by the new corporation, the city of Westminster. Then, secondly, as to whether wooden structures falling within sect. 84 are works of which the district surveyor should have a notice under sect. 145 of the Act, and as to which he has duties of inspection and supervision independently of the terms of any licence. I think upon the whole, though not without considerable doubt, that the district surveyors are entitled to have notice under sect. 145, not, of course, notice of all the things that are specified in sect. 145, because those things are not all applicable; but I think that there may be questions, notably the question of dangerous structures, or possibly the question of interference with some street or street line, and, it may be, of some other matters, which may impose upon the district surveyor in a proper case the right and duty of inspecting the structure under the terms of the London Building Act, a right in no way based upon the licence. I do not mean to suggest that because notice is given the district surveyor has the right of going in and of purporting to exercise functions under the Building Act, which have no relation to the structure, or the character of the structure, which is actually being erected. I must not be taken to express an opinion that if simply a notice is given and a surveyor says that he will go in and inspect and will claim his fee, although there was no reasonable ground for suggesting that there was any danger or any infraction of any of the conditions in the statute, the notice is to justify him in claiming a fee under those circumstances. But I think it is impossible for us to say, having regard to the duties which may in some cases be imposed or may arise under the Building Act to be performed by the surveyor, that he is not entitled to notice. The last question is whether the right to receive the fees for such supervision and inspection has been transferred to the city council and its officers, or is still retained by the district surveyors. The right to receive the fees clearly has not been transferred to the officers of the city of Westminster; that follows from what I have said with regard to the earlier part of the case. I do not think it can be said to have altogether lapsed. The reasonable and proper thing would be for the county council to exercise their powers which they have under sect. 154 of allowing a lesser fee where the duties which have to be performed

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by the district surveyor would obviously be in any case very much less than what they would have had to perform under the circumstances contemplated by the statute. I cannot say that the fees altogether lapse, and if in a proper case, for good cause, a district surveyor, acting upon information he has received, has a duty to inspect, or some question arises which may properly allow him to inspect, in order to see whether the provisions of the Building Act have been infringed, then he would be entitled to his fees. I can do no more than indicate my opinion as to what ought to be done with regard to the amount of the fees; but I wish it to be understood that, in recognising this right of district surveyors, I do not suggest that they are entitled, simply because they are district surveyors, to claim general fees upon every one of these structures because they have certain duties to perform under the Act. The case is one of some difficulty in consequence of the transfer of these duties from the county council without any special mention or reference to the duties of district surveyors. I think these answers to the questions will be sufficient to enable persons to ascertain what their rights are.

DARLING, J.—I am of the same opinion. With regard to the case of the district surveyor going in and inspecting one of these temporary wooden buildings and getting any fee for doing so, although I can imagine he might very well go in and inspect or even have notice which would take him there, still the fact that during the whole of the argument of this case it taxed the ingenuity of counsel to suggest even a hypothetical case in which one of these structures could infringe the provisions of the Building Act and so really require the attention of the district surveyor, the fact that he could not suggest even a hypothetical case is enough to satisfy me that there will be really no interference by district surveyors with structures such as these, because it is almost impossible to conceive that the district surveyors could possibly in any single instance get a fee by going to look at the structure.

CHANNELL, J.—I do not think it is correct to say that any powers, duties, or liabilities have been transferred by this Act, because the district surveyors are persons having a statutory position, and a statutory duty cast upon them. They are not mere servants of the London County Council. The result of that seems to be that the transference of the powers and duties of the London County Council cannot possibly operate as a transfer of the powers and duties of the district surveyor. But, incidentally, the transfer to the city of Westminster of powers which, but for that transfer, would have been exercised by the county council, has, in my opinion, undoubtedly very substantially diminished the duties of the district surveyors. Under the former proceedings when the duty of licensing these structures was in the London County Council, it was the practice undoubtedly, as is shown by the forms of the licence, so to frame the licence that the district surveyor would be the person who would have the very substantial work to perform of seeing whether or not the structure was made in accordance with the licence. But the taking away that licensing power and giving it to some other authority, and

giving to that other authority a power which in fact they are exercising, and which it is only natural they should exercise, of making their own officer the person to do the work, has the effect of substantially diminishing the work of the district surveyor. The duty cannot be said to be transferred, because in so far as it is an independent statutory duty it necessarily still exists. It seems to me, therefore, that the way to answer these questions is to say, in answer to the first question, that nothing has been transferred, but that, so far as any duties would formerly have been imposed upon the district surveyors by the licensing of such structures by the London County Council, no such duties are now imposed upon them, but are imposed by the terms of the licence upon other persons—on the city surveyor. We cannot answer the question in exact terms, because really nothing has been transferred. So far as there are any other duties imposed, especially the duties as to dangerous structures, they all remain as they were. Then, as to the second question whether wooden structures falling within sect. 84 are works of which the district surveyor should have a notice under sect. 145 of the Act, and so on, I think that they are works of which the district surveyor is entitled to have a notice. It would be quite a sufficient notice to say: "Two days hence I am going to begin a building—a temporary structure—which the city of Westminster has licensed, and which they have directed me to build according to the satisfaction of their own surveyor." That notice, to which the district surveyor is entitled, would at once tell him that he has very little to do with that structure; but that he may have duties of inspection and supervision independently of the terms of the licence is, I think, really quite clear. The buildings may be dangerous, and if they are dangerous he has certainly a definite duty in respect to them. As to the right of the district surveyor to recover fees, if in any case he does inspect properly, and does not go there knowing that there is nothing at all for him to inspect, and does not inspect merely for the purpose of getting his fee, then he is entitled to his fee. Incidentally the operation of transferring the licensing of these matters from the county council to the city of Westminster and the other metropolitan boroughs is very greatly to diminish the duties which in point of fact will be likely to fall upon the district surveyors. That being so, I agree with the suggestion made by my Lord that the proper way for the county council to meet this case would be for the county council to make a direction under the words of sect. 154, which says that the district surveyor is to have those fees specified in the schedule, or such other fees not exceeding the amount therein specified as may be directed by the council. If the London County Council would make a direction imposing a smaller fee to be given to the district surveyor in cases where the structure was in fact licensed by the other authority and not by the council themselves (which would undoubtedly greatly diminish the work of the district surveyor), the whole difficulty, it seems to me, would be met.

Judgment accordingly.

Solicitors: For the applicants, *Caprons, Hitchins, Brabant, and Hitchins*; for the respondents, *Hickin, Washington, and Pasmors*.

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MAYOR, &C., OF ISLINGTON v. LONDON SCHOOL BOARD.

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Wednesday, June 11, 1902.

(Before WRIGHT, J.)

MAYOR, &C., OF THE METROPOLITAN BOROUGH OF ISLINGTON v. LONDON SCHOOL BOARD. (a)

London government—Compulsory taking of lands—Poor rate—General rate and poor rate levied as one rate—“Deficiency in poor rate”—Liability of promoters to make good deficiency in whole rate—Taking of lands by school board—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 133—London Government Act 1899 (62 & 63 Vict. c. 14), s. 10, sub-s. 2.

By sect. 133 of the Lands Clauses Consolidation Act 1845, the promoters of the undertaking are to make good the deficiency in the poor rate arising from their having become possessed, under the powers of their special Act, of any lands liable to be assessed to poor rate, until the works shall have been completed and assessed to poor rate.

By sect. 10, sub-sect. 2, of the London Government Act 1899, the general rate and the poor rate are to be assessed and levied together by the borough council as one rate, which is to be termed the general rate, and is to be assessed, collected, and levied as if it were the poor rate.

Held, that the promoters of the undertaking, upon the compulsory taking of lands in London, are only bound under sect. 133 to make good the deficiency in that part of the general rate which consists of the poor rate, or of any rate chargeable upon or incorporated with the poor rate, and are not bound to make good the whole of the deficiency in the general rate.

School boards, when taking lands compulsorily for the purposes of their Acts, are, by virtue of the Elementary Education Acts 1870 and 1873, promoters of an undertaking within the meaning of sect. 133; and consequently, when the London School Board compulsorily take lands for their purposes, they are only bound to make good the deficiency in the proportion of the general rate which represents the poor rate.

SPECIAL CASE stated in an action, the parties having concurred in stating a case for the opinion of the court pursuant to Order XXXIV., r. 1.

The action was brought by the mayor, aldermen, and councillors of the metropolitan borough of Islington (called the council) against the School Board for London (called the board) for (1) a declaration that under the Lands Clauses Consolidation Act 1845 and the London Government Act 1899 the board were liable to make good to the council the deficiency in the assessment to the general rate as defined by the last-mentioned Act on the house and lands known as No. 7, Barnsbury-park, in the metropolitan borough of Islington, by reason of such premises having been taken and used for the purposes of the works of the defendants, until the works should be completed by the defendants and assessed to such rate; (2) the sum of 5l. 7s. 7d., being the second instalment of a general rate made the 28th Sept. 1901 for the period ending the 25th March 1902 and payable on the 1st Jan. 1902.

By sect. 133 of the Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18) it is provided as follows:

And be it enacted, that if the promoters of the under-

taking become possessed by virtue of this or the special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed to the poor's rate, they shall from time to time, until the works shall be completed and assessed to such land tax or poor's rate, be liable to make good the deficiency in the several assessments for land tax and poor's rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special Act; and on demand of such deficiency the promoters of the undertaking, or their treasurer, shall pay all such deficiencies to the collector of the said assessments respectively; nevertheless, if at any time the promoters of the undertaking think fit to redeem such land tax, they may do so in accordance with the powers in that behalf given by the Acts for the redemption of the land tax.

By sect. 20 of the Elementary Education Act 1870 (33 & 34 Vict. c. 75), as amended by sect. 15 of the Elementary Education Act 1873 (36 & 37 Vict. c. 86), it is enacted that

With respect to the purchase of land by school boards for the purposes of this Act, the following provisions shall have effect; that is to say: (1) The Lands Clauses Consolidation Act 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the special Act; and in construing those Acts for the purposes of this section the special Act shall be construed to mean this Act, and the promoters of the undertaking shall be construed to mean the school board, and land shall be construed to include any right over land. (2) The school board, before putting in force any of the powers of the said Acts with respect to the purchase and taking of land otherwise than by agreement, shall

Give the notices prescribed by sect. 20 of the Elementary Education Act 1870, and by the same section the Education Department may make an order authorising the school board to put in force with reference to the land referred to in such order the powers of the Lands Clauses Act 1845 and the Acts amending the same with respect to the purchase and taking of land otherwise than by agreement; but no such order is to be valid until it is confirmed by Parliament.

By sect. 15 of the Elementary Education Act 1873 it is enacted:

For the purposes of the purchase of land otherwise than by agreement under section twenty of the principal Act, the Act confirming an order of the Education Department for such purchase, together with the principal Act, shall be deemed to be the special Act.

By a provisional order duly made and confirmed by the Education Department—Provisional Order Confirmation (London) Act 1898 (61 & 62 Vict. c. cciv.)—after sect. 20 of the Elementary Education Act 1870 had been complied with the Education Department ordered that the board be authorised to put in force the powers of the Lands Clauses Acts for the purchase and taking of lands otherwise than by agreement with reference to (*inter alia*) the premises known as No. 7, Barnsbury-park aforesaid.

On the 12th Dec. 1900 the board under the powers conferred by the above order became possessed of the premises, which consisted of a private dwelling-house and garden, which were then liable to be assessed to the poor's rate and were not exempt from that or any rate, or liable to be assessed thereto at a less amount than other

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

hereditaments, and in respect thereof the board became the promoters of an undertaking within the meaning of sect. 133 of the Lands Clauses Act 1845, and the Confirmation Act together with the Elementary Education Act 1870 became the special Act within the meaning thereof, and the works within such meaning in connection with the premises had not been completed and assessed to such poor's rate.

By virtue of the London Government Act 1899 (62 & 63 Vict. c. 14), the council became and were the borough council for the borough of Islington and the collectors of the assessment for poor's rate mentioned in sect. 133.

By sect. 10, sub-sect. 1, of the London Government Act 1899 it is enacted that

A scheme under this Act [which scheme was duly made and passed as regards the borough of Islington] shall provide for all the expenses of a borough council being paid out of the general rate, and for the discontinuance of a separate sewers rate and separate lighting rate, but shall make provision for protecting the interests of owners and occupiers of any hereditament which is exempt from any rate or liable to be assessed thereto at a less amount than other hereditaments. (2) After the appointed day [which had long since passed] the general rate and the poor rate shall be assessed, made, and levied together by the borough council as one rate, which shall be termed the general rate, and shall be assessed, made, collected, and levied as if it were the poor rate, and all enactments applying or referring to the poor rate shall, subject to the provisions of this Act as to audit, be construed as applying or referring also to the general rate.

A copy of this scheme was annexed to and formed part of this case.

By reason of the lands having been taken and used by the board for the purposes of the above works, there was prior to the 28th Sept. 1901 and still was an entire deficiency in the assessment for the general rate in respect of the lands, and the council as such collectors demanded from the board 5*l.* 7*s.* 7*d.*, the amount of such deficiency for the period ending the 25th March 1902; but the board neglected to pay the same. The proportion of such 5*l.* 7*s.* 7*d.* representing that portion of the general rate which was applicable to the relief of the poor was 3*l.* 13*s.*

This deficiency had been computed according to the rental at which such lands with the buildings thereon were valued and rated at the time of the passing of the Confirmation Act of 1898.

The council claimed that the board were liable to make good to the council the deficiency in the general rate; but the board contended that they were not liable to make good any part of such deficiency, or at all events that they were only liable to make good such part of such deficiency as arose with respect to that part of the general rate which represented the poor's rate.

The questions for the opinion of the court were: (1) Whether under the provisions of the above Acts of Parliament the board were bound to make good to the council the whole of the deficiency in the general rate. (2) If the last question should be answered in the negative, whether the board were bound to make good to the council the deficiency in the proportion of the general rate which represented the poor's rate.

W. C. Byde (*Danckwerts*, K.C. with him) for the Islington Borough Council.—Our contention is that the effect of sect. 10, sub-sects. 1 and 2, of the London Government Act 1899 is to substitute the general rate for the poor rate, and that the defendants are liable under sect. 133 of the Lands Clauses Act to pay the whole deficiency, and not merely the deficiency in the poor rate. The borough council take the place of the overseers, and the important and material words of the section are, "the general rate and the poor rate shall be assessed, made, and levied together by the borough council as one rate, which shall be termed the general rate," and then the section goes on, "and shall be assessed, made, collected, and levied as if it were the poor rate." Those are the words on which the whole question turns. The board's contention is now amended by admitting liability for deficiency in the poor rate, but that is too narrow a construction of the section. The general rate is for all purposes a part of the poor rate; it remains one rate, although the collecting authorities are directed to say how much of that one rate is to be applied for the different purposes. That the board are liable for the whole deficiency clearly appears from *Farmer v. London and North-Western Railway Company* (59 L. T. Rep. 542; 20 Q. B. Div. 788), where it was held that under sect. 133 the promoters were liable for deficiency in the borough rate and county rate, which were charged upon the poor rate. [*WRIGHT, J.*—Is there any section which distinguishes the part which is poor rate from the part which is not? *Avory*, K.C.—Sect. 11 (3) does so.] That section does not affect the question; it still leaves the rate one rate to be levied and collected as if it were one rate, and the whole general rate is now the poor rate, and that one rate is to be levied, not as a poor rate, but as a whole. If the Legislature had meant this to be otherwise they would have said so. All the machinery as to poor rate now applies to the general rate, and, if that is so, the provisions must be of general application. The board are therefore liable for the whole deficiency.

Avory, K.C. (*E. Layman* with him) for the school board.—We admit that we are liable for everything which is payable out of the poor rate, and that whatever was payable out of the poor rate before 1899 is now payable, and we do not now insist on the contention to the opposite effect in the case. [*WRIGHT, J.*—The whole question, therefore, is whether the board are liable to make good anything beyond the deficiency in the poor rate.] Yes. The real question is whether in 1898, the date of the provisional order under which this property was acquired, the board became liable to anything but the poor rate as understood in sect. 133 of the Lands Clauses Act. Their liability must be ascertained having regard to the provisional order of 1898, and it is clear that at that time in 1898 their liability could not include anything except in respect of what was properly called poor rate. The effect of sect. 10 is merely to regulate procedure; that that is so is clear when we look at the scheme. By sect. 10 (1) all existing exemptions are to be protected, and the scheme carries out the object of the statute by providing that all existing exemptions from rates are to be preserved. So far, therefore, from this statute

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enlarging any liability as to rates it carefully preserves all existing rights. Sub-sect. 2 merely provides that the general rate and the poor rate shall be levied together—that is, subject to the preceding sub-section by which the owners of any hereditaments have their interests and exemptions protected; and the whole section clearly shows that the Legislature were not intending any extension of liability in these matters. Sect. 16 (1) (e) also shows the same thing. There is a general intention to preserve all existing exemptions, and, although this liability on the promoters is not an exemption, still the same principle applies, as the council are asking to extend a liability existing in 1898. Sect. 133 of the Lands Clauses Act merely says that we are to make good the deficiency in the poor rate. We admit that liability, and, as to the case of *Farmer v. London and North-Western Railway Company* (*ubi sup.*), we admit that we are liable to make good the deficiency in the poor rate, and that carries with it the liability to make good anything which is payable out of the poor rate; but we contend that there is no further liability. At the passing of the Lands Clauses Act in 1845 there were many other rates besides poor rate, so that the mind of the Legislature was directed to the question which of the rates the promoters should be liable for, and they deliberately limited the liability to those two rates—poor rate and land tax. Sects. 161 to 165 of the Metropolis Management Act 1855 (18 & 19 Vict. c. 120) provide for the making of the rates, and sect. 161 provides for a separate sewers rate and lighting rate, and then for a general rate. Looking at sect. 10 of the Act of 1899, it meant no more than a consolidation of these general and separate rates into one rate, and the words “shall be collected as poor rate” mean merely procedure, and the words “all enactments applying to the poor rate” merely mean enactments relating to the assessment, collecting, and levying the poor rate, and the Lands Clauses Act is not such an enactment. Sect. 11 (3) shows that, although the rates are to be levied on one demand note, “the several purposes for which the rate is levied” are to be stated, so that it can be ascertained how much of the rate is for poor rate.

Ryde in reply.

WRIGHT, J.—The well-known section of the Lands Clauses Act—sect. 133—rendered the promoters of undertakings to whom that Act was applied liable, not to be rated to the poor rate, but, if there was a deficiency in the poor rate, to make good that deficiency, and they were liable to be sued for the recovery of that deficiency. The conditions which made the section applicable were a deficiency in poor's rate and land tax. The defendants in this case have taken lands under circumstances which have rendered that section applicable; and the only question is what, in relation to this case, is the meaning in that section to be given to the words “poor's rate.” That appears to depend on the London Government Act 1899; s. 10. The Lands Clauses Act itself selected the one rate—namely, the “poor's rate”—as the rate which was to be made good by the promoters of the undertakings. It left a number of other rates, such as the county rate, and the lighting and watching rates which were rates in boroughs, outside the enactment.

I do not think at that time the borough rate was payable out of the poor rate, most assuredly not in some boroughs, because even down to a very late period the borough rate in some boroughs was not paid out of the poor rate. It is useless to conjecture why the same principle was not applied to other rates. It may have been that the poor's rate was a mere burden upon land, of which it was thought everybody ought to pay their share, and that it ought to be paid although, in a case like this, the land might be temporarily unprofitable, in which case it would be a burden undertaken with a view to the future profitable user of the land. It may have been that it was thought there should not be a similar liability in the case of charges which were not strictly a burden upon the land, but were rather charges in respect of the value of something provided by the local authority, such as sewerage, water, or lighting, or anything of that kind, and the land might be idle in the hands of the promoters of the undertaking and they would receive no benefit from the sewerage, lighting, and so forth. We do not gain much by trying to see what the reasons were. The question really is what is the effect of sect. 10 of the Act of 1899. Before coming to that section, I have only to add that, according to ordinary principles, if it was intended to extend the liability of the promoters of undertakings beyond the poor rate to other assessments, one would have expected that to have been indicated with some reasonable clearness. It is admitted that the principle in modern Acts of Parliament has been to some extent indicative of a different view, because, as is well known, clauses are frequently inserted in modern Acts rendering the promoters liable for all the assessments made by the local authority. That, however, does not help us very much. I now come to the section itself. Sect. 10, sub-sect. 2, says: “The general rate and the poor rate shall be assessed, made, and levied together by the borough council as one rate.” I pause there to observe that that does not abolish the general rate or abolish the poor rate. It leaves them standing side by side. Then it goes on: “Which shall be termed the general rate, and which shall be assessed, made, collected, and levied as if it were the poor rate.” It does not say that all these expenses shall be provided for by a levy which shall be part of the poor rate. It says: “As if it were the poor rate.” This new compound rate is to be levied not as a new thing, but as the general rate and the poor rate made together. I think that is a different thing from saying that all these expenses are to be treated as part of the outgoings of the poor rate. I think it is that difference of expression which prevents the case of *Farmer v. London and North-Western Railway Company* (*ubi sup.*) from applying. There it was decided, and properly decided I have no doubt, that everything which was chargeable on the poor rate was to be regarded as being within a provision of this kind. Pausing at that point in the section, I do not think that is enough to establish the conclusion that all these purposes are to be treated as purposes of the poor rate. The section then goes on to say: “And all enactments applying or referring to the poor rate shall, subject to the provisions of this Act as to audit, be construed as applying or referring also to the general rate.” It seems to me that these words do not carry the

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matter any further. I think they naturally mean what we call enactments by way of machinery. As regards the assessment, making, collecting, and levying of the poor rate, and appeals against it, and everything of that sort, then everything in the nature of machinery shall apply to the collection of this general rate. I think such matters are there dealt with as a matter of form and not as special matters, and certainly, if we take the words very literally, they are difficult to apply: "All enactments applying to the poor rate." I hardly think that the Lands Clauses Act could be properly described as an enactment applying to the poor rate. Then, if we take the words "enactments referring to the poor rate," it has been pointed out that sect. 133 of the Lands Clauses Act does not so much refer to the form of the rate as to the making good of the deficiency in it. Then sub-sect. 3 of sect. 11 of the Act of 1899 indicates that for some purposes the general rate and the poor rate are intended to be kept separate, because it provides for the separation in the demand notes of the several purposes for which the rate is made, and a statement of the approximate amount in the pound required for each purpose, including the proportionate amount of the costs of collection, and in the scheme which has been made under that Act there is an express provision for the purpose of giving effect to exemptions. The council are to apportion the amount of the general rate so as to show approximately the rate from time to time for any of the purposes or the number of purposes in respect of which there is such an exemption, "and the rates in the pound so apportioned and entered shall be treated as land for the purposes in respect of which the exemption exists." I am not quite clear that that does not apply to this very case, although the word "exemption" is not appropriate for this purpose. But it may be that the word "exemption" there is used in a very general sense, and would cover a case like this. Apart, however, from the scheme, I think, on the whole, the claim of the borough council is not made out, and that the form of sects. 10 and 11 would be a strange form to adopt if the intention were to impose a new burden of this kind, especially when it is remembered that it is not a question of rating at all that is dealt with in sect. 133. Sects. 10 and 11 are entirely concerned with the question of rating. Sect. 133 is not concerned with the question of rating at all, but with the question of making up the deficiency in certain rates. I think the true meaning of the enactments taken together must be taken to be that the school board must make up the deficiency of that part of the general rate which still represents the poor rate or represents anything chargeable on the poor rate—that is to say, not merely the rate for the relief of the poor, but the rate incorporating everything for the relief of the poor generally. I therefore answer the first question in the negative and the second question in the affirmative.

Judgment accordingly, that the school board were only liable to make good the deficiency in that part of the general rate which represented poor rate.

Solicitor for the plaintiffs, *A. M. Bramall.*
Solicitor for the defendants, *C. E. Mortimer.*

Monday, June 23, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

GAGE (app.) v. WREN (resp.). (a)

Rating—Occupation—General district rate—Exemption on ground of non-occupation—House used in summer months—Furniture removed during winter months—Fittings left in house—Intention of returning to house—Public Health Act 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 2.

The respondent took a lease of a house and furnished it for the purpose of receiving boarders. She did not reside in the house, and in Dec. 1900 she removed from the house all her furniture and effects, except certain fixtures, fittings, and things which she had hired from the previous tenant. She intended to return to the house in the following summer, and in May she returned and refurnished the house, but, with the exception of the fittings and things left therein, the house was empty from Dec. 1900 to May 1901. The respondent claimed exemption from a general district rate for the period from Dec. 1900 to May 1901, on the ground that during that period the house was "unoccupied" within the meaning of sect. 211, sub-sect. 2, of the Public Health Act 1875.

Held, that the proper inference of law was that the respondent had the beneficial occupation of the house during the whole of the period, and was therefore not entitled to the exemption in sect. 211, sub-sect. 2, of the Act in favour of unoccupied premises, but was liable to the rate for the whole period.

CASE stated by justices of the peace for the borough of Lowestoft.

At a court of summary jurisdiction in Lowestoft on the 1st Nov. 1901, Mrs. Wren (the respondent) appeared in answer to a summons issued upon the complaint of Frederick Gage, rate collector (the appellant), under the Public Health Act 1875, for that she being a person duly rated and assessed by a certain urban sanitary and general district rate for the borough of Lowestoft, bearing date the 12th March 1901, in respect of certain premises known as Tremelling, in Cliff-road, Lowestoft, in the sum of 12l. 9s. 2d., had not paid the same, and had refused to do so.

The justices dismissed the complaint.

Upon the hearing the following facts were proved or admitted:—

An urban sanitary and general district rate for the borough of Lowestoft was duly made on the 12th March 1901 for the period from the 1st Jan. 1901 to the 30th June 1901, and the respondent was rated thereby in respect of a dwelling-house known as Tremelling, situate on Cliff-road, Lowestoft, at 2s. 2d. in the pound on the annual value of 115l., in the sum of 12l. 9s. 2d.

The respondent lived at the Esplanade, Lowestoft, and rented the house now in question on a three years' tenancy from the 24th June 1900 at a rent of 100l. for the first year, and 130l. for the second and third years, and furnished it to use as a house for receiving boarders or lodgers. Previous to the respondent renting the house it was occupied by another tenant, who left a quantity of fixtures and fittings in the house, and these, as set out in a schedule which was annexed

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to the case, the respondent agreed to hire of the previous tenant during the respondent's three years' tenancy of the house at a rental of 3*l.* 10*s.* per annum, and undertook to repair any damage at the expiration of the tenancy, reasonable wear and tear excepted.

On the 22nd Dec. 1900 the respondent removed all her furniture and effects from the house, selling some and storing the rest. She also removed the door-mat in the hall included in the schedule of fixtures hired of the previous tenant.

All the other fixtures, fittings, and things hired of the previous tenant were left in the house. These fixtures, &c., were described in the schedule as being the property of the previous tenant, and were stated to be of the value of 63*l.*

The respondent admitted that she did not have the water supply of the house cut off, and that she intended to return to the house the next summer; that she did not put up a notice in the house "To be let," and that she told the rate collector (the appellant), when the rate in question was demanded of her, that she had removed her furniture in order to escape liability for the rate.

On the 17th May 1901 the respondent returned to the house and refurnished it, but, with the exception of the fixtures and fittings referred to, the house was absolutely empty from the 22nd Dec. 1900 to the 17th May 1901.

On the part of the appellant it was contended that the respondent removed her furniture to avoid her liability to pay the rates and intending to return, and that the respondent was in occupation of the premises during the whole of the period for which the rate was made and was not within the exemption contained in sect. 211 (2) of the Public Health Act 1875, and was liable to pay the whole rate.

On the part of the respondent it was contended that she only left upon the premises such things as are usually taken by an incoming tenant from an outgoing tenant—things which she was not entitled to remove; and also that the fixtures and fittings were part of those things and were not things like furniture, with which occupation is constituted, and that, under the circumstances stated above, the premises were unoccupied from the 22nd Dec. 1900 to the 17th May 1901, and that she was only liable to pay the portion of the rate for the period between the 18th May 1901 and the 30th June 1901, and that it was quite immaterial whether the respondent left the house unoccupied intentionally and for the purpose of escaping the rates.

The cases of *Re v. Inhabitants of Bedworth* (8 East, 387) and *Willing v. St. Pancras Assessment Committee* (37 L. T. Rep. 126; 2 Q. B. Div. 581) were cited by the respondent as authorities that mere payment of rent was no criterion of occupation.

The justices found as a fact that the premises were unoccupied from the 22nd Dec. 1900 to the 17th May 1901, and that the respondent was not liable to pay the rate for that period, and dismissed the complaint.

The question for the opinion of the court was whether the justices upon the above statement of facts came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides:

Sect. 211. With respect to the assessment and levying of general district rates under this Act, the following provisions shall have effect; (namely): (1) General district rates shall be made and levied on the occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor, and shall be assessed on the full net annual value of such property. . . . (2) If at the time of making any general district rate any premises in respect of which the rate may be made are unoccupied, such premises shall be included in the rate, but the rate shall not be charged on any person in respect of the same while they continue to be unoccupied; and if any such premises are afterwards occupied during any part of the period for which the rate was made and before the same has been fully paid, the name of the incoming tenant shall be inserted in the rate, and thereupon so much of the rate as at the commencement of his tenancy may be in proportion to the remainder of the said period, shall be collected, recovered, and paid in the same manner in all respects as if the premises had been occupied at the time when the rate was made.

C. A. Russell, K.C. (W. Wills and J. G. Pease with him) for the appellant.—The question is whether the premises were unoccupied within the meaning of sub-sect. 2 of sect. 211 of the Public Health Act 1875 for the period during which the respondent had removed her furniture. The justices were wrong in holding that they were unoccupied during that period. The respondent was in point of law in occupation of the premises all the time. She was not involuntarily keeping these premises in hand; what she did she did deliberately. She prevented any person from being in occupation, and she had the intention of returning in the summer when the house was likely to be profitable. She did not intend to let the house to an incoming tenant, so that the case was not one in which an outgoing tenant leaves a house unoccupied with no intention of returning to it, but with the intention of finding a new tenant. Moreover, she left many things in the house—fixtures, fittings, and chattels of various kinds. There is no definition of "occupation" in the statute; but the cases show that in the first place we have to look to see if the person sought to be rated has any user of the premises by being there or by having furniture there, and when it is found that the premises are vacant in the sense of there being no person there, still if the owner uses the place for the purpose of keeping furniture there, or for other such purposes, then the person is in occupation in point of law. The question therefore is not whether the respondent was in the premises, but whether she was in occupation. She had an occupation by reason of keeping these fittings there; she did not keep them there for the purpose of trying to let the premises; if she had kept them there for that purpose there might have been something to say for her contention. She wanted to keep this house for the purpose of carrying it on as a boarding-house during the summer months, and she was getting a benefit out of it. She was therefore in occupation of it, and was liable to the rate for the whole period:

Harter v. Salford Overseers, 6 B. & S. 591;
Bootle Overseers v. Liverpool Warehousing Company,
85 L. T. Rep. 45;
Tyne Coal Company Limited v. Overseers of Wallsend Parish, 85 L. T. Rep. 854;

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Mayor of Southend-on-Sea v. White, 83 L. T. Rep. 408;

Rees v. Inhabitants of Bedworth, 8 East, 387;

Willing (or Reg.) v. St. Pancras Assessment Committee, 37 L. T. Rep. 126; 2 Q. B. Div. 581.

A. P. Longstaffe for the respondent.—The justices found as a fact that the premises were unoccupied, and that is sufficient to bring the case within the exemption of sect. 211 (2) of the Act. Legal possession is not sufficient to constitute occupation; there must be something more than legal possession to render the person liable to the rate. In *Smith v. New Forest Union Assessment Committee* (60 L. T. Rep. 927) Field, J. said: "The question is whether or not the owner of a plot of land with the right of possession, who tells an agent in the neighbourhood to put a bill up on his land that it is to be let, is an occupier within the meaning of the statute of Elizabeth. I am of opinion that he is not, and cannot therefore be assessed to the poor rate in respect of the plot of land"; and Cave, J. said: "He has nothing more than legal possession, and that is not sufficient to make him an occupier assessable to the poor rate." That decision was affirmed by the Court of Appeal (61 L. T. Rep. 870), where Lindley, L.J. said: "There was here no use, or enjoyment, or occupation." There must also be some benefit derived from the occupation; the mere possibility of benefit is not sufficient. There must be both the possibility of benefit and actual benefit to constitute occupation. Here there was no occupation at all, as the respondent chose to go out of the house. In *Staley v. Castleton Overseers* (10 L. T. Rep. 606; 5 B. & S. 505), where a cotton mill, owing to depression in the trade, was no longer worked, but was maintained as a factory with its machinery in a fit state for working, it was held that the occupiers were rateable for the mill, but that the rate should only be on its annual value as a storehouse for the machinery in it. That was so held although there was an occupation of the mill, and men went in from time to time to watch and oil the machinery. There was nothing similar to that in this case. It was found by the justices that the respondent left in the house only these fittings, &c., which an incoming tenant would be likely or bound to take. [CHANNELL, J.—The difficulty in these cases arises from having a thing which is actually profitable once a year and at other times is unprofitable.] There was no such occupation of these premises as is required by the Act, and this appeal ought to be dismissed.

C. A. Russell, K.C. was not called upon to reply.

Lord ALVERSTONE, C.J.—In this case the respondent conceived the idea of leaving this house unoccupied for part of the time out of the six months during which this rate was made, and she claims to say that she was in the position of an incoming tenant within the last part of sub-sect. 2 of sect. 211. I think she was not, though probably it would not be enough for the appellant to rely upon that. I think the cases have laid down a perfectly clear line in the matter, and the only difficulty is one of application of the principle to the particular case. My brothers Ridley and Bigham in the case of *Boothle Overseers v. Liverpool Warehousing Company (ubi sup.)* decided that where persons go out of the occu-

pation of a warehouse and have no intention to come back and use it, there was not occupation within the section. The case of *Mayor of Southend-on-Sea v. White (ubi sup.)* decided that, where a shopkeeper went out of possession, when the season was not on, and left behind more things than the tenant in this case left—things which clearly indicated that he was coming back—there was occupation. The question here is under which of these two classes of principles this case falls. If the magistrates had stated this question and found it as a question of fact, and had not left it as a matter of law, we might have been in a difficulty; but I do not think that they intended to do that. I think they very properly stated all the evidence, and have asked us to say whether they have drawn a right conclusion on the evidence, dealing with it as a matter of law. The respondent was a tenant for three years; she paid 100*l.* as rent for the first year, and then 130*l.* a year for the remaining years, and she took the house for the purpose of receiving boarders or lodgers. She removed her furniture, and I will take it for the present purpose that she removed everything except such things as an incoming tenant would have to take, such as fixtures, blinds, meters, floor-cloth, and things of that kind. I quite agree that if those things were left in the house, and if the evidence before the magistrates was that they were only left with a view of finding a purchaser or an incoming tenant, the inference of law to be drawn from that would not be that there was any evidence of occupation. But the case goes on to say that the respondent left all the fixtures and fittings she had hired from the previous tenant, and I will assume that they were things which might all have been taken by an incoming tenant. She admitted she did not have the water supply cut off; that she intended to return to the house the following summer, and that she did not put up any notice in the house "To be let." I exclude from consideration the statement that she did it with the intention of not paying the rate, because I think that a great deal too much is said about people evading such liabilities. If persons are not within the charging Act, then they do not evade the liabilities; they simply are not liable for them. Therefore, if the respondent thought she would not be within the charging Act by going out of possession, she was quite entitled to do it. I think that the proper inference of law to be drawn from the facts is that the respondent had the beneficial occupation of this house during the whole time. She intended to come back to the house, and she might come back, and she made no attempt whatever to dispose of it, nor is there any evidence at all that she meant to go out of the beneficial occupation of the house during the year. Therefore I think on these facts the magistrates ought to have come to the conclusion that the respondent did beneficially occupy this house during the whole of the rateable period, and not merely during the period, some six weeks, when she purported to have come back as an incoming tenant. I will say as a matter of fact she was not an incoming tenant; and therefore, if that is to be the standard of occupation contemplated in the earlier part of sub-sect. 2, it is clear that she would not have been exempt. I think the magistrates ought to have found that she was in occupation and liable for the whole period.

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DARLING, J.—I am of the same opinion. It seems to me that if we want to find out whether the respondent was in beneficial occupation or not, we are entitled to consider what is the natural use of this house in the hands of the respondent. This case does not seem to me to be in the least like the case of a manufactory which, owing to depression in trade or some such reason, is for a certain time useless as a factory. The intention of person who rent houses of this kind is to do exactly what the respondent in this case did. She wanted to carry on the business of a lodging-house keeper at a seaside place which has a summer season. It is a place which is profitable during certain seasons, and unprofitable during the rest of the year. The manner of occupation and of carrying on the business which was contemplated by the respondent was that the business would best and most profitably be carried on if she were there during the busy season, and if she went away and shut the house up and thereby diminished the expense in every way during the rest of the time. To my mind there was a beneficial occupation of the house all the time, and she was the tenant with an intention to use the house in the profitable season, and to reduce the expenses in this way during the unprofitable season. It seems to me that the case is very like the case of a fruit tree which belongs to a person all the time. It would be absurd to say that the person does not occupy it except when the fruit is on the branches. One contemplates by the entire use of a thing that for a long time it will give no return, and one will then treat it in a way which makes it the cheapest thing to him during the time it is idle, and will then make the most out of it whilst he can get profit out of it. I think the whole system the respondent had laid out for herself was to contemplate this house as a business to be carried on from year to year, but treating it at one period as not being a profitable occupation, and taking all the profit which resulted in the year within a very short period of the yearly use of the house. I think, therefore, there was a beneficial occupation all the time.

CHANNELL, J.—I am of the same opinion. I wish to point out, in addition to what has been pointed out by my brothers, with whose judgments I entirely agree, that here the articles left in the house, which in the case are called fixtures and fittings, are most clearly chattels and not fixtures in the sense of articles which would pass with the property attached to them. They are fitted articles, mere chattels, and for the purpose of the present case they were let to the respondent, but they were the property of this respondent, and they were kept there during the winter, and she was just as much in occupation of that house as a person who has got a larger amount of furniture in the house, subject only to the question that during the winter months, if she had not intended to come back to the house during the summer, it is possible that the rating of the premises ought only to have been at a value for warehouse purposes in keeping this place. Two observations may be made with regard to that point. In the first place, the question would not be capable of being raised in the way it is raised here; and in the next place, if such were the case, the consequence would be that the house would be rated at double the value during the summer

months, so that nobody could gain anything by that. But, in the summons for payment of the rate, the question could not be raised that the place was not rated at the proper value. Consequently, there is here quite sufficient evidence of the occupation.

Appeal allowed. Case remitted to the justices with a direction to order payment of the rate.

Solicitors for the appellant, *Sharpe, Parker, and Co.*, for *E. B. Nicholson*, Town Clerk, Lowestoft.

Solicitors for the respondent, *Rowcliffes, Rawle, and Co.*

Wednesday, June 25, 1902.

(Before Lord ALVERSTONE, C.J., DARLING and CHANNELL, JJ.)

PASQUIER (app.) v. NEALE (resp.). (a)

Licensing Acts—Offence—Sale at place not authorised by licence—Licensing Act 1872 (35 & 36 Vict. c. 94), s. 3.

A keeper of an unlicensed refreshment house was also part proprietor of a licensed wine shop close by. A customer entered the refreshment house and ordered a meal and a bottle of wine. The waiter asked for the money for the wine, went to the wine shop, purchased the wine, and returned and served it to the customer.

Held, that on these facts there was evidence of a sale of the wine at the refreshment house to the customer, contrary to sect. 3 of the Licensing Act 1872.

CASE stated by Mr. Denman, one of the magistrates of the police-courts of the metropolis sitting at the Marlborough-street Police-court, under the statutes 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

At the Marlborough-street Police-court an information was preferred by the respondent, John Manktelow Neale, an officer of the Inland Revenue, against the appellant, Alphonse Pasquier, for that the appellant, on the 10th Dec. 1901, at the parish of St. Anne, Soho, in the county of London, did sell certain wine by retail—to wit, one pint of wine—without having a proper licence in force duly authorising him in that behalf, contrary to the form of the statutes in that case made and provided. The information was heard by the magistrate on the 19th March 1902, and he convicted the appellant and ordered him to be fined 3l. 10s. and 2s. costs.

The following were the facts set out in the case: The appellant was the proprietor of a restaurant business which he carried on at No. 16, Gerrard-street, Soho, which premises were not licensed for the sale of intoxicating liquors. The appellant also carried on the business of a wine dealer in partnership with one Paul Durand, at No. 2, Dansey-yard, Soho, in respect of which premises Paul Durand holds a licence as a dealer in foreign wine under sect. 2 of 6 Geo. 4, c. 81. Paul Durand was the manager of a restaurant in Jermyn-street, Piccadilly, of which the appellant was the proprietor, and in respect of which a licence as a retailer of beer, spirits, and wine was held. On 10th Dec. 1901 Paul de la Combe Finnigan, an officer of the Inland Revenue, entered the restaurant, No. 16, Gerrard-street, Soho, and ordered a

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at Law.

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meal. The appellant's waiter showed Finnigan a list of wines and prices, from which list Finnigan selected a pint bottle of claret at 1s. 6d. The waiter then asked Finnigan to pay for the wine, and Finnigan accordingly gave him the sum of 1s. 6d. The waiter thereupon left No. 16, Gerrard-street, and proceeded to No. 2, Dansey-yard, which latter premises are only a short distance away, and there purchased a pint bottle of claret, for which he paid, though there was no evidence as to the price. He then returned with the pint bottle of claret, which he served to Finnigan, who consumed it.

On the above facts the magistrate held that there had been a sale of wine to Finnigan by the appellant's servant at No. 16, Gerrard-street, and he accordingly convicted and fined the appellant as above stated.

The question for the opinion of the court was whether upon the above facts there was evidence upon which the magistrate was justified in finding that there was a sale of wine to Finnigan on the premises No. 16, Gerrard-street, or whether, as contended by the appellant, he was bound as a matter of law to find that the sale took place at No. 2, Dansey-yard.

The Refreshment Houses Act 1860 (23 & 24 Vict. c. 27), s. 19, provides:

Every person who shall sell any wine by retail, whether to be consumed on the premises or not, without having a proper licence in force duly authorising him in that behalf, shall, over and above any other penalty to which he may be liable, forfeit the sum of 20l., which shall be denominated an excise penalty.

The Licensing Act 1872 (35 & 36 Vict. c. 94), s. 3, provides:

No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same.

Avory, K.C. (H. B. D. Woodcock with him) for the appellant.—There is no evidence to support the finding. This practice has been going on since we can remember. The theory is that the waiter is a servant of the purchaser. There was no wine on the premises at No. 16, Gerrard-street, and on the wine being ordered the waiter asked the customer for the money. It makes no difference that the restaurant proprietor was in partnership with the man who kept the wine shop. The sale was at 2, Dansey-yard. The magistrate has so found. [Lord ALVERSTONE, C.J.—The waiter may only have paid 1s. for the wine at the wine shop.] This is a criminal case, and it must be assumed in the appellant's favour that the waiter paid 1s. 6d. The question is where the goods were appropriated. The question whether there was a sale at No. 16, Gerrard-street depends on that. It was not till the waiter got to No. 2, Dansey-yard that the particular bottle of claret was appropriated. *Pletts v. Beattie* (74 L. T. Rep. 148; (1896) 1 Q. B. 519) and *Pletts v. Campbell* (73 L. T. Rep. 344; (1895) 2 Q. B. 229) are conclusive on that point. The payment of the money to the waiter is itself conclusive unless it is displaced. He also cited

Stephenson v. Rogers, 80 L. T. Rep. 193.

Sir Edward Carson, K.C., S.-G. (S. A. T. Rowlatt with him) for the respondent.—This is a perfectly clear case. There is evidence upon which the magistrate could find that there was a sale at No. 16, Gerrard-street. Each of these cases

depends on the particular facts. I do not admit that a person who obtains a wine licence can thereby, although it only allows him to sell off the premises, carry on the business of a refreshment-house keeper next door without a licence and supply liquor there. [He was stopped by the Court.]

Lord ALVERSTONE, C.J.—In this case the magistrate has drawn an inference of fact, and the only question is whether there was evidence to justify him in drawing that inference and finding that fact. I find it impossible to say that a magistrate must not draw an inference of fact unless the particular thing is proved before him. Where a restaurant keeper boldly says that he sells no wine, but that he can obtain it as agent on behalf of the customer, as is done in respectable restaurants, it is one thing. But, on the other hand, where the restaurant keeper has a licence at another place, and he by keeping a restaurant promotes the sale of his own wines by having his agents ask customers if they will have wine, that is a very different matter. If the waiter had been called, different considerations might have arisen; but on the evidence as given it is impossible to say that there was no evidence upon which the magistrate might come to the conclusion he did. We cannot, therefore, interfere.

The other learned judges concurred.

Appeal dismissed.

Solicitors for the appellant, *Watkins, Baylis, and Chidson*.

Solicitor for the respondent, *The Solicitor of Inland Revenue*.

Friday, July 25, 1902.

(Before BIGHAM and DARLING, JJ.)

REX v. GOVERNOR OF HOLLOWAY PRISON;
Ex parte SILETTI. (a)

Extradition—Habeas corpus—Fugitive criminal—Committal order by magistrate—New evidence obtained after committal—Jurisdiction of court upon rule for habeas corpus to review decision of magistrate—Extradition Act 1870 (33 & 34 Vict. c. 52), ss. 9, 10, 11.

Upon the argument of a rule for a habeas corpus obtained by a fugitive criminal against whom the magistrate has upon the evidence before him made an order of committal under the Extradition Act 1870, the court has no jurisdiction to review the decision of the magistrate upon the ground that since the order of committal was made further evidence had been obtained which might have affected his decision.

The only question which the court can entertain is the question of jurisdiction—that is, that the crime alleged is outside the Extradition Act altogether, or that there was absolutely no evidence upon which the magistrate could properly commit; but if the magistrate have jurisdiction and if there be evidence before him upon which he could properly commit, the court cannot review his decision; and if further evidence be obtained after the order of committal, it is entirely a matter for inquiry by the Secretary of State before making an order for the surrender of the accused.

(a) Reported by W. W. OBE, Esq., Barrister-at-Law.

K.B. Div.] **REX v. GOVERNOR OF HOLLOWAY PRISON; *Ex parte* SILETTI.** [K.B. Div.]

RULE calling on the governor of His Majesty's prison at Holloway to show cause why a writ of *habeas corpus* should not issue directed to him to bring one Giuseppe Siletti before the court.

The rule was obtained at the instance of Siletti upon the ground "that further evidence had come to light since the magistrate's committal, which might have affected his mind in favour of the prisoner."

The facts were as follows:—

The applicant for the rule (Siletti) was brought before the police magistrate at Bow-street Police-court, under the Extradition Act 1870, with a view to his being surrendered to the Belgian authorities, and on the 5th June 1902 he was ordered by the learned magistrate to be kept in custody at Holloway Prison until delivered thence in pursuance of the Extradition Act to the representatives of the Belgian Government, on the ground of his being accused of committing larceny and of obtaining property or money by a fraud or trick, on the 4th Oct. 1900, within the jurisdiction of the Belgian Government, under the name of Van Mol.

The accused was not represented by any legal representative at the hearing before the magistrate. The evidence before the magistrate of his identity as the person who was guilty of the fraud was supplied very largely by a photograph which was identified by the witnesses as being the photograph of the person who committed the fraud in Belgium, and upon the evidence then before him the magistrate made an order committing Siletti to prison to await extradition if the Secretary of State should make an order under the Act.

Since the order of committal was made on the 5th June Siletti had brought forward certain documents for the purpose of showing that at the time when the fraud was committed he was serving in the Italian army, and obtained his discharge some ten days after the fraud was committed in Belgium.

In his affidavit the accused stated that he annexed thereto his certificate of discharge from the Italian army, and that it proved that he was called up for service on the 26th March 1900 at Turin, that he was transferred to Piacenza on the 2nd April 1900, and that he served there till the 11th Oct. 1900, on which date he obtained his discharge by special permission for private reasons; that on that day he left Piacenza for Turin, and that therefore he could not have committed the offence alleged against him; that the personal details set forth in the certificate of discharge exactly described himself, but that they did not agree with the description given of Van Mol by the prosecutor; that on his arrival at Turin he presented himself in his uniform to the mayor on the 15th Oct. 1900 in accordance with the military rules, and that the mayor thereupon signed his certificate, and that he was discharged. He also stated that he was not the man Van Mol, and that he was not in Belgium on the 4th Oct. 1900, the date of the alleged offence; and, further, that he could not produce his certificate of discharge before the magistrate as it was in the custody of the governor of Wormwood Scrubs Prison, in which he was detained.

The court who granted the rule *visi* (Channell and Jeff, JJ.) were of opinion that there was reasonable and proper evidence before the magis-

trate on which he could make an order to commit, and a rule was not granted upon that point, but the rule was granted upon the point as to the effect of the new facts discovered, Channell, J. pointing out that if those facts had been before the magistrate in all probability he would not have committed, and the court granted the rule as there was some doubt to what extent the court would review the decision of the magistrate under the circumstances.

The Extradition Act 1870 (33 & 34 Vict. c. 52) provides:

Sect. 9. When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England. The police magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character, or is not an extradition crime.

Sect. 10. In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged.

If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of the committal, and such report upon the case as he may think fit.

Sect. 11. If the police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. Upon the expiration of the said fifteen days, or, if a writ of *habeas corpus* is issued after the decision of the court upon the return to the writ, as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State, by warrant under his hand and seal, to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for the surrender proceeded, and such fugitive criminal shall be surrendered accordingly.

Sect. 12 provides for the discharge of persons apprehended if not conveyed out of the United Kingdom within two months.

The *Attorney-General* (Sir Robert Finlay, K.C.) (*H. Sutton* with him) showed cause.—With regard to the new evidence brought forward since the order of committal, we think there is certainly a question to be investigated before the order by the Secretary is made for handing over the accused for trial in Belgium. It may be that a mistake as to identity has been made. Witnesses have been telegraphed for from Belgium, and the Belgian Embassy state that they are getting witnesses over who will be able to put the question beyond doubt as to whether or not there has really been a mistake. We admit that on the materials which have been brought forward there is a case for inquiry, and we do not think it would

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be right that the accused should be handed over until inquiry has been made as to whether there may not have been a mistake of identity; and if it should be satisfactorily established that he was not in Belgium at the time, it would not be right that he should be sent over to Belgium for trial, because in that case it would be evident that if this further evidence had been before the magistrate the order for committal would not have been made. It is not imperative on the Secretary of State to make the order, and we shall express to the Secretary our view that before the order is made he ought to take steps to satisfy himself whether a mistake has been made. But with regard to the question of procedure on this rule, it is submitted that there is no jurisdiction in the court to take the action which counsel for the accused asks the court to take. It would be impossible to make this rule absolute without infringing upon principles which are well established and of great importance. This is really an application to reverse the decision of the magistrate upon new evidence. That is not a legitimate thing to do upon an application for a *habeas corpus*. There is a series of cases which have decided—and rightly—that this court cannot review the decision of the magistrate. The only question for the court is whether there was evidence upon which the magistrate could act, and, if there was, then this court will not, and cannot, review his decision. This new evidence is entirely a matter for inquiry by the Secretary, and not for this court. The present case is quite different from such a case as *Re Guerin* (60 L. T. Rep. 538), where it was held that the court could review the decision of the magistrate on a question of fact cardinal to the jurisdiction, in that case as to whether the accused was a British subject or not. The case relied on by the accused is

Re Castioni, 64 L. T. Rep. 344; (1891) 1 Q. B. 149.

[BIGHAM, J.—There, again, it was a question of jurisdiction.] Precisely. There are certain expressions by Hawkins and Denman, J.J. which must be read with reference to what was before the court, and, if those dicta go further than the question of jurisdiction, it is submitted they are erroneous as to the power to review generally. On an application for a *habeas corpus* the prisoner may take the point that it is not an extradition crime, that it is a crime of a political character, or that he is a British subject, and also the point, which is one of law, that there was no evidence. The present case is really concluded by the case of

Re Arton (No. 2), 74 L. T. Rep. 249; (1896) 1 Q. B. 509.

Lord Russell, U.J. there says: "We are not a Court of Appeal on questions of fact from him"—that is, the magistrate—"We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit." That view has often been acted upon, such as in *Ex parte Huguet* (29 L. T. Rep. 41), the first in point of date, and in *Reg. v. Maurer* (10 Q. B. Div. 513). These cases are irreconcilable with the view expressed by Hawkins, J. in *Re Castioni* (*ubi sup.*), and the dictum in that case is in conflict with several cases by which this court is bound. He also referred to *Re Meunier* (71 L. T.

Rep. 403; (1894) 2 Q. B. 415) and sects. 10 and 11 of the Act, and was stopped.

H. G. Booth in support of the rule.—By sect. 11 of the Act the magistrate is to inform the prisoner that he has a right to a *habeas corpus*. This would be useless if the court has no power to review the magistrate's decision in such a case as this. It must mean that a prisoner is entitled to have reviewed by this court the question whether or not the magistrate had evidence before him on which he could commit. The contention for the Crown here is absolutely inconsistent with the judgment of Hawkins, J. in *Re Castioni* (*ubi sup.*). That judgment has not been dissented from since it was given, and is relied upon as binding upon this court. It was the judgment of three judges (Denman, Hawkins, and Stephen, J.J.). Upon the judgments in that case it is quite clear that this court has power to review the evidence upon which the accused was committed by the magistrate, and to say that the order was made by the magistrate against the weight of the evidence. The cases cited are different. In those cases the conflicting evidence was before the magistrate. Here the conflicting evidence, being new evidence discovered afterwards, was not before the magistrate at all. In the cases cited the decisions merely come to this, that the magistrate having all the conflicting evidence before him, and having come to a conclusion upon that evidence, the court would not review it. Here if the magistrate had had this evidence before him he would probably have ordered the accused to be discharged. Upon the authority of *Re Castioni* (*ubi sup.*) the court has power to hear this further evidence and to review the decision of the magistrate. This rule ought therefore to be made absolute.

BIGHAM, J.—I think this rule must be discharged. The accused in this case has the right which all persons accused before a magistrate have—the right to apply for a *habeas corpus*. The Extradition Act does not give him that right. He has it already at common law. The Extradition Act merely gives him the right to be informed of the fact that he may exercise the power of applying for a *habeas corpus*, if he chooses to do so. Then, if he applies for a *habeas corpus* and obtains a rule, the question arises what points may be taken upon the argument of the rule. For my part, I think the only question that this court can entertain is the question of jurisdiction, and, applying that observation to this particular Act, all that the accused person may say is that the crime with which he was charged was not a crime within the meaning of the Extradition Act—that is to say, that it did not come within the class of offences contemplated, or that it was an offence of a political character and therefore was outside the Act altogether. He may also say that there was absolutely no evidence upon which the magistrate could exercise his discretion as to whether he would commit or not. These things he may say; but I am clearly of opinion that there is one thing he cannot say—namely, that there is evidence one way and the other, and that this court ought to enter into the consideration as to whether the magistrate has exercised his discretion as to it properly. That he cannot say. It is said that the judgments in the case of *Re Castioni*

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(*ubi sup.*) show that the court can enter into the question of the weight of evidence, and can review the decision of the magistrate. For my part, I do not think that the learned judges in that case meant to say anything of the kind. If they did mean to say that, I am of opinion that their judgment in that respect was *obiter*, and was contrary to a long course of decisions which have been brought to our attention by the Attorney-General. Therefore I think that this rule ought to be discharged.

DARLING, J. — I am of the same opinion. With regard to the statement that it is only upon questions of jurisdiction that this court can interfere, I think jurisdiction is not quite the right word to use. It is used by my brother Bigham, as I understand it, to cover a good deal more than is usually meant when we use the word jurisdiction in ordinary cases. It is used to cover want of jurisdiction in the magistrate—that is, want of that which would properly be called jurisdiction. It is also used to cover the case of there being no evidence against the accused at all, and where there was, in the opinion of this court, no evidence against the accused, not even a *prima facie* case against him, in such a case as that this court would go into the matter, and on ascertaining that there was no evidence, would make the rule absolute for a *habeas corpus*. The argument of counsel in support of this rule comes to this, that under this statute we have to discharge an absolutely different duty from that which we should discharge on the argument of a rule for a *habeas corpus* applied for by a person in respect of committal for a crime committed in England. I do not see anything in this Extradition Act to support that contention. It may be that it might be necessary to go into fresh evidence in some conceivable case, because in these extradition cases it may be necessary to apply foreign law as well as English law, for this reason, that it has to be ascertained that the offence charged is an offence by the law of England as well as by the law of the foreign country which applies for the extradition. If the proposition of counsel for the applicant is carefully looked at, it comes to this—and in fact I think he said so—that really he maintains that, on the argument for a rule for a *habeas corpus*, this court has jurisdiction to consider the application as though it were an application for a new trial on the point that the finding impeached was against the weight of the evidence. In my opinion it is not open to the court to take that view of the matter. This case is a peculiar one, because it is contended that here we should see whether there ought not to be a new trial on the ground that the finding of the magistrate was against the weight of the evidence, and the evidence is evidence which has never yet been given. It is evidence which has been procured since the order was made, and it is said that, if the magistrate had had that evidence before him, it is conceivable that he would have come to a different conclusion; and it is said, therefore, that in any case where you can produce evidence which the magistrate has not had before him, but as to which it can be said to this court that, if the magistrate had had it before him it would have affected his decision, this court will order a rule for a *habeas corpus* to be made absolute. In my opinion to do so would be to do

what the courts have never yet done. For myself I do not think we are overruling what was said by Denman and Hawkins, J.J. in the case of *Re Castioni* (*ubi sup.*), but, if what we are now deciding necessitates our differing from that case, I think it is because that case makes it necessary for us to do so. I still, however, hold the opinion which my brother has expressed, that, if our decision is in conflict with that case, then it seems to me that we have authority for what we are now deciding in the passage which was cited to us in *Arton's case* (*ubi sup.*), where Lord Russell, C.J. said: "We are not a Court of Appeal on questions of fact from the magistrate. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit." Here it is plain the magistrate had authority to commit. It is not alleged that he had not. He had jurisdiction to commit, and we have only to see whether he had such evidence before him as justified him in exercising that authority and jurisdiction. It is really not contended that he had not. What is contended is that if he had had something else before him, then he would not have committed. It seems to me that, when the matter is put in that way, it is perfectly plain that this rule ought to be discharged.

Rule discharged.

Solicitor for the applicant, *J. Weaver Burnard*.
Solicitor for the Crown, *The Treasury Solicitor*.

Monday, Aug. 4, 1902.

(Before BIGHAM, J.)

CORPORATION OF NORTHAMPTON v. ELLEN. (a)

Local government—Water supply—Water rate—Extension of boundaries of borough—Right of corporation to differentiate the water rate—"Rates" in added part not to exceed a specified sum—Whether water rates are included as "rates"—Northampton Corporation Waterworks Act 1884 (47 & 48 Vict. c. cccviii.), ss. 25, 36—Northampton (Extension) Order 1900, art. 36.

A corporation, under a Waterworks Act, were entitled to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding $7\frac{1}{2}$ per cent. on the net rateable value, and they were also empowered, if there were a deficiency in the amount of the water account for any year, to make up the deficiency out of the general district rate. The corporation, whose boundaries were extended by an extension order, had been charging a uniform water rate of $7\frac{1}{2}$ per cent. over the whole borough, but for certain reasons they reduced it in the old borough to 5 per cent., while retaining it in the added part at $7\frac{1}{2}$ per cent.

Held, that the corporation had no power so to differentiate the water rate, but must charge the same water rate over the whole borough.

An article of the extension order provided that the general district rates to be levied in the added part should not in any one year for a number of years exceed such an amount in the pound as when added to the poor rate and to the borough rate "and any other rate made by the corporation" in the same year would make

(a) Reported by W. W. OBE, Esq., Barrister-at-Law.

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up a certain specified total on each pound of the rateable value.

Held, that the water rate was not a "rate" within the meaning of the words "any other rate" in this article, but was merely the price to be paid for the water supplied, and that the water rate, therefore, was not to be included in the computation of such total.

CASE stated by consent of the parties for the opinion of the court upon questions of law arising in an action.

The action was commenced by the plaintiffs, the mayor, aldermen, and burgesses of the borough of Northampton, by a writ of summons claiming 1l. 4s. 9d., the amount of the quarterly instalment of a water rate payable by the defendant to the plaintiffs.

The plaintiffs sought to recover from the defendant, who was a burgess and ratepayer of the borough of Northampton, the sum of 1l. 4s. 9d., being the quarterly instalment of an annual water rate for domestic use to his dwelling-house situate at Kingthorpe, a district which had formed part of the area of supply since 1861, and was incorporated with the county borough of Northampton by the Northampton (Extension) Order 1900.

This sum of 1l. 4s. 9d. was made up as follows: One quarter's instalment of an annual rate of 7½ per cent. upon a rateable value of 54l.—1l. 0s. 3d.; one quarter's instalment of an annual sum of 18s., being an extra charge for one bath and two water-closets, each assessed at 6s. per annum—4s. 6d.; total 1l. 4s. 9d.

The defendant only disputed the sum of 1l. 0s. 3d., and this disputed sum was demanded under the following circumstances:—

In 1884 the plaintiffs, in pursuance of powers conferred on them by sect. 19 of the Northampton Waterworks Act 1882 (herein called "the Act of 1882"), purchased the undertaking of the Northampton Waterworks Company, which company was incorporated by the Northampton Waterworks Act 1861 (called "the Act of 1861"). This purchase was effected by the Northampton Corporation Waterworks Act 1884 (called "the Act of 1884").

By sect. 10 of the Act of 1884, the Act of 1861 and the Act of 1882 were to be read and have effect as if the plaintiffs had been named therein instead of the company, subject to certain exceptions not now material. These Acts, together with the Northampton (Extension) Order 1900, formed the authority for the rate imposed by the plaintiffs for the supply of water within the area designated in the Acts.

The plaintiffs' rate for the supply of water for domestic use was based on sect. 36 of the Act of 1884, which repealed sect. 49 of the Act of 1861 (by which rates varying with different rateable values were authorised). That section empowered the plaintiffs

To charge for the supply of water for domestic use to any dwelling-house a sum not exceeding seven and a half per centum per annum on the net rateable value of such dwelling-house as ascertained by the valuation list in force at the commencement of the quarter during which the water rate becomes payable, or, if there be no such list, then on the net rateable value of such dwelling-house as the same is assessed to the last poor rate.

There was no section in this or any of the aforesaid Acts which gave any specific directions or powers as to either equality or differentiation of rating.

Other parts of the Act of 1884 material to this case were

Sect. 20, sub-sect. 2. Any moneys borrowed in manner by this section authorised shall be a charge on the net revenue of the water undertaking and on the district fund and general district rate or some or one of them, and such revenue, fund, and rate shall be deemed to be the local rate within the meaning and for the purposes of the Local Loans Act 1875.

Sect. 24 provided for the order in which the plaintiffs were to apply all moneys received by them on account of revenue, and enacted that any balance remaining in any year after payment of the working and management expenses, interest on loans and instalments to the sinking fund, should be carried to the district fund.

Sect. 25 was as follows:

If in any year the amount standing to the credit of the water account be insufficient for the payment of the charges thereon and the execution of this Act in relation to the water undertaking, the deficiency shall be made up out of the general district rate by carrying an adequate sum therefrom to the credit of the water account, and the corporation from time to time in preparing the estimates of the amount required in their judgment to be raised by means of a general district rate for the purposes of the borough may include therein such sums (if any) as in the judgment of the corporation are necessary to be provided in aid of the deficiency from time to time arising as aforesaid in the water account, and shall collect the same as part of such general district rate.

The defendant's dwelling-house, in respect of which the rate was demanded, had always been situate within the plaintiffs' statutory area of supply, and the plaintiffs did not contend that any special circumstances existed rendering the dwelling-house less favourably situated than the other dwelling-houses within the area for the purposes of supply or of rating.

The defendant had since the commencement of his occupation of the dwelling-house until the 24th June 1901 paid a water rate of 7½ per cent. on the net rateable value.

In the year 1900 the boundaries of the then borough of Northampton were extended so as to include that part of Kingthorpe in which the defendant's dwelling-house was situate. Such extension was effected by the Northampton (Extension) Order 1900 (herein called "the order") contained in the Local Government Board's Provisional Orders Confirmation (No. 14) Act 1900 (63 & 64 Vict. c. clxxxiii.).

By art. 11 of the order, the Acts of 1861, 1882, and 1884 were made applicable to the borough as extended by the order.

The material articles of the order were:

Art. 12. All bye-laws and regulations and every list of tolls, and table of fees and payments and scale of charges made by the corporation, which at the commencement of this order are in force in the existing borough shall thenceforth apply to the borough until or except in so far as any such bye-laws, or regulations, or list of tolls, or table of fees and payments, and scale of charges may be altered or repealed.

Art. 16. All property vested in the corporation at the commencement of this order for the benefit of the existing borough shall be held by the corporation for

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the benefit of the borough, and the corporation shall hold, enjoy, and exercise for the benefit of the borough all the powers which at the date aforesaid are exercisable by or vested in the corporation for the benefit of the existing borough, and all liabilities which on the date aforesaid attached to the corporation in respect of the existing borough shall, from and after that date, attach to them in respect of the borough.

Art. 36. The general district rates to be levied in the added part of . . . Kingthorpe . . . shall not in any one year during a period of ten years from the commencement of this order exceed such an amount in the pound as when added to the poor rate and to the borough rate and any other rate made by the corporation in the same year will in respect of the assessment of any hereditament included in any such rate make up . . . in the case of the added part of Kingthorpe a total rate of five shillings and sixpence on each pound of the rateable value of such hereditament.

From the commencement of the operation of the order up to the present time, the rates levied in the added part of Kingthorpe (other than the water rate) have continuously amounted and did amount at the date in question to 5s. 6d. in the pound; and the plaintiffs under the powers given by the Acts and the order, from the commencement of the order until the 24th June 1901, continued to demand a water rate of 7½ per cent. per annum from the defendant and from all other domestic consumers both in the old borough and the added part.

On and after the 24th June 1901 the plaintiffs reduced the water rate from 7½ to 5 per cent. per annum in the case of the domestic consumers within the boundaries of the old borough, but retained the rate at 7½ per cent. in the case of the defendant and all other of the domestic consumers in the added parts, including the added part of Kingthorpe.

The differentiation of the water rate was effected by the plaintiffs in accordance with a recommendation adopted by the Northampton Town Council on the 1st April 1901, the material part of the adopted recommendation being as follows:

1. To reduce the charge of 7½ per cent. upon the rateable value to 5 per cent., the deficiency to be met out of the district rate. As the district rate for this purpose will only be chargeable within the old borough, it is obvious that the reduction ought to apply only to the old borough until such time as the rates on the newly added portion cease to be differential. It is estimated that this reduction will leave a sum of about 3500l. to be contributed out of the district rate of the old borough.

The plaintiffs stated that they deemed it equitable to effect the reduction on the ground that a large amount of property in the borough which was rateable to the poor and district rates, and which benefited by the presence of an adequate public water supply for fire extinguishing and sanitary purposes, did not pay anything towards the cost of the water undertaking, because the owners and occupiers of the property did not in respect of the same take the water supply of the plaintiffs. As a means of enforcing contribution from such owners and occupiers, the plaintiffs adopted the above reduction so that the owners and occupiers within the old borough would by their contributions to the district rate fund have to make good any deficiency created by the reduction of the water rate.

There were in the added parts a number of residents who did not take the plaintiffs' water

supply for domestic purposes, and whose property was therefore not subject to the payment of water rate.

The plaintiffs contended that they were entitled to refrain from reducing the water rate in the added parts from the 7½ per cent. now levied, as the ratepayers in the added parts being privileged from an increase in the district rate for a period of ten years (which had not elapsed), those ratepayers would bear no part of the extra burden that might be thrown upon the district rate of the old borough by reason of any deficiency resulting from such reduction.

The defendant contended (1) that the water rate was a rate within the meaning of art. 36 of the order, and that, as the poor, borough, and general district rates payable by him amounted together to the maximum sum of 5s. 6d. in the pound fixed by the order, the plaintiffs were not entitled to recover from him the sum of 1l. 0s. 3d., or any other sum in respect of water rate; (2) in the alternative, that, if he were chargeable with a water rate, the plaintiffs were not authorised to demand of him a higher rate than that demanded in respect of domestic consumers in the old borough taking a similar supply under similar circumstances; that the differentiation of the water rate as effected by the plaintiffs was contrary to the terms and intention of the Northampton (Extension) Order 1900; that it was not authorised by the Acts of 1861, 1882, or 1884; that such differentiation was in breach of the general law of the realm; and the defendant claimed that the plaintiffs were bound to place all domestic consumers in the borough on an equality, save in so far as express statutory powers might authorise otherwise; (3) that the plaintiffs were not authorised to estimate for a deficiency on the water account for the reasons stated by them, either accompanied by the above differentiation or not so accompanied.

The questions for the opinion of the court were: (1) Whether the plaintiffs were entitled to differentiate the water rate as hereinbefore set forth; (2) whether the plaintiffs were entitled to demand a water rate of the defendant within the period of ten years from the commencement of the extension order, so long as the rates payable by the defendant, exclusive of water rate, amounted to 5s. 6d. in the pound; (3) whether the plaintiffs were entitled to reduce the water rate for the purpose of creating a deficiency on the grounds hereinbefore stated.

If the court should answer these questions, more particularly the first, in the affirmative, then the parties submitted that judgment should be entered for the plaintiffs; but if the court should answer the same, more particularly the first, in the negative, then the parties submitted that judgment should be entered for the defendant.

Shiress Will, K.C. (H. W. Disney with him) for the corporation.—There are two points in the case, whether the corporation had power to differentiate the water rate in the way they have done, and whether a water rate is a rate within the meaning of the words "any other rate made by the corporation" in art. 36 of the order. The corporation had power to differentiate the payment for the supply of water. The payment for the water supply is not a rate at all; it is not a rate made by the corporation. It is simply the

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price paid for the water supplied. The object of the corporation in making this differentiation in the water charges was to make persons contribute to the water rate who did not directly pay any water rate, but who got the benefits of the water supply for fire extinguishing, sanitary, and such like purposes, and who, not being consumers, did not take a water supply. That object was obtained by levying a part of the water expenses in the general district rate, and so compelling persons to contribute for the water supply who would otherwise contribute nothing. Sect. 25 of the Act of 1884 is the section which enables the corporation to make good the deficiency in the water account from the general district rate. There is no question of a differentiation of rates. The effect was to produce equality, as all that the corporation did was to make those pay something towards the cost of the water supply who got certain benefits out of it. As to the second question, that the defendant was paying more than the statutory charges which the corporation were entitled to impose, the district rate, the borough rate, and the poor rate paid by the defendant in all amounted to 5s. 6d. in the pound. The corporation were entitled to charge that amount, and in addition they charged the water rate. The water rate not being a rate at all within the meaning of the article, but being really the price paid for the water, like the price paid for gas, ought not to be included in the computation of the 5s. 6d. in the pound.

Avory, K.C. (B. Campion with him) for the defendant.—As to the first point, it is submitted that there was no power to differentiate the rate. The water rate is a rate within the meaning of art. 36 of the order, because the other rates which are there specifically mentioned—namely, the general district rate, the poor rate, and the borough rate—are exhaustive of the rates leviable by the corporation, and therefore, if the water rate did not come within the words “any other rate,” those words would have no operation. The Public Health Act 1875, which empowers a local authority to charge a water rate where they give a water supply, speaks of this as a water “rate,” and in sect. 56 distinguishes the “water rate” from a “water rent.” The water rent is there stated to be the payment made for supplying water according to agreement and on such terms as might be agreed upon between the party receiving the water and the local authority, and the section gives the local authority “the same powers for recovering water rents or other payments accruing under such agreements as they have for recovering water rates.” The water rent is thus the price fixed by agreement for the water supplied; it is therefore the water rent, and not the water rate, which corresponds, say, to the price paid for the gas supplied. The water rate is to be assessed, like other rates, on the net annual value of the premises, but the water rent is to be paid for according to agreement. So also, in sect. 9 of the Public Health (Water) Act 1878 (41 & 42 Vict. c. 25), water rates and water rents are distinguished. Here the Act of 1884 places the corporation in precisely the same position in this respect as the water company was in prior to 1884; and it is unheard of, unless Parliament has expressly authorised it, for a differential rate to be made as in this case. Here admittedly no power was given by any statute to differentiate the rate.

If the corporation say that 5 per cent. is a proper charge for part of the borough, then it is a proper charge for the whole borough; and the rate is illegal, as it imposes a burden on the ratepayers in the added districts more than the corporation are entitled to impose. If the contention of the corporation is right, they may charge nothing for the water, and put the whole charge on the district rate, and make the ratepayer who was taking no water at all pay for it all the same by means of the general district rate. Therefore all the questions ought to be answered in favour of the defendant.

Shiress Will, K.C. in reply.

BIGHAM, J.—The first question is whether the plaintiffs, the corporation of Northampton, are entitled to differentiate the water rate. That depends entirely on the construction of sect. 36 of the Act of 1884, which empowers the corporation to charge for the supply of water for domestic use to any dwelling-house a sum not exceeding 7½ per cent. per annum on the net rateable value of the house. It is suggested that the corporation may take into account the different circumstances in which the different houses within the borough are placed, and may make a distinction in the water rate as between one set of houses and another set of houses. The boundaries of the borough were extended; and the corporation have discovered that the houses in the added districts had the use of the water for certain public purposes at a much less price than the people who had houses in the old district, and they thought it right that they should obtain from the new districts a greater water rate than from the old. The question is, Have they a right to do that? I do not think that they have a right to do that. Sect. 36 is quite plain, and it means that no distinction was to be made between one house and another house, but that one water rate should be made over the whole borough, one rate applying to every house in the borough, not exceeding 7½ per cent. on the net rateable value of the house. For these reasons I think that the answer to the first question should be that the corporation had no power to differentiate the water rate as they have done. Then the second question is whether the corporation were entitled to demand a water rate of the defendant so long as the rates payable by the defendant, exclusive of water rate, amounted to 5s. 6d. in the pound. That question depends on art. 36 of the Northampton (Extension) Order 1900, which is set out in the case, and which provides shortly that the general district rates to be levied in this added area shall not in any one year during a period of ten years exceed such an amount in the pound as when added to the poor rate, and to the borough rate, “and any other rate made by the corporation in the same year,” would, in respect of the assessment of any hereditament included in any such rate, make up, in the case of the added part of Kingsthorpe, a total of 5s. 6d. in the pound. The question is whether the water rate is to be included in the words in that article “any other rate,” and whether the total of 5s. 6d. is to be ascertained by including or excluding the water rate. In my opinion the water rate is not to be included in ascertaining that total of 5s. 6d. in the pound. In my opinion the water rate is not a rate at all

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within the meaning of that article. This order, comprising art. 36, was made in the year 1900, so that at the time the order was made the water rate was already in existence in this borough, and I cannot imagine that the Legislature, if they had intended that the water rate should come within the words "any other rate" in that article, should not have mentioned it. Why was it not mentioned? Because, as it seems to me, it was not a rate at all of the same kind as the rates which were being dealt with in that article. The rate was simply the price paid for the water, and the mere fact that it is called a rate does not make it a rate within the meaning of this article. It is the same as the price paid for gas. Therefore this water rate is not a rate which the defendant is to be entitled to have taken into consideration for the purpose of making up the total rate of 5s. 6d. Therefore that question must be answered in favour of the plaintiffs.

Judgment for the defendant, with costs.

Solicitors for the plaintiffs, *Sharpe, Parker, and Co.*, for *W. Shoosmith*, Town Clerk, Northampton.
Solicitors for the defendant, *Warren, Murton, and Miller*, for *Lamb and Stringer*, Kettering.

July 22, 23, 24, 25, 26, and Aug. 7, 1902.

(Before BIGHAM, J.)

GLAMORGAN COAL COMPANY LIMITED AND OTHERS v. SOUTH WALES MINERS' FEDERATION AND OTHERS. (a)

Action, causes of—Advice to break contract—No malice—No action—Combination to cause lawful act—No malice—No action.

The giving of advice to workmen to break their contract of service, which advice is followed, does not create a cause of action against the person giving the advice if he gave it honestly for the purpose of benefiting the workmen and not maliciously for the purpose of injuring the employer, even though in fact the breach of contract did cause the employer loss.

The combination of several persons to do a lawful act does not create a cause of action against them for conspiracy when the combination is not entered into maliciously for the purpose of injuring the plaintiff.

Lumley v. Gye (2 El. & Bl. 216), *Allen v. Flood* (18 Mag. Cas. 314; 77 L. T. Rep. 717; (1898) A. C. 1), and *Quinn v. Leatham* (ante, p. 310; 85 L. T. Rep. 289; (1901) A. C. 495) discussed and applied.

THE facts in this case are stated in his Lordship's written judgment as follows:—

This is an action brought by the Glamorgan Coal Company Limited and seventy-three other plaintiffs against the South Wales Miners' Federation, its trustees, its officers, and a number of members of its executive council, to recover damages for wrongfully and maliciously procuring and inducing the workmen in the plaintiffs' collieries to break their contracts of service with the plaintiffs. In the alternative the plaintiffs also sue the defendants for wrongfully, unlawfully, and maliciously conspiring together to do the acts complained of. The plaintiffs claim both damages and an injunction. The defence consists of denials of the material allegations in the statement of claim, and of a plea that the acts complained of were done, if at all, with reasonable justification and excuse. The case came on to be tried

before me with a special jury on the 22nd July last, but after the trial had lasted three days the jury was discharged, and all questions of law and fact, as well as the ascertainment of the damages, if any, were by consent left to me. The facts I find as follows: The plaintiffs are seventy-four limited liability companies associated together for the protection of their own interests under the style of the Monmouthshire and South Wales Coal Owners' Association. They work upwards of 200 collieries in the South Wales district, and in these collieries they employ about 100,000 men. The defendants are, first, the men's federation, a body registered under the Friendly Societies Acts; secondly, the trustees of the federation; thirdly, Mr. Brace (the vice-president), Mr. Onions (the treasurer), and Mr. Richards (the secretary of the federation); and, lastly, six men, who are members of the executive council of the federation, and who are also members of the workmen's half of a body known as the Joint Sliding Scale Committee, to which I shall have to refer later on. The trustees are joined as defendants merely in order to enable the plaintiffs to reach the funds of the federation in the event of a judgment being recovered for damages against that body. It appears that for the last twenty or twenty-five years the masters and the men in the South Wales colliery district have worked together under an agreement, called the sliding-scale agreement, by which the rate of wages paid to the men is made to depend on the price for the time being of a certain agreed class of coal. That is to say, as the price of such coal rises or falls, so the rate of wages moves up or down. It is thus to the interest, not only of the masters, but also of the men, to keep up the price of coal; but, at the same time, not to drive it up to such a point as will unduly interfere with the demand. Against the producers of coal there are always arrayed a number of coal dealers, known as merchants or middlemen, who buy coal to be shipped to foreign ports, or for resale in the South Wales market. The interest of those men is, of course, to keep down prices, so that they may buy as cheaply as possible. They frequently sell large quantities of coal for forward delivery at prices below those current for immediate delivery, trusting to supply themselves later on by purchases from one or other of the many collieries at prices which will make their bargains remunerative. This has the effect of depressing the market, and on more than one occasion, and particularly in the years 1896 and 1897, the masters and men have tried together to devise some scheme to so regulate the output of the mines, by means of stop days or otherwise, as to counteract this effect. There has, however, always been a difficulty in getting a sufficient number of the colliery proprietors to fall in with any scheme having for its object the restriction of output, and thus nothing has been done. On the 1st April 1898 a strike broke out in the South Wales district, and the collieries were closed from that date to the 31st Aug. On the 1st Sept. work was resumed throughout the district. At the collieries of forty-seven of the plaintiff companies it was resumed under an agreement which embodied the old sliding scale. By this agreement it was provided that a joint committee of masters and men should be formed, which should be called the Joint Sliding Scale Committee; and that it should be composed of twelve members representing the forty-seven firms, and of twelve men elected by the colliers in the employment of those firms. Each half of the committee was to have its own secretary, elected from its own twelve members, and it was contemplated that each half might from time to time meet separately to discuss matters affecting its own interests. One of the principal objects of the joint committee was to ascertain, by audits of the sales of the forty-seven firms, the average price of coal, for the purpose of regulating wages thereby. The agreement contained many other provisions in addition to the provisions for the formation of the joint committee, but it is only necessary to

(a) Reported by J. ANDREW STRAHAN, Esq., Barrister-at-Law.

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refer to one of them. It is clause 23 of the embodied sliding-scale agreement, and it is as follows: "It is hereby agreed that all notices to terminate contracts on the part of the employers, as well as employed, shall be given only on the first day of any calendar month, and to terminate on the last day of the same month." Although only forty-seven of the plaintiffs were parties to this agreement, and were alone to be represented on the Joint Sliding Scale Committee, the men employed by the other twenty-seven plaintiffs went back to work on the same terms, both as to wages and notice, as those contained in the agreement. On the 11th Oct. 1898 the defendant federation was formed, and practically all the miners in the South Wales district became members of it. They number about 125,000, and they include all, or very nearly all, the men who work for the plaintiffs. The members at once proceeded to elect a president, a vice-president, a treasurer, and a secretary. They also elected an executive council, consisting of twenty-five men, who were to manage the affairs of the federation. The federation was subsequently—viz., in Feb. 1899—registered under the Friendly Societies Acts. By its rules its objects are declared to be to provide funds to carry on the business of the federation; to take into consideration the question of trade and wages; to protect workmen generally; regulate the relations between them and employers; and to call conferences to deal with questions affecting the workmen, of a trade wage and legislative character. On the 5th Nov. 1898 the executive council met and resolved: "That this council in its entirety shall from time to time transact the whole of the business arising out of the sliding-scale agreement, notwithstanding that only twelve of the said council can appear before the employers to deal with the Sliding Scale Joint Committee," and, having passed this resolution, they then proceeded to elect twelve of their own body to serve on the joint committee. The forty-seven plaintiff companies objected to this election upon the ground that the council represented all the miners in South Wales, whereas the joint committee was to be composed only of the representatives of the forty-seven firms, and of the men who worked for those firms. Thereupon another election was held, at which only the men in the collieries of the forty-seven firms voted. They, however, chose the same twelve men as had been chosen by the executive council, so that the masters took nothing by their objection. The effect of this was, in my opinion, that the twelve working-men, who formed the working-men's half of the Joint Sliding Scale Committee, became the mere mouthpiece of the federation, and took their instructions from the council of the federation, of which, as I have said, they were all members. The federation prospered greatly, so that by the end of 1900 it found itself in the possession of funds amounting to 100,000l. The price of coals also rose, and with it the rate of wages. But in Oct. or Nov. 1900 the council of the federation seem to have felt some apprehension that this prosperity was being threatened by the merchant and the middleman. It is at this season of the year that foreign Governments and others make their contracts for forward delivery of coal, and the prices at which these contracts were being effected alarmed the council, and forebadowed a fall in prices. Whether the fear was well founded or not I cannot say, but I am satisfied by the evidence that it was honestly felt. On the 5th Nov. 1900 Mr. Abraham, M.P., the president, made a speech at a meeting of the council of the federation, from which I take the following passage: "There is an attempt being made by middlemen and merchants to bring about an undue reduction in the price of coal; 80 per cent. of the employers are trying to counteract this movement, but three or four large firms appear to desire that it should be successful. I therefore suggest that steps be taken to bring about a stop day throughout the coalfield as a protest against this action." Thereupon a resolution of the council was

passed ordering a stop day for Friday, the 9th Nov., and a further resolution was passed, that a general conference of the federation should be convened for the 12th Nov. In the meanwhile the following manifesto was ordered to be circulated: "Fellow Workmen,—Your council, having seriously considered the present condition of the coal trade, are strongly of opinion that an organised attempt is being made to unduly interfere with trade and prices to such an extent as will prejudice the interests of the members of the federation. With a view of preventing the industry being exploited by merchants and middlemen, we have unanimously resolved that a general holiday be taken throughout the coalfield by all colliery workmen on Friday next, Nov. 9, 1900. We also request you upon that day to hold general meetings for the purpose of appointing delegates to attend a conference at the Cory Memorial Hall on Monday next, Nov. 12, 1900, to consider and determine our future policy, as embodied in the following resolution: That the conference hereby authorises the council to declare a general holiday at any time they think it necessary for the protection of your wages and the industry generally.—W. A. ABRAHAM." This manifesto had the desired effect, and on the 9th Nov. all the colliers in the coalfield, including the men working in the plaintiffs' collieries, stopped work. No notice of any kind was served on the masters, and they knew nothing of the matter until they saw a report of Mr. Abraham's speech in the newspapers of the 6th Nov. This stoppage on the 9th Nov. is the first matter of which the plaintiffs complain in this action. On the 12th Nov. 1900 the conference which had been convened for that day was held, and at it a resolution was passed authorising the council of the federation to declare a general holiday at any time they might think it necessary for the protection of wages and of the industry generally. Having regard to what happened twelve months later, and to the present contentions of the federation, this resolution, which was passed by the conference in compliance with the request of the executive council in their manifesto, is of considerable importance. The representatives of the masters on the Joint Sliding Scale Committee were annoyed at the course which the executive council had adopted, and on the 18th Nov. 1900 they held a meeting at which the working-men's representatives on the committee were present. The latter assured the masters that the action of the council had not been taken with a view to injuring the owners, or to interfering with the relations between owners and workmen, but only to show middlemen that they were not to be allowed to do with the markets what they had done in the past. This assurance the masters accepted, recording their acceptance in a memorandum in the minute-book of the Joint Sliding Scale Committee. The memorandum is as follows: "That, whilst accepting the assurances of the workmen's representatives that they thought they were acting for the good of the coal trade in having ordered a general stoppage of work at the collieries on Friday last, the owners' representatives are unanimously of opinion that the principle involved in such a stoppage is unsound, and the action is illegal, and will not achieve the object which the workmen's representatives apparently had in mind, and the owners' representatives protest against the course followed, for, so far from assisting the trade, such action is calculated to damage it, both temporarily and permanently. And, further, the owners' representatives are of opinion that, the stoppage having been in contravention of all established customs at the collieries and so far-reaching in its effects, the general body of the associated owners will have to be consulted upon the course which the workmen have seen fit to adopt." On the 28th Nov. the associated owners met, and, after negating the expediency of prosecuting the men, resolved as follows: "That the owners' side of the Sliding Scale Committee point out to the workmen's representatives that a resolution has been passed by the association that, if the men make any future illegal

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stoppage the owners will take proceedings against the men." Thus this incident was closed; and, if nothing further had happened, I am satisfied that it would have been forgotten. I wish to say of it that I think the masters were right in accepting the assurances of the men. I am quite satisfied that in ordering the stop day the federation acted as they thought in the best interests of the men, and without any intention, malicious or otherwise, of injuring the plaintiffs. I must now deal with the events which lead up to the ordering of the other stop days, in Oct. and Nov. 1901, of which the plaintiffs complain. It is necessary to consider them with some care, inasmuch as the federation by their counsel allege that they did not order these stop days, and that they cannot therefore be held responsible for them. In this connection it is to be remembered that on the 22nd July 1901 the House of Lords had decided in the *Taff Vale* case that a friendly society could be sued, and its funds reached, to answer any damages that might be recovered against it. On the 12th Oct. 1901 the defendant Mr. Brace, the vice-president of the federation, made a speech to the miners in which, after congratulating them on the flourishing position of the federation finances, he insisted that unless some steps were taken to prevent the depression of prices, which was likely to result from what he called the out-throat competition in the trade, the workmen's wages would be seriously diminished; and in this connection he referred to the low prices at which contracts for coal had recently been made. He concluded by saying that "if there was the slightest tendency to a slump in prices brought about by unfair competition the executive council of the federation, in whom power was invested by the whole of the workmen, according to the conference resolution, would immediately declare a series of stoppages with a view to regulating the supply according to the demand." Four days later, on the 16th Oct. 1901, Mr. Brace made another speech, in which, referring to his speech of the 12th Oct., he intimated that if a stop was ordered it would not be by the federation, but by the workmen themselves. On the 19th Oct. Mr. Richards, the secretary of the federation, made a speech to a body of miners, in which, replying to the possibility of a stop day being ordered, he said that the executive council would have to move carefully, in view of the decision of the House of Lords in the *Taff Vale* case, and that, if any notice of a stop was found necessary for the purpose of keeping up wages, it would come from the Sliding Scale Committee. About the same time, on the 18th Oct. 1901, Mr. Onions, the treasurer of the federation, made a speech, in which, after observing upon the comparatively low prices at which some large contracts for coal had recently been made, he stated that some general action would have to be resorted to by the workmen to protect themselves, and that, in the face of the recent decision in the *Taff Vale* case, they would have to exercise great care. He added: "It would be better to take some action to save themselves now than to be compelled later on, when wages had been reduced to starvation point, to take drastic measures." These speeches preceded a meeting of the executive council of the federation, which was held on the 23rd Oct. 1901, and they foreshadowed what was to be done at the meeting. The federation, or its officers, obviously desired that one or more stop days should be declared, but, having regard to the decision of the *Taff Vale* case, they desired that the order for the stop days should be issued by some other body than their own, by some body which had no funds with which to answer any judgment that might be recovered in the event of the order turning out to constitute an actionable wrong. At the meeting of the executive council held on the 23rd Oct. 1901 there were twenty-two members present, ten of them being also members of the working-men's division of the Joint Sliding Scale Committee. The vice-president, Mr. Brace, and the treasurer, Mr. Onions, were there. Mr. Brace

appears to have called attention to several contracts for forward delivery of coal which had been made at many shillings below the average price as ascertained at the last sliding scale audit, and thereupon a discussion ensued as to whether the federation should take steps to counteract the bad effect of the contracts. Then it seems to have been moved that the executive council should not take upon itself the responsibility of declaring any stop day; and to that an amendment was proposed that, if any stop days were to be ordered, the orders should be issued by the executive council of the federation, no other body having authority to do so. The amendment being put, only three voted for it, while nineteen voted for the original motion. Thus it stands recorded on the minute-book of the federation that the council of the federation should take no responsibility for ordering stop days. Immediately after this vote had been taken all the members of the council who were not members of the Sliding Scale Committee left the room; and the remainder, by some process not explained, resolved themselves into the working-men's half of the Sliding Scale Joint Committee, and proceeded in that capacity to declare two stop days—the 25th and 26th Oct. 1901—and thereupon the following manifesto was published: "To the workmen employed at the South Wales and Monmouthshire Collieries.—It having come to the knowledge of your representatives upon the Sliding Scale Committee that large contracts have already been made at considerably lower prices than the average price declared by the last sliding scale audit, and fearing the result of those contracts upon annual and other contracts about to be made, which must of necessity mean a heavy reduction in wages, it was unanimously resolved that the workmen shall observe as general holidays Friday and Saturday next.—(Signed) W. BRACE, ALFRED ONIONS, ENOCH MOREL, THOMAS EVANS, D. WATTS MORGAN, C. B. STANTON, THOMAS THOMAS, D. D. BEYNON, DARONWY ISAAC, EVAN THOMAS, THOMAS RICHARDS." Telegrams were then sent to all the collieries in South Wales, notifying the fact that the stop days had been declared. It is of importance to observe that with many of these collieries the Sliding Scale Committee, as a committee, had no concern; for that committee only represented the forty-seven firms before mentioned, and the working-men's representatives on this committee were elected only by the men working in the collieries of those firms. Yet the committee took upon themselves to do that which the federation alone had authority to do—namely, to order stop days in all the collieries in South Wales. One other fact. The cost of printing the manifesto and of sending out the telegrams was paid out of the funds of the federation, and the organisation of the federation was used for the purpose of making the stop days known to the men throughout the district. Subsequently two other stop days were ordered, one for the 31st Oct. and one for the 6th Nov. They were also declared at meetings of what was called the working-men's half of the Sliding Scale Committee; but, as before, communications to the men were distributed by means of the organisation of the federation, and the cost was defrayed out of the federation funds. The result of all this was that the men stayed away from work on the four days, and so broke their contracts with their masters. It was argued on behalf of the federation that they—the federation—could not be held responsible for the consequences of stop days, for the reason that the federation had expressly refused to meddle in the matter, as appeared by the resolution of the 23rd Oct. I do not, however, think this argument well founded. It is true that the hand of the working-men's representation on the Sliding Scale Committee is made to appear as directing these stop days, but I cannot doubt that the hand was guided and controlled by the federation itself. In truth, it was the federation who were acting, the name of the Sliding Scale Committee being used as a blind, a very transparent blind, to conceal what was

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being done. The writ was issued on the 22nd Nov. 1901. After the writ was issued—namely, on the 9th Dec. 1901—Mr. Evan Thomas, one of the defendants, and a prominent official of the federation, speaking at a meeting of miners as to the way the stop days would affect the right of haulers to a certain bonus payable to them by the masters, said: "When a stop day is declared, it is expected that everyone will morally abide by it, but if the haulers do not they are in a sense acting disloyally towards the federation, and it will certainly mean that the executive council will either have to give this policy up or to do something else to meet the difficulty of carrying this policy out." It is true that within two or three days of this speech being reported Mr. Evan Thomas wrote to the newspapers to say that he had used the expression "executive council" by a slip; and that he ought to have said Sliding Scale Committee. But, for my part, I think this official made no slip at all, and he was quite right when he attributed the stop day to the executive council of the federation. A number of witnesses were called before me on the part of the plaintiffs and on the part of the defendants. Mr. Dalziel, secretary of the owners' association, stated that he did not suggest that in giving the advice to stop in Nov. 1900 there was any intention of injuring the masters, and the resolution of the masters passed on the 13th Nov. confirms Mr. Dalziel in this view. Then it appears that in Oct. 1901 circumstances similar to those which led up to the stoppage in 1900 again occurred, and that these circumstances afforded the only reason for ordering the stop days in Oct. and Nov. 1901. There was no quarrel between the masters and the men, and, so far as I can see, no illwill. The men objected to the course of business adopted by the middlemen, and in this objection some, at least, of the masters seem to have shared. The evidence satisfies me that the action of the federation and of the other defendants in 1901 was dictated by an honest desire to forward the interest of the workmen, and was not, in any sense, prompted by a wish to injure the masters. Neither the federation nor the other defendants had any prospect of personal gain from the operation of the stop days. Having been requested by the men by the resolution of the 12th Nov. 1898 to advise and direct them as to when to stop work, the federation and the other defendants, who were its officers, in my opinion did, to the best of their ability, advise and direct the men. Whether they advised them wisely I cannot say, though I am inclined to think not. But I am satisfied that they advised them honestly and without malice of any kind against the plaintiffs. I have to decide, in these circumstances, whether an action in tort will lie against the defendants. The advice and guidance of the defendants was solicited and received. It involved, if followed, as the defendants knew, the breaking of subsisting contracts. It was followed, as the defendants wished it should be, and damage resulted to the masters; but there was no malicious intention to cause injury, no profit was gained for themselves by the defendants, and their sole object was to benefit the men, whom they were advising and directing.

Rufus Isaacs, K.C. (Holman Gregory with him) for the defendants.—I submit that no action lies for advising a person to break his contract unless such advice is given maliciously. All the cases on this point rest upon *Lumley v. Gye* (2 El. & Bl. 216). That case, however, does not really affect my point. It was a case on demurrer, and in the declaration the pleader stated that the defendant had "wrongfully and maliciously" induced Johanna Wagner to break her contract. The most adverse point in the case, as far as I am concerned, is the remark of Crompton, J. that the defendant's act was done "maliciously—that is, knowingly." I submit, however, that this remark is *obiter dictum*, and, moreover, is bad law. In

Lumley v. Gye (sup.) the contract was one of service, and the Statute of Labourers was much discussed in it. In the later cases no distinction is made between a contract of service and any other contract. In *Bowen v. Hall* (44 L. T. Rep. 75; 6 Q. B. Div. 333) the decision was expressly based on the inducement to break the contract being malicious, and a sort of definition is given of malice. Lord Esher there said: "If the persuasion is used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff it is a malicious act which is in fact a wrongful act and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act such as is above described is a wrongful act in law and in fact. The act complained of in such a case as *Lumley v. Gye*, and which I complained of in the present case, is, therefore, because malicious, wrongful." In this case Lord Coleridge dissented, and held that *Lumley v. Gye* should be overruled on the ground that a malicious intention cannot make a lawful act unlawful. [BIGHAM, J.—That is the ground taken by Lord Herschell in *Allen v. Flood* (77 L. T. Rep. 717; (1898) A. C. 1).] Yes; but I think Lord Herschell hardly went so far as Lord Coleridge. Lord Selborne in *Bowen v. Hall* seems to agree with Lord Esher's definition of malice. I will not deal with *Temperton v. Russell* (69 L. T. Rep. 78; (1893) 1 Q. B. 715), since it has been explained and re-explained until nothing remains of it. As to *Allen v. Flood (sup.)*, that was a case, not of inducing persons to break their contract, but of inducing them not to enter into contracts. All I ask your Lordship to take from that case is that the question as to what was malice, and whether malice was necessary to support an action, was left open, and it was expressly said by the Law Lords that they reserved their opinion, and would have to deal with it when it came up for consideration. In an American case, *Walker v. Cronin* (107 Mass. Rep. 555), the question has been considered, and an exception has been made to the rule that inducing a breach of contract is actionable, that rule being held not to apply to "interference by way of friendly advice honestly given, nor is it in denial of the right of free expression of opinion." The case that will be most pressed against me will be *Quinn v. Leatham (ante, p. 310; 85 L. T. Rep. 289; (1901) A. C. 495)*. That, again, was a case of inducing persons not to enter into contracts with the plaintiff. I know there is the question of conspiracy, but am not now dealing with that. I know, too, that Lord Macnaghten said that to support it it was necessary to approve *Lumley v. Gye (sup.)*, which his Lordship did approve. But, as a matter of fact, the attempt to prove that anyone broke his contract with the plaintiff in consequence of the inducements of the defendant so completely failed at the hearing that FitzGibbon, L.J. refused to allow the question to go to the jury. Lord Macnaghten himself lays down the principle applicable to this case when he says that, "speaking for myself, I have no hesitation in saying that I think the decision (*Lumley v. Gye, sup.*) was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action,

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and that it is a violation of legal right to interfere with the contractual relations recognised by law, if there is no sufficient justification for the interference." This carries the matter no further. The question still is whether the inducement was with just cause or excuse. [BIGHAM, J.—It seems to me that all these cases come round to this, that where there has been an inducement to interfere with the contractual relations between two parties, the person who has so interfered must excuse himself by showing that he had what is called just cause or excuse. But upon what principle you are to decide what is a just cause or excuse is left at large.] Yes; it is left at large. On the authorities it is impossible to say what is the limitation. In *Allen v. Flood* (sup.) the Lord Chancellor says that every case must depend upon its own circumstances. [Sir Edward Clarke, K.C.—That was to get rid of *Allen v. Flood* (sup.).] Yes; he disposed of *Allen v. Flood* by saying no general principle was intended to be laid down in it. They distinguished that case further by saying that the defendant in it was not guilty of malice. Counsel also referred on this point to

Reed v. Friendly Society of Operative Stonemasons of England, Ireland, and Wales, 86 L. T. Rep. 593; (1902) 2 K. B. 88.

As to the conspiracy point, my proposition is that a combination to bring anything about is not actionable unless the thing to be brought about itself is unlawful, or the means adopted to bring it about is unlawful. The chief authority on this question is

Mogul Steamship Company v. McGregor, Gow, and Co., 66 L. T. Rep. 1; (1892) A. C. 25.

I would draw your Lordship's attention to the observations of the Lord Chancellor at p. 38. There is also a decision of the Divisional Court, to which your Lordship was a party (*Boots v. Grundy*, 82 L. T. Rep. 759), which, I submit, supports my contention completely. Counsel also referred to

Hutley v. Simmons, (1898) 1 Q. B. 181;

Gregory v. Duke of Brunswick, 6 M. & G. 953;

Keeble v. Hickeringgill, 11 East, 574, n.;

Green v. London General Omnibus Company, 2 L. T. Rep. 95.

Evans, K.C., for the other defendants, adopted *Isaacs'* argument, and referred to

Kearney v. Lloyd and others, 26 L. Rep. Ir. 268.

Bailhache followed.

Sir Edward Clarke, K.C. and Francis-Williams, K.C. (*M. Lush, K.C. and Trevor Lewis* with them) for the plaintiffs.—It is not easy to say off-hand exactly what was decided in the chief authorities referred to. After consideration, I have prepared a short note on them. I think the *Mogul* case (sup.) decides that no action will lie against persons who, for their own commercial advantage, combine to do acts otherwise lawful, even if the effect of such acts when done in combination is, and is known to them to be, productive of injury to others. That is the proposition of the *Mogul* case, and that does not apply with regard to the question of producing a breach of contract. *Allen v. Flood* (sup.) is not after *Quinn v. Leatham* (sup.) a case of great importance; and it only decides that in the case of an individual an act which does not

amount to a legal injury cannot be actionable because it is done with bad intent. *Quinn v. Leatham* (sup.) decides that a combination to do acts in themselves lawful, not to secure and advance the interests of the persons forming the combinations, but with the malicious intent to injure a particular person, renders the persons so combining liable to an action; to sustain such an action there must be an agreement to injure, the doing of acts in pursuance of agreement, and the suffering of damage by the persons against whom the combination is directed. I do not wish to go over all these cases and pick little bits from the judgments, especially after what the Lord Chancellor said in *Quinn v. Leatham* (sup.) as to the limitation of their applicability, but I rely on the law as settled fifty years ago in *Lumley v. Gye* (sup.), and since approved again and again by the House of Lords. That law is laid down by Crompton, J. in these words: "Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or whether it be, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice"—that is, with knowledge—"interferes or interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, whereby the master is injured, commits a wrongful act for which he is responsible at law." This principle was expressly approved by Erle, C.J. in *Lumley v. Gye* (sup.), by Lord Watson in *Allen v. Flood* (sup.), and by Lord Macnaghten in *Quinn v. Leatham* (sup.). [BIGHAM, J.—If a father honestly advised his daughter to break off her contract of marriage, would you say an action would lie against him?] That is not this case. Here I contend the men were constrained to break their contract. But I do not admit that a man who honestly advises another to break his contract may not be liable. If the man who breaks the contract on his advice is not able to pay the damages recovered for the breach, I do think the adviser may be made liable for them. Here, however, I contend it was not a case of advice, but an order to break the contract. As to the question of conspiracy, I contend that the conspiracy is one to do an unlawful act; it is to procure the violation of contracts by others, and for that conspiracy there can be no justification. If it be a question of doing lawful acts, as to which it cannot be suggested that they are in any respect violations of law, then there may come in the question as to the reason for which you are doing a lawful act. Here the persons concerned knew that the effect of breaking the contracts must be to inflict damage upon the plaintiffs. There can be no justification for this, even although one of the inducements for doing so was that the persons who did it might themselves eventually get profit.

Francis-Williams, K.C. followed.

Cur. adv. vult.

Aug. 7.—BIGHAM, J. (having stated the facts, proceeded as follows):—These circumstances, in my opinion, disclose no cause of action. In all the

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cases cited to me, where the action has been for damages for procuring the breach of contract, the element of actual malice—that is to say, a real intention to harm the plaintiff—has been regarded as essential. In *Lumley v. Gye* (*sup.*) the allegation was that the defendant “maliciously procured the servant to break her contract,” and the judgment rests on the malice so imputed to the defendant. It is true that Crompton, J. in that case says that it must be considered clear law that a person who, wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master’s service, whereby the master is injured, commits a tort. If this means that mere notice of the existence of the contract of service raises an irrebuttable presumption of malice, I do not think it is good law. If a brother believes that his sister is in a service that is injurious to her health, cannot he advise her to break her contract without rendering himself liable in tort to the master? In such a case, in my opinion, it would be impossible to say that an action would lie. It may be different in cases where the servant is taken into service by the defendant with notice of the existing contract, or is kept in such service after notice of the contract, so that the defendant gets a benefit; in such cases there may be some evidence of malice; though I have a difficulty in persuading myself that by giving a servant whom I know to be a truant, half-a-day’s work to save him from starvation I run the risk of making myself liable in tort to his master. If the cases to which Crompton, J. refers be pushed to their logical conclusion, it would seem that if a man, having entered into the service of another to do a particular piece of work, say to sweep out a stable, goes away refusing to do the work, no one with notice of the facts can ever afterwards employ that person without rendering himself liable in tort to the man who originally employed him. Mere notice cannot, in my opinion, be at most more than some evidence of actual malice, rebuttable by showing that, in fact, no malice existed. The cases to which Crompton, J. refers are cases either of enticing servants from the service of their masters or of harbouring them after they have improperly left the service, and with notice, and the expressions enticing and harbouring appear to me to suggest a malicious intention to injure the master. Erle, J. declined to limit the principle upon which he based his judgment in *Lumley v. Gye* to contracts of service. He declared the principle to be of universal application, and he states it in these words: “He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract.” Wightman, J. puts the case in the same way: “It was undoubtedly *prima facie* an unlawful act on the part of Miss Wagner to break her contract, and, therefore, a tortious act of the defendant maliciously to procure her to do so.” Both these learned judges evidently thought that actual malice was essential to the cause of action. In *Bowen v. Hall* (*sup.*) the action was against the defendants for wrongfully receiving and harbouring a servant after notice of his being the servant of the defendants. Bovill, C.J., in delivering a judgment in which Lord Selborne, L.C.

concurred, at p. 337, states the facts upon which the judgment is based: “We were of opinion,” he says, “that the act of the defendants was done with the knowledge of the contract between the plaintiff and the servant; was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff; was done from a wrong motive, and would, therefore, justify a finding that it was done in that sense maliciously.” Having found these as the facts, he proceeded to state the law as laid down in *Lumley v. Gye* (*sup.*) in the following terms: “Wherever a man does an act which in law and in fact is a wrongful act, and such an act may as a natural and probable consequence of it produce injury to another, and which in the particular case does produce such an injury, an action in the case will lie.” And later on he says: “Merely to persuade a person to break his contract may not be wrongful in law or fact . . . but if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore actionable if injury ensues.” This again seems to me to show that to support an action for procuring a breach of contract it is essential to prove actual malice. Lord Macnaghten in *Quinn v. Leatham* (1901) A. C. at p. 510, speaking of the decision in *Lumley v. Gye* (*sup.*), says: “Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference.” If this is the true rule, as it appears to me it may be, then in order to get a cause of action there must be an interference without sufficient justification; in other words, if from all the circumstances it appears that the interference was justified, the cause of action does not exist. In the *Mogul* case, when it was brought before the Court of Appeal (23 Q. B. Div. 598), Bowen, L.J. put the case in very much the same way. He says (p. 613): “Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage, another in that other person’s property or trade is actionable, if done without just cause or excuse”; and at p. 614 he says: “The intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it, is forbidden.” Thus it seems that the mere procurement of a breach of contractual rights is not necessarily actionable; and that it will not be actionable, if it appears to have been sufficiently justified (per Lord Macnaghten), or if it appears to have been done with just cause or excuse (per Bowen, L.J.). What may be a sufficient cause or excuse is perhaps difficult to determine. But Bowen, L.J. gives some indication of what may or may not amount to a sufficient cause or excuse. He says at pp. 618-619 of the *Mogul* case: “Then comes the question, Was it done with or without ‘just cause or excuse’? If it was *bona fide* done in the use of a man’s own property, in the exercise of a man’s own trade, such legal justification would, I think,

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exist, not the less because what was done might seem to others to be selfish or unreasonable: (see the summing up of Erle, J. and the judgment of the Queen's Bench in *Reg. v. Rowlands*). But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal, which had to decide, would have to analyse the circumstances, and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J. in *Reg. v. Rowlands* of workmen and of masters: 'The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions, and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage.' Then do the facts in the present case constitute a justification or excuse? I think they do. I have already found that there was no malice, no desire to injure; then why was the order to stop issued? It was issued because the men had asked the council of the federation to advise them from time to time as to when they should stop. Stopping, no doubt, involved a breach of the men's contract with their masters. But, if a man asks another for advice as to whether or not it is wise to break a contract, is not the person asked entitled (so long as he acts honestly) to give the advice, and if the advice is followed, do not the circumstances afford the man who gave it a sufficient excuse within the meaning of the rule? Solicitors, parents, and friends are over and over again consulted as to whether it is better to continue to perform a disastrous contract, or to break it and submit to a claim for damages. Do they by giving the advice, and so procuring the breach, make themselves liable in tort? Or does not the fact that they were asked for advice, and gave it honestly, afford a sufficient excuse for what they did? A man may persuade himself to break his contract, and the only consequence is that he renders himself liable in damages for the breach; he certainly does not thereby create a further cause of action against himself in tort. Then why should his friend, who advises him, and perhaps prevails upon him, to do the same thing, incur the consequences of such a course of action? In the present case I find that the federation and all the other defendants acted honestly, and without any malice, and in ordering the stop days did no more than that which they conceived to be in the best interest of the men, whom they represented, and for whom they were acting; and I find, moreover, they had lawful justification or excuse for what they did in this, that having been solicited by the men to advise and guide them on the question of stop days it was their duty and their right to give the advice, and to do what might be necessary to secure that the advice should be followed. Taking the view which I do of the facts of this case, it is only necessary to say

a few words as to the cause of action founded on conspiracy. An actionable conspiracy exists when a number of men combine either to do an unlawful act or to do a lawful act by unlawful means. I have already said that in my opinion the acts of the individual defendants were not unlawful, and there is good authority for saying that a combination entered into for the mere purpose of doing a lawful act cannot constitute an actionable conspiracy. In order to give a cause of action, the combination to do the lawful act must be entered into with a malicious intention of damaging the plaintiff, and must cause him damage. Here no such conspiracy ever, in fact, existed, for there never was any malicious intention. My judgment, therefore, must be for the defendants on both branches of the plaintiffs' claim. If this case is taken further and my judgment is reversed, it will then become my duty to inquire into the question of damages; but, even at the risk of being told that I am going outside my province, I strongly advise the parties to consider whether they cannot end this litigation. I doubt if it serves any useful purpose, and I am sure that it creates bitterness of feeling, and makes the relations between the masters and the men difficult and unpleasant. The plaintiffs must pay the defendants' costs except the costs incurred by the federation in putting forward the defence that the federation was not responsible for the acts done in Oct. and Nov. 1901. Those costs the federation must itself bear; and the federation must also pay such part of the plaintiffs' costs as is attributable to meeting that defence.

Judgment for the defendants.

Solicitors for the plaintiffs, *Bell, Brodrick, and Gray*, for C. and W. Kenshole, Aberdare.

Solicitors for the defendants, *Riddell and Co.*, for *Walter Morgan, Bruce, and Nicholas*, Pontypridd.

Oct. 31 and Nov. 3, 1902.

(Before Lord ALVERSTONE, C.J., WILLS and CHANNELL, JJ.)

HUMPHREY (app.) v. YOUNG (resp.). (a)

Public health—Drain—Sewer—Pair of semi-detached houses—Drain used for draining both houses—Drain for drainage of "one building only"—Liability of owner to keep drain in repair—Public Health Act 1875 (38 & 39 Vict. c. 55), ss. 4, 41.

It is a question of fact in each case whether a pair of semi-detached houses is "one building only" within the meaning of the definition of "drain" in sect. 4 of the Public Health Act 1875, or is two separate buildings, so as to make the drain receiving the drainage of the two houses a sewer within the meaning of the Act, and thereby relieve the owner of the houses of liability under sect. 41 to alter or amend the drain.

A pair of semi-detached houses was built at the same time having one continuous roof and a party wall dividing the houses. The houses had always been let to separate tenants and were separately rated. A drain, which received the drainage of both houses, ran under the garden of one of the houses to the public sewer. Justices

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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having found as a fact that the houses were two separate buildings; that the drain was therefore a sewer, and that the owner of the houses was not liable under sect. 41 of the Act to alter or amend the drain:

Held, that it was a question of fact for the justices, and that there was evidence on which they could find that the two houses were two separate buildings, and were not "one building only" within the meaning of sect. 4.

CASE stated by justices for the borough of Reigate, sitting as a court of summary jurisdiction.

On the 18th April 1902 an information was preferred by Joseph Humphrey (the appellant), inspector of nuisances for the borough of Reigate, on behalf of the mayor, aldermen, and burgesses of the borough, being, by their council, the urban district council for the borough and the local authority for the district, under the statute 38 & 39 Vict. c. 55, s. 41, against Douglas Young (the respondent), for that on the written application to the authority stating that a drain belonging to Nos. 36 and 38, Somers-road, within the borough, was a nuisance and injurious to health, the local authority did empower him (the appellant), after twenty-four hours' written notice to the occupiers of the premises, to enter the same and cause the ground to be opened and examine the drain, and that upon examination the drain appeared to be in a bad condition and to require alteration or amendment, and that the local authority did, on the 25th Feb. 1902, cause notice in writing to be given to the respondent, the owner of the premises, requiring him before the 4th March then next to do the following necessary works, that is to say, relay the drain with soundly jointed 6in. glazed stoneware pipes on a bed of 6in. of cement concrete, the drain to be jointed so as to stand the water test, and that the notice had not been complied with, and the works had not been executed.

The information was heard and dismissed by the justices on the 24th April.

Upon the hearing of the information the following facts were proved or admitted before the justices:—

The written application to the local authority was made as required by sect. 41 of the statute 38 & 39 Vict. c. 55.

The local authority thereupon by writing empowered the appellant, who was their inspector of nuisances, after the notice to the occupiers required by the same section, to enter the premises mentioned in the application and cause the ground to be opened and examine the drain or sewer mentioned in the application, which the appellant accordingly did.

Upon such examination the drain or sewer appeared to be in a bad condition, and to require alteration or amendment.

Thereupon the local authority forthwith caused notice in writing to be given to the respondent, who was the owner of the premises, requiring him before the 4th March (being a reasonable time) to do the necessary works, which necessary works were specified in such notice and in the information.

Such notice was not complied with.

The premises in question were a pair of semi-detached houses, built apparently at the same

time, having one continuous roof and divided by a party wall which did not go up through the roof. At the time of the erection of the houses, the local authority did not require the party wall to be carried up above the roof.

At the point of division there was a recess in the front wall down which a water-pipe ran. The houses had gardens in front and behind, which were divided by fences.

The houses had always been the subject of separate lettings, and occupied by separate tenants; and they were separately assessed and rated for the poor and other rates.

The drain or sewer in question was used for the drainage of both houses. It commenced at the point of junction of two separate drains which drained the respective houses, ran thence under the garden of one of the houses into and under a public road, called Somers-road, and was connected with a public sewer which ran along that road.

On the part of the appellant it was contended that the two houses were one building only, and that the drain or sewer was a drain within the meaning of sect. 41 of the statute 38 & 39 Vict. c. 55.

On the part of the respondent it was contended that the two houses were two buildings not within the same curtilage, and that the sewer or drain was not a drain within the meaning of sect. 41, but was a sewer vested in and repairable by the local authority.

The attention of the justices was called to the cases of *Travis v. Uttley* (70 L. T. Rep. 242; (1894) 1 Q. B. 233); *Hedley v. Webb* (*ante*, p. 182; 84 L. T. Rep. 526; (1901) 2 Ch. 126); *Woodford Urban District Council v. Stark* (*ante*, p. 524; 86 L. T. Rep. 685).

The justices found as a fact (if and so far as it was a question of fact) that the two houses were two separate buildings and not within the same curtilage, and they were of opinion, on the authority of *Travis v. Uttley* (*ubi sup.*), that the drain or sewer in question was a sewer within the meaning of the Public Health Act 1875, vested in the local authority, and that the respondent could not be required to alter or amend it. They therefore dismissed the information.

The question for the opinion of the court was whether the justices upon the above statement of facts came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

The Public Health Act 1875 (38 & 39 Vict. c. 55) provides

Sect. 4. "Drain" means any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating therefrom with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed. "Sewer" includes sewers and drains of every description, except drains to which the word "drain" interpreted as aforesaid applies, and except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act.

Sect. 41. On the written application of any person to a local authority, stating that any drain, water-closet, earth-closet, privy, ashpit, or cesspool on or belonging to any premises within their district is a nuisance or injurious to health (but not otherwise) the local

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authority may, by writing, empower their surveyor or inspector of nuisances, after twenty-four hours' written notice to the occupier of such premises, or in case of emergency without notice, to enter such premises, with or without assistants, and cause the ground to be opened, and examine such drain, water-closet, earth-closet, privy, ashpit, or cesspool. . . . If the drain . . . on examination appear to be in bad condition, or to require alteration or amendment, the local authority shall forthwith cause notice in writing to be given to the owner or occupier of the premises requiring him forthwith or within a reasonable time therein specified to do the necessary works; and if such notice is not complied with, the person to whom it is given shall be liable to a penalty not exceeding ten shillings for every day during which he continues to make default, and the local authority may, if they think fit, execute such works, and may recover in a summary manner from the owner the expenses incurred by them in so doing, or may by order declare the same to be private improvement expenses.

Bray, K.C. (George Humphreys with him) for the appellant.—The justices came to a wrong conclusion in finding as a fact that the two houses were two separate buildings and not within the same curtilage. In sect. 4 of the Public Health Act 1875 "drain" is defined as a drain used for the drainage of "one building only," and "sewer" is defined as including sewers and drains of every description except (*inter alia*) drains as above defined. To be a "drain," therefore, within the meaning of the Act so as to entitle the local authority to put in motion the powers given by sect. 41, the drain must be used for the drainage of "one building only." These two semi-detached houses formed one building only. That was clearly decided upon precisely the same state of facts by Cozens-Hardy, J. in *Hedley v. Webb* (84 L. T. Rep. 526; [1901] 2 Ch. 126), in which he held that a pair of semi-detached houses, precisely similar to the present, was "one building only" within the meaning of sect. 4. He says that, apart from authority, he should have thought that, as regards the drainage of one building only, it was a question of fact in each case—"Aye or no is this one building?"; and he points out that the words used in sect. 4 are not one "house" only, but one "building" only. That decision was binding upon the justices and they ought to have followed it, and would no doubt have followed it if they had not been under some misapprehension as to the law applicable to the case which in their judgment prevented them from following it. They were under such misapprehension as to the law by reason of the case cited to them of *Woodford Urban District Council v. Stark* (*ubi sup.*), which was a wholly different case. There it was held that a pair of semi-detached houses formed two "houses" within and for the purposes of sect. 25 of the Act, which required each newly-built "house" to have a separate drain. The question there was not whether they formed two buildings, but whether they formed two houses, which is a different consideration altogether. The justices seem to have been influenced by the separate lettings and rating of the houses, but they did not direct their minds to the real question as to whether these houses were one building. In *Travis v. Uttley* (70 L. T. Rep. 242; (1894) 1 Q. B. 233) that question was not raised, and in fact was not raised until the case before Cozens-Hardy, J. This pair of semi-

detached houses was built at the same time and was under one continuous roof. It cannot be said that they were two buildings. It may be a question of fact, but on the facts these houses were one building only, and there was no evidence on which the justices could properly find that they were two buildings. If they are held to be two buildings, it will be a great hardship to the local authority, as the drain would then be a sewer, and the duty of keeping it in repair would be imposed on the local authority.

Macmorran, K.C. (Naldrett with him) for the respondent.—The justices found as a fact that the houses were two separate buildings. It was entirely a question of fact for them to deal with, and they have so dealt with it. Cozens-Hardy, J. in *Hedley v. Webb* (*ubi sup.*) put it as a question of fact in each case. In so far as it was there held that the pair of houses formed one building only, it is submitted that the decision was wrong. By sect. 25 a drain must be provided for each "house." The mere fact that the drain passed under the garden of one of the houses did not prevent it from being a sewer: (*Travis v. Uttley, ubi sup.*). He referred to *Woodford Urban District Council v. Stark* (*ubi sup.*) and was stopped.

Bray, K.C. in reply.

Lord ALVERSTONE, C.J.—We have been invited by counsel for the appellant to lay down a clear rule on the subject, but I decline to lay down any general rule. The question arises under sect. 4 of the Public Health Act of 1875, which contains the definition of "drain" and "sewer." That section says that "drain" means any drain of and used for the drainage of one building only or premises within the same curtilage, and "sewer" includes sewers and drains of every description except drains to which the word "drain" as above defined applies. Counsel for the appellant says that we must find that these semi-detached houses were one building only, because they were built at the same time and were under one continuous roof, and that there was no evidence on which the justices could properly find that they were two buildings. It is doubtful whether the word "building" in the Public Health Act was intended to have so wide a meaning. I have, however, come to the conclusion that it must be a question of fact in each case for the justices, and we are not sitting here as a court of review from the justices as to the facts. Upon the facts as set out in the case it seems impossible for us to hold that the magistrates may not say on that statement of facts that these houses may be two buildings, and the magistrates have found as a fact that the two houses were two separate buildings, and that therefore the drain in question was a sewer within the meaning of the Public Health Act. In *Travis v. Uttley* (*ubi sup.*), which came before Wills and Wright, JJ., it was held that a drain passing through private ground but receiving the drainage of three houses was a sewer within the meaning of the Act. So far as the facts appear in that case, it seems that three houses were grouped together for the purposes of drainage, and that one drain ran under the three and received the drainage of all three and conveyed it to the sewer, and it was held that the drain was a "sewer." That case seems to me to be

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an authority here, at least to the extent of showing that it is a question of fact, and that each case has to be dealt with on its own facts. Cozens-Hardy, J. considered the matter in *Hedley v. Webb* (*ubi sup.*), where he held that a pair of semi-detached houses formed one building only, and he thought that it was a question of fact to be considered in each case. In my opinion it must be a question of fact in each case, and we cannot lay down any general rule on the subject, or say that it must be one building because it was built at the same time. As an illustration to show that it must be a question of fact, I may refer to the case of *Rogers v. Hosegood* (83 L. T. Rep. 186; (1900) 2 Ch. 388), where the Court of Appeal decided that for some purposes a block of residential flats was not one dwelling-house. It is a question of fact, and I cannot say that there was no evidence on which the magistrates could come to the conclusion to which they came. It is quite impossible for us to lay down any general rule, and this appeal must be dismissed on the ground that the magistrates have in fact found that these two houses were two separate buildings, and we cannot say that there was no evidence upon which they could so find.

WILLS, J.—I am of the same opinion. I have only one observation to make. I do not feel

pressed by the argument of counsel for the appellant as to the hardship to the local authority by this pipe becoming a sewer instead of being a drain. I cannot see that there is any greater hardship in the case of a man who has built a pair of semi-detached houses than in the case of a man who has built two separate houses. As to the view that I seem, according to the report, to have expressed in *Travis v. Uttley* (*ubi sup.*), to the effect that because part of the pipe was undoubtedly a sewer the whole of the drain was a sewer from end to end, I modified and corrected that expression in the case of *Beckenham Urban District Council v. Wood* (60 J. P. 490), where I stated that, if the expression attributed to me was understood to mean that a part of the system which ends in an undoubted sewer must necessarily be a sewer above the point where it became a sewer, I thought it erroneous, and that I was not prepared to abide by any such general statement as that.

CHANNELL, J.—I am of the same opinion. I think this question is undoubtedly a question of fact.

Appeal dismissed.

Solicitors for the appellant, *Nicol, Son, and Jones*, for *Clair J. Grece*, Reigate.

Solicitors for the respondent, *Pettiver and Pearkes*.



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